



Fenwick Elliott

## THE JCT MAJOR PROJECTS FORM

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Little has been written about the Major Projects Form ("MPF") which has been with the industry the best part of five years. However, as the Government's honeymoon with the NEC family may be about to change given talk on the grapevine perhaps it is time to dust off your prep notes on the MFP.

It is worth looking at and considering the following areas:

### Guidance note<sup>1</sup>

The JCT warns in its Guidance Notes that the form of contract is not for everyone. They say it is designed for use by experienced Employers who require limited procedural provisions in the contract form and have their own sophisticated in-house procedures and protocols, and Contractors with whom they regularly work. Also, given the fact that under this new form of contract the Contractor assumes more risks and responsibilities than under traditional JCT standard forms, the JCT is particularly "nervous" that work should only be carried out under the new Major Project Form of contract by experienced, knowledgeable contractors who can carry out proper risk analysis and put in place appropriate risk management systems. This should be recognised if anyone looks "green" in the gene pool. The same applies to subcontractors.<sup>2</sup>

The JCT specifically decided to call the "new"<sup>3</sup> form of contract the "Major Project" form in order to try and deter, or dissuade, yellow inexperienced Employers and Contractors from adopting it in lieu of WCD on "run of the mill" design and build projects. It remains to be seen whether this form of contract is taken up exclusively for "Major Projects" or whether, as one

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<sup>1</sup> The JCT has also published a 24-page set of Guidance Notes for use with the MPF (which appears to partly contradict the aim of producing a shorter and simpler contract which should be sufficiently self-explanatory).

<sup>2</sup> The JCT Sub-Contract first published in June 2004 reflects the format and approach of the Contract and anticipates that the subcontractor will be similarly experienced in undertaking work.

<sup>3</sup> A June 2003 virgin. The MPF is considerably shorter than any of its contemporary JCT contracts, for example it is 80 per cent smaller than the 1998 With Contractor's Design contract.

rather suspects, it creeps into general usage after a time lag which by all accounts is still running.

The MPF is still a hard-edged document; it adopts provisions designed to encourage modern and best practice in procurement, but it is nevertheless not a partnering arrangement. There are toughly framed rights and remedies within its various provisions.

Thus far it has been used on the Oval to my knowledge, but take-up is beginning slowly but against the competition now of NEC 3. The MPF is in its infancy relatively speaking given in terms of time on the block but JCT 05 may now have speeded familiarisation given the sanguinity.

### **Risks, responsibilities and contractor freedom**

As has already been alluded to, under this “new” form of contract the Contractor assumes significantly more risks and responsibilities than under traditional JCT standard forms. The quid pro quo is that the Contractor should have greater freedom as to how and in what manner he delivers the Project.

The intention of the contract is that having defined its “requirements”, the Employer should then permit the Contractor to undertake the Project without the Contractor being constrained by or reliant upon the Employer for anything more than access to the Site, the review of Design Documents and payment. In particular, there is no requirement or expectation that the Employer will issue any further information to the Contractor, as all design and production information beyond that contained in the Employer’s “Requirements” will be produced by the Contractor.

### **Design responsibilities**

The Guidance Notes suggest that, depending upon the manner in which the Employer’s “Requirements” are formulated, the Contractor could find itself responsible for virtually the entire design of the Project or, possibly, just the design or the design detailing of specific elements of the Project. The allocation of design responsibility is something which will need to be clearly spelt out in the tender documents.

The new contract expressly states that the Contractor “shall not be responsible for the contents of the Requirements or the adequacy of the design contained within the Requirements” (as with JCT 05 - DB, ICD, and MWD), but it is not immediately apparent how, or on what basis, the Contractor can seek recompense for additional time and/or costs incurred in overcoming any shortcomings in concept or detailed designs contained within the Employer’s Requirements. Perhaps it is intended that in circumstances where the Employer’s general expectations and requirements are at variance with specific concept or detailed designs contained within the Requirements one falls back on the provisions dealing with discrepancies within the Requirements which entitle the Contractor effectively to choose between discrepant provisions at the Employer’s cost. However, what if an element of the design for which the Contractor is wholly responsible is dependent upon an element of design provided in the Requirements, how then does one deal with inadequacies in the Employer’s design?

With three notable exceptions the Contractor's design warranty is generally one of skill and care, albeit "the skill and care to be expected of a professional designer appropriately qualified and competent in the discipline to which such design relates and experienced in carrying out work of a similar scope, nature and size to the Project".

In fact, the contract expressly states that the Contractor does not warrant that the Project, when constructed in accordance with the Contractor's designs, will be suitable for any particular purpose.<sup>4</sup>

The three exceptions to the skill and care warranty are compliance with:

- the Statutory Requirements;
- any performance specification contained within the Requirements; and
- the guidance on the selection of materials contained within the publication *Good Practice in the Selection of Construction Materials* prepared by Ove Arup & Partners.

Subject to the Contractor not being responsible for the contents of the Employer's Requirements or the adequacy of designs contained therein, the Contractor gives an otherwise strict, unqualified assurance that the design of the Project will comply with the Statutory Requirements, performance specifications and stipulated guidance on the selection of materials.

The new design provisions, however, are generally in line with what one frequently sees by way of amendment to WCD. It remains to be seen how professional/design indemnity insurers will react to these new standard form proposals.

#### **Design submission procedure**

The contract recognises that not all of the Contractor's designs will necessarily be contained within the Contractor's Proposals. The Major Project Form contains a first for the JCT, a procedure for the preparation, submission and review of Design Documents post-contract. Now adopted by JCT 05.

The Employer has the right to review all designs prepared by the Contractor<sup>5</sup> and can comment upon any which it considers are not in accordance with the contract. The Employer is only

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<sup>4</sup> Thus, the Employer defines his Requirements and the Contractor carries out work in accordance with them, although he is not responsible for the adequacy of design contained within the Requirements. The Contractor takes on, as in WCD, reasonable skill and care obligations but not fitness for purpose. However, he warrants that his design will use materials selected in accordance with the current version of *Good Practice in the selection of Construction Materials* prepared by Ove Arup.

<sup>5</sup> The Contractor has to submit documents to the Employer on or before dates contained within the design programme. The Employer has to respond within 14 days with either "A Action", "B Action" or "C Action". The Contractor has a period of 7 days in which to disagree with the Employer's comments and to indicate that any compliance constitutes a Change. The Employer then has 7 days to confirm or withdraw its comments. Although such confirmation does not signify acceptance that any design is in accordance with Contract or constitutes a Change. If the Contractor does not notify the Employer it considers the comments are a Change within 7 days, any subsequent comments will not be treated as a Change.

obliged to pay for Contractor-designed works that have been executed in accordance with designs which have either the status no comment or only limited comments.

### **Novation of pre-appointed consultants**

In line with current design and build practice, the new form of contract provides the parties with the option of novating Pre-Appointed Consultants over from the Employer to the Contractor. However, whereas one usually only novates design consultants in order to provide the Contractor with recourse in respect of design work for which the Contractor has assumed responsibility, the new Major Project Form suggests that novation of Pre-Appointed Consultants will be on the basis that the Contractor will assume responsibility for the full range of services provided by the Pre-Appointed Consultants, both pre and post-novation (other than the preparation of the Proposals).

Before agreeing to such a wide-ranging extension of the Contractor's responsibilities, the Contractor would be well advised to ensure that he fully understands the full scope of services undertaken by Pre-Appointed Consultants.

Whilst the new contract makes reference to novation being carried out pursuant to a new Model Form' of Novation appended to the contract, rather embarrassingly the JCT had to admit at the launch of the 'Major Project Form' that it had not been possible to reach consensus on the form of novation which ought to be adopted - so it looks like the battle over *Blyth & Blyth* warranty and indemnity provisions in novation agreements is set to continue.

### **Named specialists**

Hand in hand with the novation of Pre-Appointed Consultants the Employer may "name" within the Requirements (either uniquely or by their inclusion in a list) both consultants and subcontractors who must be used by the Contractor for specific elements of work. In a departure from the philosophy and approach of named and nominated sub-contractor provisions in traditional JCT standard forms pre 05, responsibility under the new contract for the performance of such "Named Specialists" will lie entirely with the Contractor.

### **Value engineering**

The Contractor is encouraged to suggest amendments to the Requirements and/or the Proposals which, if instructed as a Change,<sup>6</sup> would result in a financial benefit to the Employer. Any such financial benefit will ultimately be shared between the Employer and the Contractor in the proportions identified in the appendix to the contract.

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<sup>6</sup> Changes are to be determined either by pre-agreement or by fair valuation. A significant departure from JCT's usual approach is that a loss and expense in respect of Changes is to be agreed or assessed as part of the process of valuing the Change rather than as a separate exercise, thus isolating the effect of the Change. The remaining grounds for claiming loss and expense form a much shorter list than in most other JCT forms and include only a breach or act of prevention by the Employer, interference by others authorised by the Employer or the Contractor's suspension following non-payment. Therefore, only matters for which the Employer is unequivocally responsible will justify loss and expense.

## Curtailment of Contractor's entitlement to EOTs

The provisions relating to time, commencement and completion have all been greatly simplified and cropped. Of particular note, however, is the fact that the list of events entitling the Contractor to an extension of time has been quite radically curtailed.<sup>7</sup> The Contractor is no longer entitled to extensions of time for exceptionally adverse weather, civil commotion, local combination of workmen, strikes, lock-outs etc., delay on the part of Nominated Subcontractors or Suppliers, difficulties in securing labour, goods or materials, delay on the part of statutory undertakers - (although this may now be covered by the new provision entitling the Contractor to an EOT for interference with the Contractor's regular progress by "others" on the site) - and changes in law after the Base Date. A number of the traditional Relevant Events such as failure to give access to the site and non-compliance with CDM requirements are now covered by a general catch-all, Employer default provision which entitles the Contractor to an EOT for "any breach or act of prevention" on the part of the Employer or the Employer's representatives or advisers.

In addition to breaches and acts of prevention by the Employer that must give rise to extensions (greatly diminishing scope for good old time at large arguments), the form offers extensions for *force majeure*, specified perils, the exercise of statutory powers and terrorism. It does not go on, as do traditional design-and-build forms, to give extensions of time for adverse weather, strikes, lock-outs, delays in receiving permission or approval from statutory bodies, inability to obtain labour and materials, etc. Again, a sensible and fair compromise.<sup>8</sup>

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<sup>7</sup> To preserve the liquidated damages provision the MPF provides an extensive list of relevant delay events, but this list does not include exceptional weather conditions, industrial disputes, the inability to obtain labour and/or materials, or delays in statutory approvals. These excluded items are therefore at the risk of the Contractor.

The MPF adopts the following principles for making an extension of time:

- The Employer should implement any agreement reached regarding Changes, acceleration or cost savings.
- Regard must be given to any failure by the Contractor of clause 9.3, i.e. using reasonable endeavours to prevent or reduce delay to the works.
- A fair and reasonable adjustment should be given regardless of any concurrent culpable delay.

<sup>8</sup> However note some other "standard" amendments which have not been picked up in this new contract relate to the area of extensions of time. It is generally felt that a Contractor should not be allowed to benefit from the grant of an extension of time where the grounds for doing so have been caused by his own default or negligence (e.g. a fire started by the Contractor which destroys all or part of the building, as happened in the Uppark case). Nevertheless, the extensions of time provision do not contain such a proviso or exception to such entitlement. What is more, although the general view of concurrency (where there are two or more causes for the same period of delay) is that it should be decided by the "Dominant Event" principle. Clause 12.7.3 of this contract specifically states that any concurrent cause of delay due to the Contractor's default should be disregarded when determining the Contractor's entitlement to an extension of time.

Another term of this contract which is likely to be a contentious one for Employers is a compulsory bonus to be awarded to the Contractor on achievement of an earlier completion date. Such bonuses are to be payable to the Contractor in addition to any costs awarded to the Contractor arising from acceleration. A curiously half-baked and potentially ineffective provision is contained in Clause 19 of the contract whereby the Contractor is "encouraged" to suggest amendments to the Requirements and/or the Proposals which would result in a financial benefit for the Employer. This provision imposes no real liability on the Contractor to take positive action in this respect, nor is there any apparent commercial inducement for him to do so by way of financial reward. Curiously, however, the second part of this clause (Clause 19.2) appears to contain another inherent contradiction in that it imposes a strict obligation on the Contractor to "provide details of its suggested amendments to the Requirements".

## Loss and/or expense

The scope for claiming loss and expense is reduced significantly. Any instruction which is a Change shall not under this form either individually or in conjunction with other Changes give rise to loss and expense. This means Contractors will need to price Changes rather more accurately to ensure sound recovery of loss and expense.

Loss and expense is payable by the Employer:

- if there is an act of breach or prevention by the Employer (and certain representatives) in matters or actions other than those permitted by the Contract or that are not stated as giving rise to a Change
- where there is interference with the Contractor's regular progress by others
- where the Contractor validly exercises its right of suspension.

## Practical completion, acceleration and early completion bonuses

For the first time, the new JCT contract contains a definition of Practical Completion and there are provisions which permit acceleration and the payment of bonuses for early Practical Completion.

The definition of Practical Completion requires that the Project be complete for "all practical purposes" but makes the point specifically that the Project may "all practical purposes" be Practically Complete notwithstanding the existence of minor outstanding works which do not affect its use. The definition also envisages that any stipulations considered essential to the issue of whether the Project is to be considered Practically Complete, or not, should be set out in the Requirements. Production and delivery of the health and safety file, as built information and O&M manuals are all expressed to be conditions precedent to Practical Completion.

The Contractor can only be instructed to accelerate where he is in agreement and the provisions conferring bonuses for early completion are an option. To give incentive to the Contractor to complete before Practical Completion, the Contract provides for the Contractor to be paid a bonus if completion occurs before the Completion Date. Bear in mind that for a bonus to apply, the Appendix needs to have been filled in, otherwise the principle in *Glenlion Construction Ltd v Guinness Trust*<sup>9</sup> holds true - a Contractor under most standard form contracts is entitled to plan the early completion of the works, but this will not impose unilateral obligations upon the Employer to facilitate that early completion.

## Payment

The payment procedures are simple and straightforward. Payment is made 14 days after receipt of the contractor's VAT invoice. No hedges and traps for the unwary, provided they produce a sensible pricing document.

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<sup>9</sup> (1987) 39 BLR 89

The payment provisions provide options including Interim Valuations (Rule A), Stage Payments (Rule B), Schedule of Payments (Rule C) or other terms which the parties might decide to incorporate. Interim Payments remain the predominant method, and a single payment notice is to be issued, covering any amounts to be withheld. The Form is therefore combining the requirements of section 110 and section 111 of the Housing Grants, Construction and Regeneration Act 1996 by the provision of a single notice, thus attempting to avoid arguments as to whether a section 111 Withholding Notice has been properly served at the correct time and/or in the correct format.

Interim payments will therefore be made monthly but through the use of the Pricing Document it will be possible to adopt a range of options for the payment of the Contract Sum, including interim valuations, stage payments, scheduled payments or any other terms which the parties may wish to agree.

Another first for the JCT (and a significant break from tradition) is that the new Major Project Form does not envisage any sort of retention.

### **Insurance**

As major projects will frequently be subject to specific, bespoke, insurance arrangements, the contract allows for the relevant insurance documents to be attached to the contract rather than seeking to define each party's insurance obligations and responsibilities in the text of the contract. Other than providing a general framework by which these insurances are to be maintained and operated, the new contract contains no specific requirements in respect of insurance.<sup>10</sup>

### **Third party rights**

Probably the most novel change innovative provisions in the contract (but in common with JCT 05) are those relating to third party rights.

The contract endeavours to do away with the need for collateral rights by utilising the provisions of the Contracts (Rights of Third Parties) Act 1999 and setting out Funders, Purchasers and Tenants rights in a special Third Party Rights Schedule appended to the contract.

The idea is that Funders, Purchasers and Tenants will be able to enforce their rights directly against the Contractor pursuant to the Act without the need for a multitude of collateral warranties.

Regrettably the rights set out in the Third Party Schedule appended to the contract are based upon the rights conferred by the existing JCT collateral warranties in favour of a Funder,

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<sup>10</sup> Thus, Contractors and Employers who use the JCT Major Projects Form should not assume they are covered for all Acts of terrorism. Under the MPF, terrorism is defined by the Terrorism Act 2000 not by the 1993 act, which creates a problem for insurers' reinsurance arrangements. This is because reinsurance cover provided by Pool Re is only available for acts of terrorism as defined in the 1993 Act, a narrower definition than that of the Terrorism Act. If an insurer underwriting the terrorism risk cannot obtain reinsurance cover for acts of terrorism outside the definition in the Act, cover for such acts of terrorism will be excluded from the policy.

Purchaser and/or Tenant (MCWa/F and MCWa/P&T) which are something of a notorious “fudge” of conflicting interests and have not really found favour in the market. It remains to be seen whether the new Third Party Rights Schedule finds favour with Funders, Purchasers, Tenants and Contractors or whether it too will be subject to heavy amendment.

From a Funder's perspective the new Schedule only grants rights for the Funder to call upon the Contractor to procure copyright licences rather than actually conferring copyright licences and instead of a “spread” of risk between Contractor, subcontractors and sub-consultants the Funder is required to put all his eggs in one basket and rely solely upon the Contractor's covenant. Another concern for Funders is (or may be) that the Schedule only allows the assignment of the Funders' rights to another Funder providing finance or re-finance not a Purchaser or Tenant acquiring an interest in the Project from the Funder following realisation of the Funder's security in or over the Project.

Purchasers and Tenants will have similar concerns to Funders plus the added concern that their rights are restricted to the recovery of “the reasonable costs of repair, renewal and/or reinstatement of any part of the Project to the extent that a Purchaser or Tenant incurs such costs and/or a Purchaser or Tenant is or becomes liable either directly or by way of financial contribution for such costs”. Contractors will have myriad concerns about the new Schedule of Third Party Rights including the following: the Contractor will be the sole covenantor in respect of the Project; the definitions of Purchasers and Tenants in the new contract are very wide and make no distinction between a Tenant of a significant part of the Project, e.g. a complete building or a threshold number of floors in a given building, and a Tenant of an insignificant part of the Project which would not ordinarily justify the grant of a collateral warranty, e.g. a kiosk.

It is not clear how, if at all, the Contractor can enforce the Funder's payment obligation and/or its guarantee of payment by the Funder's appointee following exercise of the Funder's step-in rights under the Schedule; and neither the Contracts (Rights of Third Parties) Act 1999 nor the Schedule deals adequately with the risk of “double jeopardy” - the risk of being sued more than once in respect of the same loss.

### **Design warranty**

Most Employers entering into a design-and-build contract want an undertaking from the Contractor that the component parts of the building delivered will be up to scratch. That the roof will not leak, the cladding will not corrode, and so on. Some will go further and say they expect the Contractor to warrant that the building will be “suitable for its purpose”. Expect amendments by way of special conditions. The form plainly delivers the first. Materials and goods are required to be “reasonably fit for their intended purpose”. It ducks the second by expressly excluding any suitability warranty, but it does cross-refer to the Form's guidance note, which sets out alternative model clauses delivering fitness for purpose responsibility. A partial success.



## **Other warranties**

No complaints here. The Form offers clear warranties in respect of compliance with statutory requirements, with performance specifications, that workmanship will be to the standard required, and so on.

## **Ground conditions**

There is an option here: an Employer that wishes the Contractor to accept responsibility for ground conditions (which are conditions or man-made obstructions in the ground that necessitate amendment to either the Requirements or Proposals) can leave the Form unamended. A sensible compromise.

If it is happy to accept that ground conditions give rise to a "change", then it can tick the relevant option in the appendix and operate clause 8.2. Experience tells in real life few Employers will do so.

If clause 8.2 applies, any ground conditions or man-made obstructions in the ground which could not have been foreseen by an experienced and competent Contractor at the Base Date will constitute a Change. However, it will only be a Change by reference to the information about the site which the Contractor had received or could reasonably have obtained.

The contract therefore specifically addresses the issue of unforeseen ground conditions and gives the parties the option of ground conditions being either the Contractor's risk (which is the default option) or alternatively treating unforeseen ground conditions in similar manner to clause 12 of the ICE conditions.

## **Named specialists**

Under the JCT Major Project Form all subcontractors are "domestic", meaning that this Subcontract is equally suitable for use whether the Subcontractor is a Named Specialist (i.e. a Subcontractor that the contract requires the Contractor to utilise) or a Subcontractor who is identified and selected by the Contractor.

Specialists can be named in the Requirements and the Contractor must accept an obligation to employ specialists so named. But there is no "nomination" (again followed by JCT 05) allowing the Employer to impose subcontractors on the Contractor after the date of contract. The corollary is that there are none of the get-outs to which nomination gives rise under traditional JCT forms.

## **Novation**

The Form recognises the fact that novation is used on most large design-and-build contracts and provides a mechanism for achieving it. It does not include a form of novation agreement because of difficulties in securing a consensus with the consultants on the JCT.

## "Development" requirements

The Form provides for assignment to funds or banks; it provides for third-party rights in favour of funds Purchasers and Tenants and it generally tries to anticipate the needs of developers. Other JCT forms, of course, ignore their requirements altogether.

## Making good

What is termed the "Rectification Period" is a key stage of the contract. The intention is that at the expiry, quality, financial and commercial matters will have been dealt with. Fat chance, some may say, but that is the intention, hence all the health warnings about entering such a contract and the maturity required of its players and hangers-on!

At the end of the Rectification period, the Employer issues a statement to the Contractor. This is similar to a certificate of making good defects. This should be done promptly. The statement will either state the Contractor has made good the defects, or in circumstances where the Contractor has been requested to undertake remedial work and has not done so within a reasonable time of the expiry of the Rectification Period, the statement will indicate that the Employer will instruct others to rectify the defects and give an estimated cost of rectifying the defects. Alternatively, the Employer can elect not to have the defects rectified as under JCT contracts pre-98. If the Employer decides not to rectify the defects, the Employer can make an appropriate deduction or abatement from the final payment advice. The final payment advice should be issued concurrently with the Rectification Statement and has the status of being final and binding upon the parties in relation to any financial matters unless they are disputed within 28 days of issue.

## Disputes

And finally, one further point of interest, there is no provision for arbitration in the new contract - followed now by the JCT 05 family. Disputes are to be resolved by mediation, adjudication and/or litigation. Adjudication will be conducted in accordance with the Scheme for Construction Contracts.

Accordingly, I believe, and it is a view shared by the British Property Federation, that this form offers the single-point responsibility for design-and-build procurement that is required.

## Summary

At fewer than 15,000 words, the Major Projects Form is a slip of a girl compared with what much of the industry has wrestled with under JCT WCD 98. This comes of more modern drafting but the bulk of it is due to the contract taking a "less is more approach". As you prepare Major Project Form contracts for signature, you need to ensure that the documents you are adding to it cover all the central issues of insurance, payment arrangements, tests and inspections.

29 January 2007

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