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## Background and Introduction

### 1.1 The Joint Contracts Tribunal (JCT)

The Joint Contracts Tribunal (JCT) was established in 1931 and for over 80 years has produced standard forms of contracts, guidance notes and other standard documentation for use in the construction industry. In 1998, the JCT became incorporated as a company limited by guarantee and commenced operation as such in May 1998.

Currently, JCT forms require the agreement of seven constituent bodies before they are issued by the JCT. Those bodies are:

- The British Property Federation
- The Contractors Legal Group
- The Local Government Association
- The National Specialist Contractors Council
- The Royal Institute of British Architects
- The Royal Institution of Chartered Surveyors
- The Scottish Building Contract Committee

The above listed bodies are intended to be reasonably representative of the interests across the construction industry, namely, the employers, the consultants, the contractors and the sub-contractors, and the JCT sub-contract forms are naturally a reflection of these competing interests.

### 1.2 Sub-contracting

The regular position is that an employer contracts with a contractor, and the contractor contracts separately and independently with each of his sub-contractors.

The key point in respect of the above relationships is that, although the term 'sub-contract' is used in respect of the contract between the contractor and the sub-contractor, in *all* of the above cases, a *contract* is formed between two parties only (i.e. a contract is formed between an employer and a main contractor; a contract is formed between a sub-contractor and a main contractor).

With that in mind, it would be useful, therefore, to understand some basic principles of contract law.

Most aspects of the law of contract are set down in case law; however, there are some notable exceptions where provision is made in statute (e.g. the Sale of Goods Act 1979, the Unfair Contract Terms Act 1977 and the Supply of Goods and Services Act 1982).

Because of the nature of this book, the basic principles of contract law, as provided at section 1.3 can naturally be dealt with in outline only.

## 1.3 The formation of contracts and sub-contracts

There are many definitions of a contract, but in simple terms, it can be considered as being: 'an agreement which gives rise to obligations which are enforced or recognised by law'. Under English law, only the actual parties to a contract can acquire rights and liabilities under the contract. This is known as 'privity of contract'.

In respect of a main contract situation, the practical consequences of the doctrine of privity of contract are twofold:

- the main contractor carries responsibility for a sub-contractor's work, etc., so far as the employer is concerned; and
- the employer cannot take direct action in contract against the sub-contractor, unless there is a separate contract between the employer and the sub-contractor.

The effect that the Contracts (Rights of Third Parties) Act 1999 has upon this position in respect of the JCT sub-contracts considered in this book is dealt with later within this book.

The essence of any contract is *agreement*. In deciding whether there has been an agreement, and what its terms are, the court looks for an *offer* to do or to forbear from doing something by one party and an unconditional *acceptance* of that offer by the other party, turning the offer into a promise.

In addition, the law requires that a party suing on a promise must show that he or she has given *consideration* for the promise, unless the promise was given by *deed*.

Further, it must be the intention of both parties to be legally bound by the agreement, and the parties must have the capacity to make a contract, and any formalities required by law must be complied with. Finally, there must be sufficient *certainty of terms*.

### 1.3.1 Offer

An offer is a statement by one party of a willingness to contract on definite stated terms and intended to be binding, provided that these terms are, in turn, unequivocally<sup>1</sup> accepted by the party or parties to whom the offer is addressed.

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<sup>1</sup>The acceptance must be unqualified; it must 'mirror' the offer i.e. it must accept all of the terms being offered without changing or seeking to add to, vary or amend the terms of the offer being made.

There is generally no requirement that the offer be made in any particular form; it may be made orally, in writing or by conduct. Of course, if a dispute arose in the future, then it would be beneficial for the offer to be in writing.

In whichever form an offer is made, it must be sufficiently definite to be capable of resulting in a contract if accepted. Its terms and conditions must be clear and unequivocal, and it must be made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. In this context, a person includes a corporation because, in law, a corporation is a legal person; that is to say, a corporation is regarded by the law as a legal entity quite distinct from the person or persons who may, for the time being, be the member or members of the corporation.

Putting the above into context, it is generally the case that when the sub-contractor submits his estimate (i.e. his tender), this is an offer which the contractor can either accept or reject.

With the above in mind, it must be noted by sub-contractors that the submission of a tender does not (normally) conclude a contract. Therefore, the preparation of a tender in response to a tender enquiry (which would, in the normal course of events, become an offer when submitted) may involve the sub-contractor in (sometimes considerable) expense, but the cost of tender preparation is not normally recoverable as a discrete cost. Obviously, the cost of tender preparations is included within the head office overhead percentage that is added by sub-contractors onto their tenders, and the tender preparation costs so incorporated are therefore recovered by sub-contractors when their tenders are successful.

### 1.3.2 Acceptance

For agreement to be reached, there must be a clear and unequivocal acceptance of a clear and unequivocal offer. The acceptance must be unqualified; that is, as noted earlier, it must 'mirror' the offer.

Therefore, if in a tender enquiry, a sub-contractor was required to use Welsh slates but submitted his tender on the basis of using Spanish slates, and the contractor, upon receiving the sub-contractor's tender, accepted the sub-contractor's tender without qualification, then the contract, when formed, would be on the basis of the terms and conditions which formed part of the tender (i.e. based on using Spanish slates rather than Welsh slates).

In such a situation, if a future dispute arose, the contractor would not be able to rely on the terms and conditions forming part of the tender enquiry (i.e. that Welsh slates were required) because those terms and conditions would not form part of the contract between the parties.

As a general rule, silence does not constitute acceptance<sup>2</sup>; neither does inactivity.

Given this, the general rule is that an acceptance has no effect until it is communicated (either in writing or orally) to the party making the offer. The main

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<sup>2</sup>*Felthouse v. Bindley* (1862) aff'd (1863).

reason for this being that it could cause hardship to the party making the offer if he or she were bound without knowing that his or her offer had been accepted.

Another rule is that refusal of an offer puts an end to that offer.<sup>3</sup> Hence, if a contractor rejects a sub-contractor's offer (i.e. his submitted tender), it is, in legal parlance, extinguished and is no longer legally capable of being accepted.

An offer can be withdrawn at any time before it is accepted.<sup>4</sup> This rule even applies where an offer is stated to be open for a fixed time. Therefore, if a sub-contractor submitted a tender (or a quotation) and stated that it remained open for acceptance within 30 days, there would be nothing to prevent the sub-contractor from withdrawing that offer in a period less than 30 days (unless the express terms of the sub-contract stated otherwise).

If an offer is stated to be open for a fixed time, then it cannot (without the agreement of the party making the offer) be accepted after that time.

However, if no time is stated in the offer, then the offer is taken to lapse after a reasonable time. The word 'reasonable' is, of course, open to interpretation, but is based on the facts of the particular case.

In certain circumstances, depending on the facts of each particular case, acceptance may be made by conduct<sup>5</sup> (e.g. allowing possession, making payments in line with the agreed terms) or by performance<sup>6</sup> (e.g. by carrying out and completing the sub-contract works).

### 1.3.3 Counter-offer

If the acceptance does not clearly and unequivocally accept the offer (e.g. it seeks to add to or vary the terms contained in the offer), then it is, simply, a counter-offer (not an acceptance), and this simply destroys the original offer.

A counter-offer has the same status as an offer in the formation of a contract, and consequently, a counter-offer must be clearly and unequivocally accepted before agreement has been reached.

Counter-offers should be distinguished from requests for information, which will not necessarily amount to a counter-offer.<sup>7</sup> Care must be taken when requesting further information to ensure this request is not construed, in fact, as being a counter-offer.

In respect of construction works, in particular, there are frequently negotiations during which a whole series of counter-offers are made between the respective parties to each other before an acceptance is finally made by one party to the other party. This may be because the parties are negotiating about the terms or because they are each trying to impose their own terms.

This latter situation is often called the 'battle of the forms', and variants of this battle of the forms are at the base of many disputes between contractors and sub-contractors.

<sup>3</sup>*Hyde v. Wrench* (1840) 3 Beav 334.

<sup>4</sup>*Dickinson v. Dodds* (1876) 2 Ch D 463.

<sup>5</sup>*G Percy Trentham v. Archital Luxfer Ltd* (1992) 63 BLR 44, CA.

<sup>6</sup>*Brogden v. Metropolitan Railway Co* (1877) 2 App Cas 666.

<sup>7</sup>*Stevenson, Jaques & Co v. McLean* (1880).

### 1.3.4 The ‘battle of the forms’

The expression ‘battle of the forms’ refers to an offer followed by a series of counter-offers where each party successively seeks to stipulate different terms, often based on their own standard printed terms. It is sometimes extremely difficult to determine whether or when a concluded contract came into existence, particularly where no formal contract is ever signed, and it is then left to the courts to determine the matter.

Clearly, this is far from satisfactory, and it makes sense to ensure that the sub-contract terms are agreed and recorded in writing to avoid the need to rely on a court interpreting the intention of the parties from an analysis of the various exchanges of communication.

### 1.3.5 Agreement

As noted at the beginning of section 1.3 the essence of any contract is agreement.

The test for the existence of an agreement is objective rather than subjective. In other words, the existence is tested on the facts, rather than on what may have been perceived to be the intention of the parties.

The principal justification for the adoption of this test is the need to promote certainty.

An agreement is reached either:

- when a statement of agreement is signed; or
- when one party makes an unambiguous offer capable of being accepted, and the other party accepts it unequivocally.

### 1.3.6 Certainty of terms

Even if there is clearly agreement through offer and acceptance, a contract may fail to come into existence because of uncertainty as to what has been agreed<sup>8</sup>.

Although it has been found that ‘the parties are to be regarded as masters of their contractual fate in determining what terms are essential<sup>9</sup> and ‘it is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant’,<sup>10</sup> it is generally considered that agreement as to parties, price, time and description of works is normally the minimum necessary to make the contract commercially workable.

Silence by the parties as to either price or time may not alone prevent a contract coming into existence, for if the other essential terms are agreed, a reasonable price or time for completion may be implied by the Supply of Goods and Services Act 1982.

<sup>8</sup>*Scammell v Ouston* (1941) 1 ALL ER 14

<sup>9</sup>*Pagnan v. Feed Products* [1987] 2 Lloyd’s Rep 601, CA.

<sup>10</sup>*Mitsui Babcock Energy Ltd v. John Brown Engineering Ltd* (1996) CILL 1189.

### 1.3.7 Consideration

Other than where a contract is executed as a deed (see further commentary later in this book at chapter 2, section 2.6.1), an agreement requires consideration to be exchanged between the contracting parties before it becomes binding.

The classic definition of consideration was expressed in *Currie v. Misa* (1875)<sup>11</sup> in the following terms:

‘a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.’

In the ordinary building sub-contract situation, the consideration given by the contractor is the price paid or the promise to pay, and the consideration given by the sub-contractor is the carrying out of the works or the promise to carry them out.

The rules which make up the doctrine of consideration may be divided into three categories:

1. Consideration must be sufficient but it need not be adequate.
2. Past consideration is not good consideration (i.e. the general rule is that the consideration must relate to future works. Any acts already performed that are the subject matter of the agreement do not, generally, constitute good consideration and are unenforceable).
3. Consideration must move from the party to whom the promise has been made.

As noted above, consideration is not required in the case where a contract is executed as a deed. Contracts, other than made by deed, are termed simple contracts, whether made orally or in writing.

## 1.4 Standard forms of contract and sub-contract

There are obvious benefits in using standard forms of contract and sub-contract. These include:

- There is no need to produce (and incur the legal costs of producing) *ad hoc* contracts and sub-contracts for every project.
- There is a degree of certainty regarding the interpretation of the clauses of the contract (particularly those standard forms that have been in existence for some time and where some of the more important clauses may have been tested in the courts).
- The parties know (with reasonable certainty) the consequences of various possible courses of action.

<sup>11</sup>*Currie v. Misa* (1875) LR 10 Ex 153.

Standard forms of contract (perhaps less so of standard forms of sub-contract) can be traced back to the nineteenth century (if not earlier). However, it appears to be a fairly recent phenomenon, largely emanating from the Latham Report (*Constructing the Team*, 1994), that standard forms and sub-contracts are now seen as having a dual purpose. These are:

- To set out the rights and obligations of the parties.
- To ensure that the risk of the project is allocated to the party that can best manage that risk.

In this regard, there have been great steps taken, particularly in respect of main contracts, but it is questionable whether that same progress has been made in respect of sub-contracts.

It is still prevalent that main contractors produce their own sub-contract forms, or, more commonly, issue their own amendments to the standard sub-contract forms.

Perhaps unfortunately, under the JCT main contract forms, there is nothing to prevent this from happening in the future, and because of this, it is considered by some that main contractors under JCT contracts should be obliged to sub-let works using JCT sub-contracts.

In 2011, the JCT authorised the publication of an entirely new suite of contracts and sub-contracts, etc.

Amongst the sub-contracts that have been issued are the following sub-contracts:

- Standard Building Sub-contract
- Standard Building Sub-contract with sub-contractor's design
- Design and Build Sub-contract
- Major Project Sub-contract
- Intermediate Sub-contract
- Intermediate Sub-contract with sub-contractor's design
- Intermediate Named Sub-contract
- Minor Works Sub-contract with sub-contractor's design
- Short Form of Sub-contract
- Sub-subcontract
- Management Works Contract (a sub-contract under the Management Building Contract)

## 1.5 The JCT Sub-contracts dealt with within the chapters of this book

The following sub-contracts are dealt with within the chapters of this book:

- Standard Building Sub-contract
- Standard Building Sub-contract with sub-contractor's design
- Design and Build Sub-contract

- Intermediate Sub-contract
- Intermediate Sub-contract with sub-contractor's design

### 1.5.1 The standard building sub-contract

The Standard Building Sub-contract can be used where the main contract is the 2011 issue of any of the three versions of the Standard Building Contract 2011, that is, With Quantities (SBC/Q), With Approximate Quantities (SBC/AQ) or Without Quantities (SBC/XQ).

The Standard Building Sub-contract is for use where the Sub-contractor is not required to design any of the Sub-contract Works.

The Standard Building Sub-contract can be used when the Main Contract Works are to be carried out in Sections, and can be used either where the Sub-contractor is to be paid a Lump Sum, adjustable for variations, etc., or where there is an agreed Tender Sum but the sub-contract works are to be subject to complete re-measurement.

The Standard Building Sub-contract, referred to as the SBCSub, comprises two documents:

- the Agreement (SBCSub/A), and
- the Conditions (SBCSub/C).

### 1.5.2 The standard building sub-contract with sub-contractor's design

The Standard Building Sub-contract with sub-contractor's design can be used where the main contract is the 2011 issue of any of the three versions of the Standard Building Contract 2011, that is, With Quantities (SBC/Q), With Approximate Quantities (SBC/AQ) or Without Quantities (SBC/XQ).

The Standard Building Sub-contract with sub-contractor's design is for use where the Sub-contractor is required to design all or part of the sub-contract works.

The Standard Building Sub-contract can be used when the Main Contract Works are to be carried out in Sections and can be used either where the Sub-contractor is to be paid a Lump Sum, adjustable for variations, etc., or where there is an agreed Tender Sum but the sub-contract works are to be subject to complete re-measurement.

The Standard Building Sub-contract, referred to as the SBCSub/D, comprises two documents:

- the Agreement (SBCSub/D/A), and
- the Conditions (SBCSub/D/C).

### 1.5.3 The design and build sub-contract

The Design and Build Sub-contract is only suitable for sub-contracts where the main contract is the 2005 edition of the JCT Design and Build Contract.



Within this book, the JCT Design and Build Sub-contract will be referred to as DBSub (the designation given to it by the JCT).

This sub-contract can be used even where the sub-contractor is not to carry out any design work at all, and can be used for either lump sum or re-measurement contracts.

The sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

The sub-contract comprises two documents:

- the Agreement (denoted by the JCT and in this book as DBSub/A), and
- the conditions (denoted by the JCT and in this book as DBSub/C).

#### 1.5.4 The intermediate sub-contract

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract *or* where the main contract is the JCT Intermediate Building Contract with contractor's design; but even where the main contract form with contractor's design is used, the Intermediate Sub-contract is only for use when the sub-contractor is not liable for design.

Within this book, the Intermediate Sub-contract will be referred to as ICSUB (the designations given to it by the JCT).

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

This sub-contract cannot be used where the sub-contractor is to be named or where the sub-contractor is to carry out any design work, but can be used for either lump sum or re-measurement contracts.

The sub-contract comprises two documents:

- the Agreement (denoted by the JCT and in this book as ICSUB/A), and
- the Conditions (denoted by the JCT and in this book as ICSUB/C).

#### 1.5.5 The intermediate sub-contract with sub-contractor's design

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract with contractor's design.

Within this book, the Intermediate Sub-contract with sub-contractor's design will be referred to as ICSUB/D (the designations given to it by the JCT).

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

This sub-contract is to be used where the sub-contractor is to design all or part of the sub-contract works, and can be used for either lump sum or re-measurement contracts.

This sub-contract is not to be used where the sub-contractor is to be named.

The sub-contract comprises two documents:

- the Agreement (denoted by the JCT and in this book as ICSUB/D/A), and
- the Conditions (denoted by the JCT and in this book as ICSUB/D/C).

## 1.6 The JCT Sub-contracts not dealt with in the chapters of this book

The following sub-contracts are not dealt with within the chapters of this book but in outline as follows:

- Major Project Sub-contract
- Intermediate Named Sub-contract
- Minor Works Sub-contract with sub-contractor's design
- Short Form of Sub-contract
- Sub-subcontract
- Management Works Contract (a sub-contract under the Management Building Contract)

### 1.6.1 The major project sub-contract

The Major Project Sub-contract (the 'MPSub') is only suitable for sub-contracts where the main contract is the JCT Major Project Construction Contract.

This sub-contract does not have a separate Agreement document, but relies on a section within the sub-contract called the Sub-contract Particulars to provide the information that would normally be included in the appendix to a pre-2005 JCT form.

The MPSub can be used whether or not the sub-contractor is responsible for design, and can be used for either lump sum or re-measurement contracts.

The sub-contract works on site commence on notice from the Contractor, and although the sub-contract contains no specific provisions for the completion of the sub-contract works in sections, a similar effect can be achieved by setting out within the sub-contract particulars specific binding dates for particular items.

Interim payments are to be made monthly, but through the use of the pricing document, it is possible to adopt a range of options for the payment of the sub-contract sum, including interim valuations, stage payments and/or scheduled payments. The sub-contract does not provide for retention to be held from any payment.

The contractor may require changes to either the requirements or the proposals (if applicable), or in the manner in which the sub-contractor undertakes the sub-contract works. The financial consequences of changes are intended to be determined on an all-inclusive basis (i.e. they are to include any loss and expense that may be incurred as a result of the change) and are intended to be agreed in advance.

There is no provision for arbitration; disputes may be resolved by mediation, adjudication or litigation.

### 1.6.2 The intermediate named sub-contract

This sub-contract is suitable for sub-contracts where the main contract is the JCT Intermediate Building Contract *or* where the main contract is the JCT Intermediate Building Contract with contractor's design.

As its name implies, this sub-contract is to be used where a sub-contractor is named (by the employer) to carry out the sub-contract works.

The Intermediate Building Contract and the Intermediate Building Contract with contractor's design are the only contracts in the JCT suite of contracts that allow for the naming of a sub-contractor. It should be noted that a named sub-contractor does not have the status that a nominated sub-contractor had under the JCT 98 Main Contract Form, and after a named sub-contractor is appointed, he or she effectively simply becomes a domestic sub-contractor.

This sub-contract can be used when the main contract works are to be carried out in Sections as detailed in the main contract.

It is not suitable for any sub-contract work that forms a part of the contractor's designed portion, but can be used where the sub-contractor is required to design all or part of the sub-contract work. In other words, any design carried out by a named sub-contractor cannot be design that forms part of the contractor's designed portion.

This sub-contract can be used for either lump sum or re-measurement contracts.

The Sub-contract comprises four documents:

- the invitation to tender (ICSub/NAM/IT),
- the tender (ICSub/NAM/T),
- the agreement (ICSub/NAM/A), and
- the conditions (ICSub/NAM/C).

The process of a named sub-contractor being appointed starts with an invitation to tender being issued to the proposed sub-contractor normally by the employer or his or her agent (ICSub/NAM/IT).

Upon receipt of the invitation to tender form, the proposed named sub-contractor provides his or her tender to the employer's/agent using the form ICSub/NAM/T. The sub-contractor's tender is to provide, amongst other things, the sub-contractor's price and the basis upon which that price is supplied, the required programme details, and any additional attendance items required.

The main contractor first becomes aware of a prospective named sub-contractor when the sub-contractor's tender (and the invitation to tender) is included in:

- the original tender enquiry to the main contractor,
- an architect's/contract administrator's instruction for the expenditure of a provisional sum under the main contract, or
- in an architect's/contract administrator's instruction for the expenditure of a provisional sum naming a replacement named sub-contractor.

The Intermediate Building Contract and the Intermediate Building Contract with contractor's design set out the various procedures that must be followed by a contractor in respect of the appointment of a named sub-contractor (and those procedures deal with the situation where a contractor objects to the proposed named sub-contractor or the proposed terms of that sub-contractor).

It is for the main contractor and the prospective named sub-contractor to agree upon the actual terms of the sub-contract. Those terms will, of course, be based upon the ICSUB/NAM/IT and the ICSUB/NAM/T, and the main contractor therefore, in effect, accepts the named sub-contractor's tender, but there may be amendments and/or additions agreed to the terms contained in these documents. Any such amendments and/or additions are to be noted in the numbered documents referred to under the second recital of the ICSUB/NAM/A, and listed under the numbered documents section of the contract particulars of the ICSUB/NAM/A.

When a sub-contract is entered into between a main contractor and a named sub-contractor, the sub-contract form used is the ICSUB/NAM. When this occurs, the named sub-contractor becomes, for all intents and purposes, a normal domestic sub-contractor of the main contractor, and the main contractor has the same liability in respect of the named sub-contract works (sub-contract works is a defined term in the sub-contract) as it would for the works of a normal domestic sub-contractor. The only exception to this position is that if the contractor becomes aware of events that may lead to the termination of a named sub-contractor's employment, the contractor must notify the architect/contract administrator accordingly. If termination subsequently takes place because of the default or insolvency of a named sub-contractor, then, with the architect/contract administrator's consent, the contractor is entitled to some relief from the financial consequences of that event.

The use of the named sub-contractor procedure is intended primarily for work involving a design input by the named sub-contractor, and this may be the case even where the installation of the specialist work is not of a complex nature. Under paragraph 11.1 of schedule 2 of the main contract, the contractor is in such cases expressly relieved of responsibility to the employer for defects in the named sub-contractor's design of the sub-contract works.

Because there is no contractual link between the employer and the named sub-contractor, and as the contractor is relieved of responsibility for the named sub-contractor's design, the JCT suggests that an employer may consider using an intermediate named sub-contractor-employer agreement (ICSUB/NAM/E), which provides a direct contractual link between the employer and the named sub-contractor for use where the named sub-contractor is to carry out design work or is to procure or fabricate materials or goods prior to the letting of the main contract.

### 1.6.3 The minor works sub-contract with sub-contractor's design

This sub-contract is suitable for sub-contracts where the main contract is the JCT Minor Works Building Contract with contractor's design.

This sub-contract is for use with small sub-contract packages with a straightforward content and a low risk involved, and is only to be used where the sub-contractor is required to design all or part of the sub-contract works.

This sub-contract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

Provision for brief entries identifying the main contract conditions are included in the first recital.

Articles 2 and 3 deal with the date for commencement and the period for completion, respectively. The guidance notes state that any information beyond this, for example, site working times or any working restrictions, should, if necessary, be set out in the pricing document or further documents inserted in the second recital.

Details of the main contract particulars and the amendments to those particulars should be provided under the third recital.

Despite the sub-contract's brevity, it is in the sub-contractor's interest to ensure that the sub-contract is provided with clear, accurate and sufficient information in respect of the main contract and any matters relevant or affecting the sub-contract works, especially given the obligations placed on the sub-contractor to comply with the main contract provisions at clause 7.

The first interim payment becomes due not later than 1 month after commencement of the sub-contract works on site. Subsequent interim payments are due at monthly intervals after the first interim payment. The final date for payment is 21 days after the due date.

This sub-contract makes no provision for a sub-contractor to make a payment application in advance of the payment due date, but the sub-contractor is permitted to make a payment application as a default payment notice.

The amount due for payment in respect of interim payments is 95% (or such other percentage as may be set out in the sub-contract documents) of the value of the work properly carried out, together with any applicable loss and/or expense, less the total amount due in any previous payments.

After practical completion of the sub-contract works, the amount due for payment increases to 97.5% (or such other percentage as may be set out in the sub-contract documents).

The value of the works properly executed is determined by reference to the rates and prices in the pricing document or by reference to the sub-contract sum if there are no such rates and prices.

This sub-contract does not envisage that payment will be made for off-site materials.

A payment notice is to be given not later than 5 days after the date on which a payment becomes due. That notice is to specify the amount of the payment to be made and the basis on which that amount was calculated.

A Pay Less notice (if applicable) is to be given not later than 5 days before the final date for payment of an interim payment.

This sub-contract does not require the sub-contractor to provide information to the contractor to enable the contractor to calculate the final sub-contract sum.

Article 1 of the sub-contract conditions makes it clear that the sub-contract sum excludes VAT. Any VAT properly chargeable is to be paid by the contractor to the sub-contractor.

This sub-contract does not contain an express term preserving the sub-contractor's common law rights to claim damages for breach of contract;

however, it is considered that their silence on this point does not affect the sub-contractor's right to bring a claim based on his or her common law rights.

Clause 10.3 restricts the sub-contractor's right to payment of any direct loss and/or expense to circumstances due to the regular progress of the sub-contract works being affected by the compliance with any written variation. Such recovery is also subject to the sub-contractor notifying the contractor of the same as soon as it is 'reasonably practicable'. Under this provision, the contractor is obliged to determine a fair and reasonable amount of direct loss and/or expense.

The limited right to payment of loss and/or expense under the sub-contract may cause some problems in practice, for example, not all instructions may constitute variations. However, if additional costs due to matters other than variations are incurred by the sub-contractor, then these may be pursued as a claim for common law damages in appropriate circumstances.

All variation instructions are to be issued in writing in line with clause 9.1.

If the contractor gives oral instructions, those instructions are to be confirmed by the contractor within two working days of being given (as clause 9.2).

Clause 10.1 requires the sub-contractor to carry out any reasonable variation of the sub-contract works that is instructed in writing by the contractor. Of course, there could be many disputes regarding what a 'reasonable variation' is, and the wording of clause 10.1 is therefore not entirely satisfactory.

Clause 9.1 notes that the contractor is not to issue any instructions affecting the design of the sub-contractor's design portion works without first obtaining the consent of the sub-contractor (consent that the sub-contractor shall not unreasonably withhold).

Clause 10.2 notes that variations shall be valued by the contractor on a fair and reasonable basis, with reference, where available and relevant, to rates and prices in the pricing document (which being any document identified in the second recital of the contract that shows rates and prices).

#### **1.6.4 The short form of sub-contract**

This sub-contract is suitable for any sub-contracts (other than for named sub-contractors) where the main contract is a JCT contract. However, it is not suitable where provisions which are fully back to back with a particular main contract are required.

This sub-contract can be used when the main contract works and/or the sub-contract works are to be carried out in Sections, and can be used for either lump sum or re-measurement contracts.

This sub-contract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

This sub-contract is intended for use in respect of small sub-contract packages of straightforward content and with low risk involved. It is not suitable where the sub-contractor is to design any part of the sub-contract works.

### 1.6.5 The sub-subcontract

This sub-contract is an entirely new concept for the JCT in that it is a tertiary contract. It is intended for use when a sub-contractor wishes to place a sub-contract with his or her own sub-contractor(s), that is, the sub-subcontractor(s).

It is suitable for sub-subcontracts where the main contract is a JCT contract, and can be used with any sub-contract. However, it is not suitable where provisions which are fully back to back with a particular sub-contract are required.

This sub-subcontract can be used when the main contract works and/or the sub-contract works are to be carried out in Sections, and can be used for either lump sum or re-measurement contracts.

This sub-subcontract does not have a separate Agreement document, but relies on the Recitals and the Articles to provide the information that would normally be included in an appendix to a pre-2005 JCT form.

### 1.6.6 The management works contract (a sub-contract under the management building contract)

The Management Works Contract 2011 is suitable for sub-contracts where the main contract is the JCT Management Building Contract 2011.

A management contractor does not carry out the construction works at the project (he is paid a fee for managing the project and providing necessary site facilities). The management contractor directly engages specialist contractors to execute the construction works at the Project under sub-contracts.

As noted above the JCT publish the JCT Management Works Contract 2011 as a suitable sub-contract where the main contract is the JCT Management Building Contract 2011.

The Management Works Contract 2011 comprises two documents:

- The management works contract agreements (MCWC/A), and,
- The management works contract conditions (MCWC/C).

This sub-contract can be used when the sub-contract works or the Project are to be carried out in Sections. This sub-contract can also be used whether or not the sub-contractor is responsible for design. In terms of payment to the sub-contractor this sub-contract can be used for either a lump sum price (with adjustment for variations, provisional sums) or in the alternative it has the option for payment to be on a re-measurement basis.

The management works contract conditions (MCWC/C) has a familiar JCT style in its layout, and is in 9 sections,

- Section 1 – entitled “*definitions and interpretation*”.
- Section 2 – entitled “*carrying out the works*”.
- Section 3 – entitled “*control of the works*”.
- Section 4 – entitled “*Payment*”.
- Section 5 – entitled “*valuation of the works and variations*”.

- Section 6 – entitled “*injury, damage and insurance*”.
- Section 7 – entitled “*termination*”.
- Section 8 – entitled “*settlement of disputes*”.

There are also 7 schedules appended dealing with various matters, such as Design submission procedure (schedule 1), acceleration quotation and variation procedure (schedule 2), third party rights (schedule 3) etc.

As noted above, the sub-contract sets out the payment mechanism (terms, requirements, obligations, rules, etc) at section 4 of the management works contract conditions, dealing with payment matters such as (but not limited to), for example:

- The method of calculating payment whether by:
  - The Adjustment basis (where Article 3 A of the MCWC/A is selected), including the method of calculating the Final Works Contract Sum.
  - The remeasurement basis (where Article 3 B of the MCWC/A is selected), including the method of calculating the Final Works Contract Sum.
- Payments and notices
  - Interim payments
  - Final payment
- Construction Industry Scheme
- Retention
- Loss and expense.

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