

The JCT Contract in a Cold Climate

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1. Introduction

- Key Provisions of JCT Contract in Recession
 - Determination of the contract
 - Provisions dealing with Employer or Contractor Insolvency
 - Ownership/Retention of Materials
 - Advance Payments
 - Dispute Resolution

2. Determination by the Employer

- JCT Standard Form of Building Contract Clause 8.4:
 - Wholly or substantially suspends the carrying out of the work before completion without a reasonable cause (Clause 8.4.1.1);
 - Fails to proceed regularly and diligently with the works (Clause 8.4.1.2);
 - Refuses or neglects to remove defective work after written notice and the Works are materially affected (Clause 8.4.1.3);
 - Fails to comply with clauses restricting sub-letting, assignment, or dealing with named subcontractors (Clause 8.4.1.4); and
 - Fails to comply with CDM Regulations (Clause 8.4.1.5)

3. Determination by the Employer

- Procedure for determination:
 - The architect must first serve a notice by special or recorded (or actual) delivery specifying the default (Clause 8.4.1)
 - Contractor has 14 days from receipt of the notice in which to remedy the default.
 - If the Contractor “continues a specified default for 14 days from receipt of the notice under Clause 8.4.1, the Employer may on, or within 10 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor’s employment” (Clause 8.4.2)
 - The architect is not empowered to send actual notice of termination.
 - If the contractor remedies default or the employer does not issue a termination notice under Clause 8.4.2 but the same default is later repeated, employer is entitled to serve notice of termination without a further default notice (Clause 8.4.3).

4. Termination by the Contractor

- Clause 8.9:
 - Where the Employer:
 - *"Does not pay by the final date for payment the amount properly due to the Contractor in respect of any certificate..."* (Clause 8.9.1.1)
 - *"interferes with or obstructs the issue of any certificate due under this Contract"* (Clause 8.9.1.2)
 - suspends the works owing to specific instructions or impediment, prevention or default (Clause 8.9.2).
 - Same Procedure as for termination by the Employer

5. Consequences of Termination by Employer

Clause 8.7:

- The employer may take, and the contractor must give up possession of the site;
- The employer may employ and pay others to complete the works;
- Provisions concerning the payment or release of retention to the contractor cease to apply, meaning that employer need make no further payments to the contractor until the works are completed and defects rectified;
- A reasonable time after the Works are complete and the defects rectified, an account must be drawn up stating:
 - The amount of loss and/or expense caused to the employer by the termination, including the cost of having the work completed by others;
 - The amount already paid to the contractor;
 - The amount which would have been payable for the Works in accordance with the contract.

6. Consequences of Termination by Contractor

Clause 8.9:

- Clauses requiring payment or release of retention to the contractor cease to apply;
- The Contractor must prepare an account as soon as reasonably practical setting out:
 - The total value of the Works at termination;
 - Any sum ascertained under the loss and/or expense claim;
 - The reasonable cost of removal of its property from site;
 - The cost of materials properly ordered for the Works for which the contractor has already paid or is legally bound to pay;
 - Any direct loss and/or damage caused to the contractor by the termination after taking into account amounts already paid under the contract.

7. Insolvency

- Clause 8.1:
 - *a Party is Insolvent if:*
 - *He enters into an arrangement, compromise or composition in satisfaction of his debts...*
 - *Without a declaration of solvency, he passes a resolution or makes a determination that he be wound up; or*
 - *He has a winding up order or bankruptcy order made against him; or*
 - *He has appointed to him an administrator or administrative receiver; or*
 - *He is the subject of any analogous arrangement, event or proceedings in any other jurisdiction..."*

8. Contractor Insolvency

- Clause 8.5 provides that:
 - If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.
 - As from the date the Contractor becomes Insolvent, whether or not the Employer has given such notice of termination:
 - The provisions of clauses 8.7.4, 8.7.5, and 8.8 shall apply as if such notice had been given and the other provisions of this Contract which require any further payment or any release of Retention shall cease to apply;
 - The Contractor's obligations ... to carry out and complete the Works and the design of the Contractor's Designed Portion shall be suspended; and
 - The Employer may take reasonable measures to ensure that the site, the Works and Site Materials are adequately protected and that such Site Materials are retained on site....

9. Employer Insolvency

- Clause 8.10:
 - *If the Employer is Insolvent, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract;*
 - *The Employer shall immediately inform the Contractor in writing if he makes any proposal, gives notice of any meeting or becomes the subject of any proceedings or appointment relating to any of the matters referred to in clause 8.1;*
 - *As from the date the Employer becomes Insolvent, the Contractor's obligations under clauses 2.1 and 2.2 to carry out and complete the Works and the design of the Contractor's Designed Portion shall be suspended*

10. Employer Insolvency

- Clause 2.24 provides that:

"Unfixed materials and goods delivered to, placed on or adjacent to the Works and intended for them shall not be removed except for use on the Works unless the Architect/Contract Administrator has consented in writing to such removal, such consent not to be unreasonably delayed or withheld."

"Where the value of such materials or goods has in accordance with clause 4.10 [Amounts due in Interim Certificates] and 4.16 [Ascertainment of Gross Valuation] been included in any Interim Certificate under which the amount properly due to the Contractor had been paid by the Employer, such materials and goods shall become the property of the Employer, but subject to Insurance Option B or C (if applicable), the Contractor shall remain responsible for loss or damage to them."

11. Advance Payments

- Clause 4.8 :

"the advance payment shall be paid to the Contractor on the date and reimbursed to the Employer on the terms stated in the Contract Particulars. Provided that where the Contract Particulars state that an advance payment bond is required, such payment shall only be made if the Contractor has provided to the Employer a bond...from a surety approved by the Employer."

12. Dispute Resolution

- Arbitration vs Litigation
 - Article 9 of the JCT Articles of Agreement: *"...the English courts shall have jurisdiction over any dispute or difference between the Parties which arises out of or in connection with this Contract."*
- Framework Agreement and Partnering

The End

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