

- 6 If either Party fails to pay a sum, or any part of it, due to the other Party under these Conditions by its final date for payment, he shall, in addition to any unpaid amount that should properly have been paid, pay the other Party simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made.
- 7 Any such unpaid amount and any interest under clause 4·9·6 shall be recoverable as a debt. Acceptance of a payment of interest shall not in any circumstances be construed as a waiver either of the recipient's right to proper payment of the principal amount due or of the Contractor's rights to suspend performance under clause 4·11 or terminate his employment under section 8.

#### **Pay Less Notices and other general provisions**

- 4·10 ·1 A Pay Less Notice given by either Party shall specify the sum he considers to be due to the other Party at the date the notice is given and the basis on which that sum has been calculated.
- 2 A Payment Notice, a Final Payment Notice or a Pay Less Notice to be given by the Employer may be given on his behalf by the Employer's Agent or by any other person who the Employer notifies the Contractor as being authorised to do so.
- 3 In relation to the requirements for the giving of Payment Notices, the Final Payment Notice, Pay Less Notices and the submission of a Final Statement, it is immaterial that the amount then considered to be due may be zero.
- 4 The Employer's fiduciary interest in the Retention referred to in clause 4·16 shall not prevent him exercising any right under this Contract to withhold or deduct from a sum due to the Contractor, subject to clause 4·9·5, even if that sum includes any Retention due for release under clause 4·18.

#### **Contractor's right of suspension**

- 4·11 ·1 If the Employer fails to pay a sum payable to the Contractor in accordance with clause 4·9 (together with any VAT properly chargeable in respect of that payment) by the final date for payment and the failure continues for 7 days after the Contractor has given notice to the Employer of his intention to suspend the performance of his obligations under this Contract and the grounds for such suspension, the Contractor, without affecting his other rights and remedies, may suspend performance of any or all of his obligations until payment is made in full.
- 2 Where the Contractor exercises his right of suspension under clause 4·11·1, he shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by him as a result of exercising the right.
- 3 Applications in respect of any such costs and expenses shall be made to the Employer and the Contractor shall with his application or on request submit such details of them as are reasonably necessary for ascertaining the amount in question.

### **Interim Payments – calculation of sums due**

#### **Gross Valuation – Alternative A**

- 4·12 The Gross Valuation for each Interim Payment shall be the total of the amounts referred to in clauses 4·12·1 and 4·12·2, less the deductions referred to in clause 4·12·3, each calculated as at the Interim Valuation Date:
  - 1 the total of the following, which are subject to Retention:
    - 1 the cumulative value of stages completed;
    - 2 the value of any Changes or other work referred to in clause 5·2 that are relevant to the Interim Payment (whether agreed pursuant to clause 5·2 or valued under the Valuation Rules) but excluding any amounts referred to in clause 4·12·2·4;
    - 3 the value of any Listed Items for which the conditions set out in clause 4·15 are satisfied; and
    - 4 where JCT Fluctuations Option C is applicable and where in accordance with the Formula Rules amounts in the Value of Work are to be allocated to lift installations, structural steelwork installations or catering equipment installations, the total value

of Site Materials of those descriptions, provided that their value shall only be included if they are adequately protected against weather and other casualties and they are not on the Works prematurely;

those values shall be adjusted, where appropriate, in accordance with any applicable Fluctuations Provision or any Acceleration Quotation for which there has been Confirmed Acceptance;

- 2 the total of the following, which are not subject to Retention:
  - 1 any amounts to be included in accordance with clause 4·3 by the Employer as a result of payments made or costs incurred by the Contractor under clause 2·5·2, 2·20, 3·12, 6·10·2 or 6·10·3, 6·11·3, 6·12·2 or 6·20;
  - 2 any amounts payable under clause 4·11·2;
  - 3 the amount of any loss and/or expense to which the Contractor is entitled under clause 4·19·1 or by a Confirmed Acceptance;
  - 4 where Insurance Option B or C applies or to the extent that the work is under clause 6·13·5·3 to be treated as a Change, any amounts in respect of reinstatement work under clause 6·13·4; and
  - 5 any amount payable to the Contractor under any applicable Fluctuations Provision, other than by means of an adjustment made under clause 4·12·1;
- 3 the following deductions:
  - 1 any amounts deductible under clause 2·35, 3·6, 6·12·2 or 6·19·2; and
  - 2 any amount allowable by the Contractor under clause 6·10·2 or under any applicable Fluctuations Provision, other than by means of an adjustment made under clause 4·12·1.

#### Gross Valuation – Alternative B

**4·13** The Gross Valuation for each Interim Payment shall be the total of the amounts referred to in clauses 4·13·1 and 4·13·2, less the deductions referred to in clause 4·13·3, each calculated as at the Interim Valuation Date:

- 1 the total values of the following, which are subject to Retention:
  - 1 work properly executed including any design work carried out by the Contractor and work so executed for which a value has been agreed pursuant to clause 5·2 or which has been valued under the Valuation Rules, but excluding any amounts referred to in clause 4·13·2·4;
  - 2 Site Materials provided they are adequately protected against weather and other casualties and they are not on the Works prematurely; and
  - 3 Listed Items (if any) for which the conditions set out in clause 4·15 are satisfied;

those values shall be adjusted, where appropriate, in accordance with any applicable Fluctuations Provision or any Acceleration Quotation for which there has been Confirmed Acceptance;
- 2 the total of the following, which are not subject to Retention:
  - 1 any amounts to be included in accordance with clause 4·3 by the Employer as a result of payments made or costs incurred by the Contractor under clause 2·5·2, 2·20, 3·12, 6·10·2 or 6·10·3, 6·11·3, 6·12·2 or 6·20;
  - 2 any amounts payable under clause 4·11·2;
  - 3 the amount of any loss and/or expense to which the Contractor is entitled under clause 4·19·1 or by a Confirmed Acceptance;
  - 4 where Insurance Option B or C applies or to the extent that the work is under clause 6·13·5·3 to be treated as a Change, any amounts in respect of reinstatement work under clause 6·13·4; and
  - 5 any amount payable to the Contractor under any applicable Fluctuations Provision, other than by means of an adjustment made under clause 4·13·1;
- 3 the following deductions:

- 1 any amounts deductible under clause 2·35, 3·6, 6·12·2 or 6·19·2; and
- 2 any amount allowable by the Contractor under clause 6·10·2 or under any applicable Fluctuations Provision, other than by means of an adjustment made under clause 4·13·1.

### Sums due as Interim Payments

**4·14** The sum due as an Interim Payment shall in each case be an amount equal to the Gross Valuation under clause 4·12 where the Contract Particulars state that Alternative A applies, or clause 4·13 where Alternative B applies, in either case less the following deductions:

- 1 any amount which may be deducted and retained by the Employer under clauses 4·16 to 4·18 ('the Retention');
- 2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Contract Particulars for clause 4·6; and
- 3 the amounts paid in previous Interim Payments.

### Listed Items

**4·15** The conditions for inclusion of the value of a Listed Item in the Gross Valuation before its delivery to or adjacent to the Works as referred to in clause 4·12·1·3 or 4·13·1·3 are:

- 1 the Listed Item is in accordance with this Contract;
- 2 the Contractor has provided the Employer with reasonable proof that:
  - 1 property in the Listed Item is vested in the Contractor; and
  - 2 the Listed Item is and will remain insured against loss or damage for its full value under a policy of insurance protecting the interests of the Employer and the Contractor in respect of the Specified Perils until delivered to, or adjacent to, the Works;
- 3 at the premises where the Listed Item is situated pending delivery, there is in relation to that item clear identification of:
  - 1 the Employer as the person to whose order it is held; and
  - 2 the Works as its destination,

each item being either set apart or clearly and visibly marked, individually or as a set, by letters, figures or a pre-determined code; and
- 4 for uniquely identified Listed Items, the Contractor, if it is stated in the Contract Particulars as required, has provided a bond in favour of the Employer from a surety approved by the Employer in the terms set out in Part 2 of Schedule 6<sup>[41]</sup> ('the required bond') in the amount specified in the Contract Particulars for this clause 4·15·4; or
- 5 for Listed Items that are not uniquely identified, the Contractor has provided the required bond in the amount specified in the Contract Particulars for this clause 4·15·5.

### Retention

#### Rules on treatment of Retention

**4·16** The Retention which the Employer may deduct and retain as referred to in clause 4·14 shall be subject to the following rules:

- 1 the Employer's interest in the Retention is fiduciary as trustee for the Contractor (but without obligation to invest);
- 2 except where the Employer is a Local or Public Authority, the Employer, to the extent that he exercises his right under clause 4·18 and if the Contractor so requests, shall at the time of each Interim Payment place the Retention in a separate bank account (so designated as

<sup>[41]</sup> As to approval of sureties, see the Design and Build Contract Guide.

to identify the amount as the Retention held by the Employer on trust as provided in clause 4.16.1) and notify the Contractor that the amount has been so placed. The Employer shall be entitled to the full beneficial interest in any interest accruing on the separate bank account and under no duty to account for any such interest to the Contractor.

### Retention Bond

- 4.17 Not applicable.

### Retention – amounts and periods

- 4.18 During the period prior to issue of the Notice of Completion of Making Good (or last such notice) the Retention which may be deducted and retained by the Employer shall be the following percentages of the total amount (or proportion of that amount) included in the Gross Valuation for any Interim Payment under clause 4.12.1 or 14.3.1, whichever is applicable, for work and (where applicable) Site Materials and Listed Items<sup>[43]</sup>:
- 1 the Retention Percentage may be deducted from the total amount where the Works have not reached practical completion or (where there are Sections) from that proportion of the total amount that relates to uncompleted Sections (in either case excluding from the total amount any proportion of it attributable to a Relevant Part);
  - 2 half the Retention Percentage may be deducted:
    - 1 from the total amount where the Works as a whole have reached practical completion but the Notice of Completion of Making Good has not been issued; or
    - 2 from the proportion of the total amount that relates to each Section that has reached practical completion but for which such a notice has not been issued or relates to a Relevant Part for which a notice has not been issued under clause 2.32.

## Loss and Expense

### Matters materially affecting regular progress

- 4.19
- 1 If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.4 or because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.19.2 and compliance with the provisions of clause 4.20 be entitled to reimbursement of that loss and/or expense.
  - 2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.19 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

### Notification and ascertainment

- 4.20
- 1 The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.
  - 2 That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense incurred.
  - 3 The Contractor shall thereafter, in such form and manner as the Employer may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.
  - 4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Employer shall notify the Contractor of the ascertained

<sup>[43]</sup> For the effect of clause 4.18.2, see the Design and Build Contract Guide.

amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

#### Relevant Matters

#### 4.21 The following are the Relevant Matters:

- 1 Changes and any other matters or instructions which under these Conditions are to be treated as a Change;
- 2 Employer's instructions:
  - 1 under clause 3.10 or 3.11; or
  - 2 for the opening up for inspection or testing of any work, materials or goods under clause 3.12 (including making good), unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract;
- 3 compliance with clause 3.15.1 or with Employer's instructions under clause 3.15.2;
- 4 delay in receipt of any permission or approval for the purposes of Development Control Requirements necessary for the Works to be carried out or proceed, which delay the Contractor has taken all practicable steps to avoid or reduce;
- 5 any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any Contractor's Person.

#### Amounts ascertained – addition to Contract Sum

#### 4.22 Amounts ascertained under clause 4.20 shall be added to the Contract Sum.

#### Reservation of Contractor's rights and remedies

#### 4.23 The provisions of clauses 4.19 to 4.22 shall not limit or affect any other rights and remedies of the Contractor.

#### Final Statement and Final Payment<sup>[44]</sup>

- 4.24 ·1 Following practical completion of the Works the Contractor shall submit the Final Statement to the Employer and supply him with such supporting documents as he may reasonably require.
- 2 The Final Statement shall set out the adjustments to the Contract Sum to be made in accordance with clause 4.2 and shall state:
- 1 the Contract Sum, as so adjusted; and
  - 2 the sum of amounts already paid by the Employer to the Contractor,
- and the final payment shall be the difference (if any) between the two sums, which shall be shown as a balance due to the Contractor from the Employer or to the Employer from the Contractor, as the case may be. The Final Statement shall state the basis on which that amount has been calculated, including details of all such adjustments.
- 3 If the Contractor does not submit the Final Statement within 3 months of practical completion of the Works, the Employer may on or after the expiry of that period give the Contractor notice that unless that statement is submitted within 2 months from the date of the notice the Employer may himself issue a final statement in lieu of that from the Contractor.
- 4 Unless the Contractor submits the Final Statement prior to the Employer exercising that right, the Employer may at any time after the 2 month notice period issue a final statement to the Contractor ('the Employer's Final Statement') in the form and with the details required by clause 4.24.2, so far as the Employer, on the information in his possession, is reasonably able to do so.
- 5 The due date for the final payment shall be the date one month after whichever of the

<sup>[44]</sup> The effect of the Final Statement is set out in clause 1.8.

following occurs last:

- 1 the end of the Rectification Period in respect of the Works or (where there are Sections) the last such period to expire;
  - 2 the date stated in the Notice of Completion of Making Good under clause 2.36 or (where there are Sections) in the last such notice to be issued; or
  - 3 the date of submission to the other Party of the Final Statement or, if issued first, the Employer's Final Statement ('the relevant statement').
- 6 Except to the extent that prior to the due date for the final payment the Employer gives notice to the Contractor disputing anything in the Final Statement or the Contractor gives notice to the Employer disputing anything in the Employer's Final Statement, and subject to clause 1.8.2, the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.24.2 and have the further effects stated in clause 1.8.

## Section 5 Changes

### General

#### Definition of Changes

**5.1** The term 'Change' means:

- 1 a change in the Employer's Requirements which makes necessary the alteration or modification of the design, quality or quantity of the Works, otherwise than such as may be reasonably necessary for the purposes of rectification pursuant to clause 3.13, including:
  - 1 the addition, omission or substitution of any work;
  - 2 the alteration of the kind or standard of any of the materials or goods to be used in the Works;
  - 3 the removal from the site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;
- 2 the imposition by the Employer of any obligations or restrictions in regard to the following matters or any addition to or alteration or omission of any such obligations or restrictions that are so imposed or are imposed in the Employer's Requirements in regard to:
  - 1 access to the site or use of any specific parts of the site;
  - 2 limitations of working space;
  - 3 limitations of working hours; or
  - 4 the execution or completion of the work in any specific order.<sup>[45]</sup>

#### Valuation of Changes and provisional sum work

**5.2** The value of:

- 1 all Changes required by Employer's instructions;
- 2 all work which under these Conditions is to be treated as a Change; and
- 3 all work executed by the Contractor in accordance with Employer's instructions as to the expenditure of Provisional Sums included in the Employer's Requirements

shall be such amount as is agreed by the Employer and the Contractor or, where not agreed, the amount valued (a 'Valuation') in accordance with clauses 5.4 to 5.7 ('the Valuation Rules').

#### Giving effect to Valuations, agreements etc.

**5.3** The Contract Sum shall be adjusted for each agreement by the Employer and the Contractor under clause 5.2 and for each Valuation.

### The Valuation Rules

#### Measurable Work

**5.4** Valuations shall be made in accordance with this clause 5.4 and, so far as is relevant, clauses 5.5 to 5.7.

- 1 Allowance shall be made in such Valuations for the addition or omission of the relevant design work.
- 2 The valuation of additional or substituted work shall be consistent with the values of work of a similar character set out in the Contract Sum Analysis, making due allowance for any change in the conditions under which work is carried out and/or any significant change in the quantity of the work so set out. Where there is no work of a similar character set out in the Contract Sum Analysis a fair valuation shall be made.

<sup>[45]</sup> See clause 3.5.1 for the Contractor's right of reasonable objection to Changes.

- 3 The valuation of the omission of work set out in the Contract Sum Analysis shall be in accordance with the values therein for such work.
- 4 Any valuation of work under clauses 5·4·2 and 5·4·3 shall include allowance for any necessary addition to or reduction of the provision of site administration, site facilities and temporary works.

#### **Daywork**

- 5·5** Where the execution of additional or substituted work cannot be valued in accordance with clause 5·4, the Valuation shall comprise:

- 1 the prime cost of such work (calculated in accordance with the 'Definition of Prime Cost of Daywork carried out under a Building Contract' issued by The Royal Institution of Chartered Surveyors (RICS) and Construction Industry Publications Ltd as current at the Base Date) together with Percentage Additions to each section of the prime cost at the rates stated in the document identified in the Contract Particulars or, if they apply in respect of labour, at the All-Inclusive Rates stated in such document; or
- 2 where the work is within the province of any specialist trade and the RICS and the appropriate body representing the employers in that trade have agreed and issued a definition of prime cost of daywork<sup>[46]</sup>, the prime cost of such work calculated in accordance with that definition current at the Base Date, together with Percentage Additions on the prime cost at the rates stated in the document identified in the Contract Particulars or, if they apply in respect of labour, at the All-Inclusive Rates stated in such document.

Provided that in any case vouchers specifying the time daily spent upon the work, the workmen's names, the plant and the materials employed shall be delivered for verification to the Employer not later than 7 Business Days after the work has been executed.

#### **Change of conditions for other work**

- 5·6** If as a result of:

- 1 compliance with any instruction requiring a Change; or
- 2 compliance with any instruction as to the expenditure of a Provisional Sum,

there is a substantial change in the conditions under which any other work is executed, that other work shall be treated as a Change and shall be valued in accordance with the provisions of this section 5.

#### **Additional provisions**

- 5·7**
- 1 To the extent that a Valuation does not relate to the execution of additional or substituted work or the omission of work or to the extent that the valuation of any work or liabilities directly associated with a Change cannot reasonably be effected in the Valuation by the application of clauses 5·4 to 5·6, a fair valuation shall be made.
  - 2 No allowance shall be made under the Valuation Rules for any effect upon the regular progress of the Works or of any part of them or for any other direct loss and/or expense for which the Contractor would be reimbursed by payment under any other provision in these Conditions.

<sup>[46]</sup> There are currently three definitions to which clause 5·5·2 refers, namely those agreed between the RICS and the Electrical Contractors Association, the RICS and the Electrical Contractors Association of Scotland and the RICS and the Building and Engineering Services Association.

## Section 6 Injury, Damage and Insurance

### Personal Injury and Property Damage

#### Contractor's liability – personal injury or death

- 6.1 The Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, except to the extent that the same is due to any act or neglect of the Employer, any Employer's Person or any Statutory Undertaker.

#### Contractor's liability – loss, injury or damage to property

- 6.2 Subject to clause 6.3, the Contractor shall be liable for, and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor or any Contractor's Person.

#### Loss or damage to Existing Structures or their contents

- 6.3
- 1 Where paragraph C.1 of Insurance Option C applies, the Contractor's liability and indemnity under clause 6.2 excludes any loss or damage to Existing Structures or to any of their contents required to be insured under that option that is caused by any of the risks or perils required or agreed to be insured against under that option.
  - 2 The exclusion in clause 6.3.1 shall apply notwithstanding that the loss or damage is or may be due in whole or in part to the negligence, breach of statutory duty, omission or default of the Contractor or any Contractor's Person.
  - 3 Where Insurance Option C applies but a C.1 Replacement Schedule applies in lieu of paragraph C.1, the Contractor's liability and indemnity under clause 6.2 shall, in respect of loss, injury or damage to the Existing Structures and their contents due to the causes specified in that clause, be subject only to such limitations or exclusions as are specified in that schedule.
  - 4 The reference in clause 6.2 to 'property real or personal' does not include the Works, work executed or Site Materials up to and including the date of issue of the Practical Completion Statement or, if earlier, the date of termination of the Contractor's employment, except that:
    - 1 after the date of issue of a Section Completion Statement, the Section to which it relates shall no longer be regarded as 'the Works' or 'work executed' for these purposes; and
    - 2 if partial possession is taken under clause 2.30, the Relevant Part shall no longer be so regarded after the Relevant Date.

### Insurance against Personal Injury and Property Damage

#### Contractor's insurance of his liability

- 6.4
- 1 Without limiting or affecting his indemnities to the Employer under clauses 6.1 and 6.2, the Contractor shall effect and maintain insurance in respect of claims arising out of the liabilities referred to in those clauses which:
    - 1 in respect of claims for personal injury to or the death of any employee of the Contractor arising out of and in the course of such person's employment, shall comply with all relevant legislation; and

- 2 for all other claims to which clause 6·4·1 applies<sup>[47]</sup>, shall indemnify the Employer in like manner to the Contractor (but only to the extent that the Contractor may be liable to indemnify the Employer under the terms of this Contract) and shall for any one occurrence or series of occurrences arising out of one event be in a sum not less than that stated in the Contract Particulars for clause 6·4·1.<sup>[48]</sup>
- 2 As to evidence that such insurances have been effected and are being maintained and the consequences of failure to comply, clause 6·12 shall apply.

#### Contractor's insurance of liability of Employer

- 6·5** ·1 If the Employer's Requirements state that insurance under clause 6·5·1 is required, the Contractor shall effect and maintain a policy of insurance in the names of the Employer and the Contractor for the amount of indemnity stated in the Contract Particulars in respect of any expense, liability, loss, claim or proceedings which the Employer may incur or sustain by reason of injury or damage to any property caused by collapse, subsidence, heave, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works, excluding injury or damage:
- 1 for which the Contractor is liable under clause 6·2;
  - 2 which is attributable to errors or omissions in the designing of the Works;
  - 3 which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed and the manner of its execution;
  - 4 (if Insurance Option C applies) which it is the responsibility of the Employer to insure under paragraph C·1 of Schedule 3;
  - 5 to the Works and Site Materials except where the Practical Completion Statement has been issued or in so far as any Section is the subject of a Section Completion Statement;
  - 6 which arises from any consequence of war, invasion, act of foreign enemy, hostilities (whether war is declared or not), civil war, rebellion or revolution, insurrection or military or usurped power;
  - 7 which is directly or indirectly caused by or contributed to by or arises from the Excepted Risks;
  - 8 which is directly or indirectly caused by or arises out of pollution or contamination of buildings or other structures or of water or land or the atmosphere happening during the period of insurance, save that this exception shall not apply in respect of pollution or contamination caused by a sudden identifiable, unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during the period of insurance (all pollution or contamination which arises out of one incident being considered for the purpose of this insurance to have occurred at the time such incident takes place); or
  - 9 which results in any costs or expenses being incurred by the Employer or in any other sums being payable by the Employer in respect of damages for breach of contract, except to the extent that such costs or expenses or damages would have attached in the absence of any contract.
- 2 Any insurance under clause 6·5·1 shall be placed with insurers approved by the Employer, and the Contractor shall upon its issue deposit the policy with the Employer.
  - 3 As to evidence that such insurance has been effected and is being maintained and the consequences of failure to comply, clause 6·12 shall apply.

#### Excepted Risks

- 6·6** Notwithstanding clauses 6·1, 6·2 and 6·4·1, the Contractor shall neither be liable to indemnify the Employer nor obliged to insure against any personal injury to or the death of any person or any damage, loss or injury to the Works, Site Materials, work executed, the site or any other property, caused by the effect of an Excepted Risk.

<sup>[47]</sup> It should be noted that the cover granted under Public Liability policies taken out pursuant to clause 6·4·1 may not be co-extensive with the indemnity given to the Employer in clauses 6·1 and 6·2: for example, each claim may be subject to an excess and cover may not be available in respect of loss or damage due to gradual pollution.

<sup>[48]</sup> The Contractor may, if he wishes, insure for a sum greater than that stated in the Contract Particulars.

## Insurance of the Works and Existing Structures

### Insurance Options and period

- 6-7
- 1 Insurance Options A, B and C are set out in Schedule 3. The Insurance Option that applies to this Contract is that stated in the Contract Particulars.<sup>[49]</sup>
  - 2 In each case the Party responsible for effecting a Joint Names Policy under the Insurance Option that applies (the 'Works Insurance Policy') shall maintain that policy up to and including the date of issue of the Practical Completion Statement, or last Section Completion Statement, or (if earlier) the date of termination of the Contractor's employment, except that the obligation to maintain a Works Insurance Policy:
    - 1 shall not apply in relation to a Section after the date of issue of its Section Completion Statement; and
    - 2 if partial possession is taken under clause 2-30, shall not as from the Relevant Date apply in relation to the Relevant Part.

### Related definitions

- 6-8 In these Conditions the following phrases shall have the following meanings:

- All Risks Insurance<sup>[50]</sup>: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:
- (a) property which is defective due to:
    - (i) wear and tear,
    - (ii) obsolescence, or
    - (iii) deterioration, rust or mildew;
  - (b) any work executed or any Site Materials lost or damaged as a result of its own defect in design, plan, specification, material or workmanship or any other work executed which is lost or damaged in consequence thereof where such work relied for its support or stability on such work which was defective<sup>[51]</sup>;
  - (c) loss or damage caused by or arising from:

<sup>[49]</sup> **Insurance Options A and B** are for use in the case of new buildings. **Insurance Option A** is applicable where the **Contractor** is required to take out a Joint Names Policy for All Risks Insurance of the Works or to include them on that basis within his Annual Construction policy; **Insurance Option B** is applicable where the **Employer** has elected to take out that Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to Existing Structures. Under that option, the **Employer** is required to take out a Joint Names Policy for All Risks Insurance for the Works and also, if paragraph C-1 applies, a Joint Names Policy to insure the Existing Structures and their contents owned by him or for which he is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and some homeowners) may not be able readily to obtain the Joint Names cover required under paragraph C-1. Where that is the case, alternative arrangements through use of a C-1 Replacement Schedule or as otherwise described in the Design and Build Contract Guide will be necessary.

**Where there are Existing Structures, it is vital that any prospective Employer who is not familiar with Insurance Option C – in particular any Employer who is a tenant or domestic homeowner – or an appropriate member of the Employer's professional team, should consult specialist insurance advisers prior to the tender stage. Any Employer who is a tenant should also consult his insuring landlord prior to that stage.**

<sup>[50]</sup> The risks and costs that All Risks Insurance is required to cover are defined by exclusions. Policies issued by insurers are not standardised; the way in which insurance for these risks is expressed varies and in some cases it may not be possible for insurance to be taken out against certain of the risks required to be covered. In the case of Terrorism Cover, where the extension of cover will involve an additional premium and may in certain situations be difficult to effect, the requirement is now expressly limited to Pool Re Cover or such other cover as is agreed and set out in the Contract Particulars. That extension and any other relevant details of Works insurance also require discussion and agreement between the Parties and their insurance advisers at an early stage, prior to entering into the Contract. See the Design and Build Contract Guide.

<sup>[51]</sup> In an All Risks Insurance policy for the Works, cover should not be reduced by any exclusion that goes beyond the terms of paragraph (b) in this definition. For example, an exclusion in terms that 'This Policy excludes all loss of or damage to the property insured due to defective design, plan, specification, materials or workmanship' would not be in accordance with the terms of the relevant Insurance Options or that definition. In relation to design defects, wider All Risks cover than that specified may be available, though it is not standard.

- (i) any consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation, commandeering, nationalisation or requisition or loss or destruction of or damage to any property by or under the order of any government *de jure* or *de facto* or public, municipal or local authority,
- (ii) disappearance or shortage if such disappearance or shortage is only revealed when an inventory is made or is not traceable to an identifiable event, or
- (iii) an Excepted Risk.

**Excepted Risks:**

the risks comprise:

(a) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof (other than such risk insofar, but only insofar, as it is included in the Terrorism Cover from time to time required to be taken out and maintained under this Contract);

(b) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and

(c) any act of terrorism that is not within the Terrorism Cover from time to time required to be taken out and maintained under this Contract.

**Joint Names Policy:**

a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

**Pool Re Cover:**

such insurance against loss or damage to work executed and Site Materials caused by or resulting from terrorism as is from time to time generally available from insurers who are members of the Pool Reinsurance Company Limited scheme or of any similar successor scheme.<sup>[52]</sup>

**Specified Perils:**

fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, but excluding Excepted Risks.

**Terrorism Cover:**

Pool Re Cover or other insurance against loss or damage to work executed and Site Materials (and/or, for the purposes of clause 6.11.1, to an Existing Structure and/or its contents) caused by or resulting from terrorism.<sup>[52]</sup>

**Sub-contractors – Specified Perils cover under Works Insurance Policies**

- 6.9** ·1 The Contractor, where Insurance Option A applies, and the Employer, where Insurance Option B or C applies, shall ensure that the Works Insurance Policy either:

- 1 provides for recognition of each sub-contractor as an insured under the policy; or
- 2 includes a waiver by the insurers of any right of subrogation which they may have against any such sub-contractor

in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed and Site Materials and that this recognition or waiver continues up to and including the date of issue of any statement or other document which states that in relation to the Works, the sub-contractor's works are practically complete or, if earlier, the date of

<sup>[52]</sup> As respects Terrorism Cover and the requirements of Insurance Options A, B and C, see footnote [50] and the Design and Build Contract Guide.

termination of the sub-contractor's employment. Where there are Sections, the recognition or waiver for a sub-contractor in relation to a Section shall cease upon the issue of such statement or other document for his work in that Section.

- 2 Clause 6·9·1 applies also in respect of any Works Insurance Policy taken out in default under clause 6·12·2.

#### **Terrorism Cover – policy extensions and premiums**

- 6·10 ·1 To the extent that the Works Insurance Policy excludes (or would otherwise exclude) loss or damage caused by terrorism, the Contractor, where Insurance Option A applies, or the Employer, where Insurance Option B or C applies, shall unless otherwise agreed effect and maintain, either as an extension to the Works Insurance Policy or as a separate Joint Names Policy, in the same amount and for the same period as the Works Insurance Policy, such Terrorism Cover as is specified in or by the Contract Particulars, subject to clauses 6·10·4 and 6·11.
- 2 Where Insurance Option A applies and the Contractor is required to take out and maintain Pool Re Cover, the cost of that cover and its renewal shall be deemed to be included in the Contract Sum save that, if at any renewal of the cover there is a variation in the rate on which the premium is based, the Contract Sum shall be adjusted by the net amount of the difference between the premium paid by the Contractor and the premium that would have been paid but for the change in rate.
- 3 Where Insurance Option A applies and Terrorism Cover other than Pool Re Cover is specified as required, the cost of such other cover and of its renewal shall be added to the Contract Sum.
- 4 Where Insurance Option A applies and the Employer is a Local or Public Authority, if at any renewal of the Terrorism Cover (of any type) there is an increase in the rate on which the premium is based, he may instruct the Contractor not to renew the Terrorism Cover. If he so instructs, clause 6·13·5·3 shall apply with effect from the renewal date.

#### **Terrorism Cover – non-availability – Employer's options**

- 6·11 ·1 If the insurers named in any Joint Names Policy notify either Party that, with effect from a specified date (the 'cessation date'), Terrorism Cover will cease and will no longer be available or will only continue to be available with a reduction in the scope or level of such cover, the recipient shall immediately notify the other Party.
- 2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Contractor either:
  - 1 that, notwithstanding the cessation or reduction in scope or level of Terrorism Cover, the Employer requires that the Works continue to be carried out; or
  - 2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Contractor's employment under this Contract shall terminate.
- 3 Where Insurance Option A applies and the Employer gives notice under clause 6·11·2·1 requiring continuation of the Works, he may instruct the Contractor to effect and maintain any alternative or additional form of Terrorism Cover then reasonably obtainable by the Contractor, the net additional cost to the Contractor of any such cover and its renewal shall be added to the Contract Sum.
- 4 If the Employer gives notice of termination under clause 6·11·2·2, then upon and from such termination the provisions of clause 8·12 (excluding clause 8·12·3·5) shall apply.
- 5 If the Employer does not give notice of termination under clause 6·11·2·2, but work executed and/or Site Materials thereafter suffer physical loss or damage caused by terrorism, clauses 6·13 and 6·14 shall as appropriate apply.

#### **Evidence of insurance**

- 6·12 ·1 Where a Party is required by this Contract to effect and maintain an insurance policy or cover under any of clauses 6·4, 6·5, 6·7 and 6·10, or is responsible for ensuring that it is effected and maintained, that Party shall at the request of the other Party supply such documentary evidence as the other Party may reasonably require that the policy or cover has been effected and remains in force.
- 2 If a Party required to provide such documentary evidence fails to provide it within 7 days of a request being made, the other Party may assume that there has been a failure to insure, and may insure against any risk, liability or expense to which he may be exposed as a

consequence, but shall not be obliged to do so. If the other Party insures, the defaulting Party shall be liable for the costs that the other Party incurs in taking out and maintaining that insurance. Any costs payable to the Contractor shall be added to the Contract Sum; any costs payable to the Employer may be deducted from any sums due or to become due to the Contractor or shall be recoverable from the Contractor as a debt.

#### Loss or damage – insurance claims and reinstatement

- 6.13**
- 1 If during the carrying out of the Works any loss or damage affecting any executed work or Site Materials is occasioned by any of the risks covered by the Works Insurance Policy or an Excepted Risk or there is any loss of or damage of any kind to any of the Existing Structures or their contents, the Contractor shall forthwith upon it occurring or becoming apparent give notice to the Employer of its nature, location and extent.
  - 2 Subject to clauses 6.13.5.1 and 6.13.6, the occurrence of such loss or damage to executed work or Site Materials shall be disregarded in calculating any amounts payable to the Contractor under this Contract.
  - 3 The Contractor, for himself and for all his sub-contractors recognised as an insured under the Works Insurance Policy, shall authorise the insurers to pay to the Employer all monies from such insurance, and from any policies covering Existing Structures or their contents that are effected by the Employer.
  - 4 Where loss or damage affecting executed work or Site Materials is occasioned by any risk covered by the Works Insurance Policy, and subject to clause 6.14 where relevant, the Contractor shall after any inspection required by the insurers under the Works Insurance Policy and with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris (collectively 'reinstatement work') and proceed with the carrying out and completion of the Works.
  - 5 Where Insurance Option A applies:
    - 1 the Employer shall pay all monies from such insurance to the Contractor by instalments under separate reinstatement work statements issued by the Employer at the same dates as those for Payment Notices under clause 4.7.5 but without deduction of Retention and less only the amounts referred to in clause 6.13.5.2;
    - 2 the Employer may retain from those monies any amounts properly incurred by the Employer and notified by him to insurers in respect of professional fees up to the aggregate amount of the percentage cover for those fees or (if less) the amount paid by insurers in respect of those fees;
    - 3 in respect of reinstatement work, the Contractor shall not be entitled to any payment other than amounts received under the Works Insurance Policy except where there has been a cessation of or reduction in Terrorism Cover under clause 6.10.4 or 6.11 and loss or damage is then caused by or results from terrorism, in which case the reinstatement work shall, to the extent that its cost is no longer recoverable under the policy, be treated as a Change and under clause 4.12.2.4, 4.13.2.4 or 6.13.5.1 included in Payment Notices. In neither case shall there be any reduction in any amount payable by reason of any act or neglect of the Contractor or of any sub-contractor which may have contributed to the physical loss or damage.
  - 6 Where Insurance Option B or paragraph C.2 of Insurance Option C applies or where loss or damage is caused by an Excepted Risk, reinstatement work shall be treated as a Change.

#### Loss or damage to Existing Structures – right of termination

- 6.14**
- If there is material loss of or damage to any of the Existing Structures, the Employer shall be under no obligation to reinstate those structures, but either Party may, if it is just and equitable, terminate the Contractor's employment under this Contract by notice given to the other in accordance with clause 1.7.4 within 28 days of the occurrence of that loss or damage. If such notice is given, then:
- 1 unless within 7 days of receiving the notice (or such longer period as may be agreed) the Party to whom it is given invokes a dispute resolution procedure of this Contract to determine whether the termination is just and equitable, it shall be deemed to be so;
  - 2 upon the giving of that notice or, where a dispute resolution procedure is invoked within

that period, upon any final upholding of the notice, the provisions of clause 8.12 (except clause 8.12.3.5) shall apply.

## Professional Indemnity Insurance

### Obligation to insure

#### 6.15 The Contractor shall:

- 1 forthwith after this Contract has been entered into, take out (unless he has already done so) a Professional Indemnity insurance policy with limits of indemnity of the types and in amounts not less than those stated in the Contract Particulars<sup>[53]</sup>;
- 2 thereafter, provided it is available at commercially reasonable rates, maintain such insurance until the expiry of the period stated in the Contract Particulars from the date of practical completion of the Works; and
- 3 as and when reasonably requested to do so by the Employer, produce for inspection documentary evidence that such insurance has been effected and/or is being maintained.

### Increased cost and non-availability

- 6.16 If the insurance referred to in clause 6.15 ceases to be available at commercially reasonable rates, the Contractor shall immediately give notice to the Employer so that the Contractor and the Employer can discuss the means of best protecting their respective positions in the absence of such insurance.

## Joint Fire Code – compliance

### Application of clauses

- 6.17 Clauses 6.18 to 6.20 apply where the Contract Particulars state that the Joint Fire Code applies.

### Compliance with Joint Fire Code

- 6.18 The Parties shall comply with the Joint Fire Code and any amendments or revisions to it; the Employer shall ensure such compliance by all Employer's Persons and the Contractor shall ensure such compliance by all Contractor's Persons.

### Breach of Joint Fire Code – Remedial Measures

- 6.19 ·1 If a breach of the Joint Fire Code occurs and the insurers under the Works Insurance Policy specify by notice to the Employer or the Contractor the remedial measures they require (the 'Remedial Measures'), the Party receiving the notice shall copy it to the other and the Contractor shall ensure that the Remedial Measures are carried out.
- 2 If the Contractor, within 7 days of receipt of a notice specifying Remedial Measures, does not begin to carry out or thereafter fails without reasonable cause regularly and diligently to proceed with the Remedial Measures, then the Employer may employ and pay other persons to carry out those Remedial Measures. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment and an appropriate deduction shall be made from the Contract Sum.

### Joint Fire Code – amendments/revisions

- 6.20 Where the Joint Fire Code is, under a Joint Names Policy, applicable to the Works and amendments or revisions are made to it after the Base Date, any cost of compliance by the Contractor with amendments or revisions made after that date shall be borne as stated in the Contract Particulars. If the cost is to be borne by the Employer, it shall be added to the Contract Sum.

<sup>[53]</sup> See the Design and Build Contract Guide.

## Section 7 Assignment, Performance Bonds and Guarantees, Third Party Rights and Collateral Warranties

### Assignment

#### General

- 7.1 Subject to clause 7.2, neither the Employer nor the Contractor shall without the consent of the other assign this Contract or any rights thereunder.

#### Rights of enforcement

- 7.2 Where clause 7.2 is stated in the Contract Particulars to apply, then, in the event of transfer by the Employer of his freehold or leasehold interest in, or of a grant by the Employer of a leasehold interest in, the whole of the premises comprising the Works or (if the Contract Particulars so state) any Section, the Employer may at any time after practical completion of the Works or of the relevant Section grant or assign to any such transferee or lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation, whichever applies under this Contract) to enforce any of the terms of this Contract made for the benefit of the Employer. The assignee shall be estopped from disputing any enforceable agreements reached between the Employer and the Contractor which arise out of and relate to this Contract (whether or not they are or appear to be a derogation from the right assigned) and which are made prior to the date of any grant or assignment.

### Performance Bonds and Guarantees

- 7.3 The Contractor shall on the execution of this Contract provide to the Employer whichever of the following the Contract Particulars state as being required:

- 1 a performance bond or guarantee of the Contractor's due performance of the Contract from a bank or other surety approved by the Employer in an amount equal to the percentage of the Contract Sum and for the period stated in the Contract Particulars;
- 2 a guarantee by the Contractor's parent company identified in the Contract Particulars;

any such bond or guarantee, unless otherwise agreed by the Employer, being substantially in the form of the document identified by the Contract Particulars.

### Clauses 7A to 7E – Preliminary

#### Rights Particulars

- 7.4 The requirements for the grant of P&T Rights and Funder Rights by the Contractor and sub-contractors and any requirement for the grant of Employer Rights by any sub-contractors ('Rights Particulars') are set out in the document(s) identified in the Contract Particulars against the reference to clause 7.4.<sup>[54]</sup> As respects those requirements:
- 1 such rights are conferred only on persons sufficiently identified (by name, class or description) in the Rights Particulars;
  - 2 if in relation to an identified beneficiary the Rights Particulars fail to specify the method by

<sup>[54]</sup> The relevant Rights Particulars should identify the beneficiaries (by name, class or description) and the sub-contractors who are also required to grant rights, specify whether rights are to be granted at each level as Third Party Rights or by way of Collateral Warranties, state in those cases where the default provision is not to apply which alternative provision is to apply in its place and give any other details required to complete the terms of the rights or warranties that are to be given. A Model Form for the Rights Particulars is included in the Design and Build Contract Guide and is also available on the JCT website [www.jctttd.co.uk](http://www.jctttd.co.uk). In the case of third party rights the relevant limits and details required for the purposes of the respective parts of Schedule 5 of this Contract and Schedule 6 of the Design and Build Sub-Contract are the same as required for the purposes of the Warranty Particulars for the corresponding Collateral Warranty (CWa/P&T, CWa/F, SCWa/P&T, SCWa/F or SCWa/E). Directions may be needed as to mode of execution of sub-contracts and/or collateral warranties by relevant sub-contractors. See also the Design and Build Contract Guide.

which such rights are to be conferred, the Contractor in relation to rights to be granted by him may elect to do so either as third party rights or by collateral warranty;

- 3 unless otherwise stated in the Rights Particulars, the term 'the Consultants' shall in all third party rights and/or collateral warranties to be granted mean the Employer's Agent (including any replacements) and any other consultants providing design services to the Employer in connection with the Works.

#### Notices

- 7-5 Each notice to the Contractor referred to in clauses 7A to 7E shall be given in accordance with clause 1-7-4.

#### Execution of Collateral Warranties

- 7-6 Where this Contract is executed as a deed, any collateral warranty to be entered into by the Contractor pursuant to clause 7C or 7D shall be executed as a deed. Where this Contract is executed under hand, any such warranty may be executed under hand.<sup>[55]</sup>

### Third Party Rights from Contractor

#### Rights for Purchasers and Tenants

- 7A ·1 Where the Rights Particulars state that the Contractor shall confer P&T Rights on a Purchaser or Tenant as third party rights, those rights shall vest in that Purchaser or Tenant on the date of receipt by the Contractor of the Employer's notice to that effect, stating the name of the Purchaser or Tenant and the nature of his interest in the Works.
- 2 Where P&T Rights have vested in any Purchaser or Tenant, the Employer and the Contractor shall not be entitled without the consent of that Purchaser or Tenant to amend or vary the express provisions of this clause 7A or of Part 1 of Schedule 5 (Third Party Rights for Purchasers and Tenants) but, subject thereto, the rights of the Employer and/or the Contractor:
  - 1 to terminate the Contractor's employment under this Contract (whether under section 8 or otherwise), or to agree to rescind this Contract;
  - 2 to agree to amend or otherwise vary or to waive any terms of this Contract;
  - 3 to agree to settle any dispute or other matter arising out of or in connection with this Contract, in each case in or on such terms as they shall in their absolute discretion think fit,
 shall not be subject to the consent of any Purchaser or Tenant.

#### Rights for a Funder

- 7B ·1 Where the Rights Particulars state that the Contractor shall confer Funder Rights on a Funder as third party rights, those rights shall vest in the Funder on the date of receipt by the Contractor of the Employer's notice to that effect.
- 2 Where Funder Rights have been vested in the Funder pursuant to clause 7B-1:
  - 1 no amendment or variation shall be made to the express terms of this clause 7B, to Part 2 of Schedule 5 (Third Party Rights for a Funder) or to the relevant Rights Particulars without the prior written consent of the Funder; and
  - 2 neither the Employer nor the Contractor shall agree to rescind this Contract, and the rights of the Contractor to terminate his employment under this Contract or to treat it as repudiated shall in all respects be subject to the provisions of paragraph 6 of Part 2 of Schedule 5
 but, subject thereto, unless and until the Funder gives notice under paragraph 5 or paragraph 6-4 of Part 2 of Schedule 5, the Contractor shall remain free without the consent of the Funder to agree with the Employer to amend or otherwise vary or to waive any term of this Contract and to settle any dispute or other matter arising out of or in connection with this Contract, in each case in such terms as they think fit, without any requirement that the

<sup>[55]</sup> See the footnote to clause 7-4 above.

Contractor obtain the consent of the Funder.

## **Collateral Warranties from Contractor**

### **Contractor's Warranties – Purchasers and Tenants**

- 7C** Where the Rights Particulars state that the Contractor shall confer P&T Rights on a Purchaser or Tenant by way of collateral warranty, the Employer may by notice to the Contractor, identifying the Purchaser or Tenant and his interest in the Works, require that the Contractor within 14 days from receipt of that notice enter into a Collateral Warranty with such Purchaser or Tenant in the form CWa/P&T, completed in accordance with the relevant Rights Particulars.

### **Contractor's Warranty – Funder**

- 7D** Where the Rights Particulars state that the Contractor shall confer Funder Rights on a Funder by way of collateral warranty, the Employer may by notice to the Contractor require that the Contractor within 14 days from receipt of the Employer's notice enter into a Collateral Warranty with the Funder in the form CWa/F, completed in accordance with the relevant Rights Particulars.

## **Third Party Rights and Collateral Warranties from Sub-Contractors**

- 7E** Where the Rights Particulars state that a sub-contractor shall confer third party rights on a Purchaser, Tenant or Funder and/or the Employer or execute and deliver a Collateral Warranty in favour of such person:

- 1 the Contractor shall comply with the Contract Documents as to the obtaining of such rights or warranties including:
  - 1 on receipt of notice from the Employer identifying in each case the sub-contractor, type of right or warranty and beneficiary, promptly giving notice under clause 2.26.3 or, where appropriate, 2.26.4 of the JCT Design and Build Sub-Contract Conditions or other equivalent sub-contract condition to each sub-contractor identified in the Employer's notice; and
  - 2 in the case of each Collateral Warranty specified in the Employer's notice and within 21 days of receipt of that notice, taking such steps as are required to obtain each warranty, promptly forwarding the executed document to the Employer or as he may direct and, where Collateral Warranty SCWa/F is required, having himself also executed and delivered the document;
- 2 any amendment to the form of any third party rights or collateral warranty proposed by a sub-contractor shall require approval by both the Contractor and the Employer;
- 3 in the case of vested third party rights, the Contractor shall not without the consent of each beneficiary in whom those rights have been vested:
  - 1 agree any amendment or variation to the express terms of clause 2.26, clause 2.27 or Schedule 6 (Third Party Rights) of the JCT Design and Build Sub-Contract Conditions or other equivalent conditions of the sub-contract; or
  - 2 where such beneficiary is the Employer or a Funder, agree to rescind the sub-contract.

## Section 8 Termination

### General

#### Meaning of insolvency

#### 8.1 For the purposes of these Conditions:

- 1 a company becomes Insolvent:
  - 1 when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986;
  - 2 on the appointment of an administrative receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part;
  - 3 on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act; or
  - 4 on the making of a winding-up order under Part IV or V of that Act;
- 2 a partnership becomes Insolvent:
  - 1 on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act; or
  - 2 when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.
- 3 an individual becomes Insolvent:
  - 1 on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986; or
  - 2 on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors;
- 4 a person also becomes Insolvent if:
  - 1 he enters into an arrangement, compromise or composition in satisfaction of his debts (excluding a scheme of arrangement as a solvent company for the purposes of amalgamation or reconstruction); or
  - 2 (in the case of a partnership) each partner is the subject of an individual arrangement or any other event or proceedings referred to in this clause 8.1.

Each of clauses 8.1.1 to 8.1.4 also includes any analogous arrangement, event or proceedings in any other jurisdiction.

#### Notices under section 8

- 8.2 ·1 Notice of termination of the Contractor's employment shall not be given unreasonably or vexatiously.
- 2 Such termination shall take effect on receipt of the relevant notice.
- 3 Each notice referred to in this section shall be given in accordance with clause 1.7.4.

#### Other rights, reinstatement

- 8.3 ·1 The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer. The provisions of clauses 8.9 and 8.10 and (in the case of termination under either of those clauses) the provisions of clause 8.12, are without prejudice to any other rights and remedies of the Contractor.
- 2 Irrespective of the grounds of termination, the Contractor's employment may at any time be reinstated if and on such terms as the Parties agree.

### Termination by Employer

#### Default by Contractor

- 8.4** ·1 If, before practical completion of the Works, the Contractor:
- 1 without reasonable cause wholly or substantially suspends the carrying out of the Works; or
  - 2 fails to proceed regularly and diligently with the performance of his obligations under this Contract; or
  - 3 refuses or neglects to comply with a notice or instruction from the Employer requiring him to remove any work, materials or goods not in accordance with this Contract and by such refusal or neglect the Works are materially affected; or
  - 4 fails to comply with clause 3.3 or 7.1; or
  - 5 fails to comply with clause 3.16,
- the Employer may give to the Contractor a notice specifying the default or defaults (a 'specified' default or defaults).
- 2 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 21 days from, the expiry of that 14 day period by a further notice to the Contractor terminate the Contractor's employment under this Contract.
- 3 If the Employer does not give the further notice referred to in clause 8.4.2 (whether as a result of the ending of any specified default or otherwise) but the Contractor repeats a specified default (whether previously repeated or not), then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor terminate that employment.

#### **Insolvency of Contractor**

- 8.5** ·1 If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.
- 2 The Contractor shall immediately notify the Employer 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.
- 3 As from the date the Contractor becomes Insolvent, whether or not the Employer has given such notice of termination:
- 1 clauses 8.7.3 to 8.7.5 and (if relevant) clause 8.8 shall apply as if such notice had been given;
  - 2 the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works shall be suspended; and
  - 3 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; the Contractor shall allow and shall not hinder or delay the taking of those measures.

#### **Corruption and regulation 73(1)(b) of the PC Regulations**

- 8.6** The Employer shall be entitled by notice to the Contractor to terminate the Contractor's employment under this or any other contract with the Employer if, in relation to this or any other such contract, the Contractor or any person employed by him or acting on his behalf shall have committed an offence under the Bribery Act 2010, or, where the Employer is a Local or Public Authority, shall have given any fee or reward the receipt of which is an offence under sub-section (2) of section 117 of the Local Government Act 1972, or, where this Contract is one to which regulation 73(1) of the PC Regulations applies, the circumstances set out in regulation 73(1)(b) of the PC Regulations apply.

#### **Consequences of termination under clauses 8.4 to 8.6**

- 8.7** If the Contractor's employment is terminated under clause 8.4, 8.5 or 8.6:
- 1 the Employer may employ and pay other persons to carry out and complete the Works and to make good any defects of the kind referred to in clause 2.35, and he and they may enter upon and take possession of the site and the Works and (subject to obtaining any necessary third party consents) may use all temporary buildings, plant, tools, equipment and Site Materials for those purposes;
  - 2 the Contractor shall:

- 1 when required in writing by the Employer to do so (but not before), remove or procure the removal from the Works of any temporary buildings, plant, tools, equipment, goods and materials belonging to the Contractor or Contractor's Persons;
- 2 provide the Employer with copies of all Contractor's Design Documents then prepared, whether or not previously provided;
- 3 if so required by the Employer within 14 days of the date of termination, assign (so far as assignable and so far as he may lawfully be required to do so) to the Employer, without charge, the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this Contract<sup>[56]</sup>;
- 3 no further sum shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 8·7·5 or 8·8·2 and the Employer need not pay any sum that has already become due either:
  - 1 insofar as the Employer has given or gives a Pay Less Notice under clause 4·9·5; or
  - 2 if the Contractor, after the last date upon which such notice could have been given by the Employer in respect of that sum, has become insolvent within the meaning of clauses 8·1·1 to 8·1·3;
- 4 following the completion of the Works and the making good of defects in them (or of instructions otherwise, as referred to in clause 2·35), an account of the following shall within 3 months thereafter be set out in a statement prepared by the Employer:
  - 1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8·7·1 and, where applicable, clause 8·5·3·3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;
  - 2 the amount of payments made to the Contractor; and
  - 3 the total amount which would have been payable for the Works in accordance with this Contract;
- 5 if the sum of the amounts stated under clauses 8·7·4·1 and 8·7·4·2 exceeds the amount stated under clause 8·7·4·3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor.

#### **Employer's decision not to complete the Works**

- 8·8 ·1 If within the period of 6 months from the date of termination of the Contractor's employment the Employer decides not to have the Works carried out and completed, he shall forthwith notify the Contractor. Within a reasonable time from the date of such notification, or if no notification is given but within that 6 month period the Employer does not commence to make arrangements for such carrying out and completion, then within 2 months of the expiry of that 6 month period, the Employer shall send to the Contractor a statement setting out:
  - 1 the total value of work properly executed at the date of termination or date on which the Contractor became Insolvent, ascertained in accordance with these Conditions as if that employment had not been terminated, together with any amounts due to the Contractor under these Conditions not included in such total value; and
  - 2 the aggregate amount of any expenses properly incurred by the Employer and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise.
- 2 After taking into account amounts previously paid to the Contractor under this Contract, if the amount stated under clause 8·8·1·2 exceeds the amount stated under clause 8·8·1·1, the difference shall be a debt payable by the Contractor to the Employer or, if the clause 8·8·1·2 amount is less, by the Employer to the Contractor.

### **Termination by Contractor**

#### **Default by Employer**

- 8·9 ·1 If the Employer:

<sup>[56]</sup> Clause 8·7·2·3 may not be effectual in cases of Contractor's insolvency.

- 1 does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4·9 and/or any VAT properly chargeable on that amount; or
  - 2 fails to comply with clause 7·1; or
  - 3 fails to comply with clause 3·16,
- the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).
- 2 If after the Date of Possession (or after any deferred Date of Possession pursuant to clause 2·4) but before practical completion of the Works the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for a continuous period of the length stated in the Contract Particulars by reason of any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, then, unless it is caused by the negligence or default of the Contractor or any Contractor's Person, the Contractor may give to the Employer a notice specifying the event or events (a 'specified' suspension event or events).
  - 3 If a specified default or a specified suspension event continues for 14 days from the receipt of notice under clause 8·9·1 or 8·9·2, the Contractor may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.
  - 4 If the Contractor for any reason does not give the further notice referred to in clause 8·9·3, but (whether previously repeated or not):
    - 1 the Employer repeats a specified default; or
    - 2 a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby,
 then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract.

#### **Insolvency of Employer**

- 8·10** ·1 If the Employer is Insolvent, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract;
- 2 the Employer shall immediately notify the Contractor 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;
  - 3 as from the date the Employer becomes Insolvent, the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works shall be suspended.

#### **Termination by either Party and regulations 73(1)(a) and 73(1)(c) of the PC Regulations**

- 8·11** ·1 If, before practical completion of the Works, the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for the relevant continuous period of the length stated in the Contract Particulars by reason of one or more of the following events:
- 1 force majeure;
  - 2 Employer's instructions under clause 2·13, 3·9 or 3·10 issued as a result of the negligence or default of any Statutory Undertaker;
  - 3 loss or damage to the Works occasioned by any risk covered by the Works Insurance Policy or by an Excepted Risk;
  - 4 civil commotion or the use or threat of terrorism and/or the activities of the relevant authorities in dealing with such event or threat;
  - 5 the exercise by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Works; or
  - 6 delay in receipt of any permission or approval for the purposes of Development Control Requirements necessary for the Works to be carried out or proceed, which delay the Contractor has taken all practicable steps to avoid or reduce,
- then either Party, subject to clause 8·11·2, may upon the expiry of that relevant period of suspension give notice to the other that, unless the suspension ceases within 7 days after the date of receipt of that notice, he may terminate the Contractor's employment under this

Contract. Failing such cessation within that 7 day period, he may then by further notice terminate that employment.

- 2 The Contractor shall not be entitled to give notice under clause 8.11.1 in respect of the matter referred to in clause 8.11.1.3 where the loss or damage to the Works was caused by the negligence or default of the Contractor or any Contractor's Person.
- 3 Where this Contract is one to which regulation 73(1) of the PC Regulations applies the Employer shall be entitled by notice to the Contractor to terminate the Contractor's employment under this Contract where the grounds set out in regulation 73(1)(a) or 73(1)(c) of the PC Regulations apply.

### **Consequences of Termination under clauses 8.9 to 8.11, etc.**

- 8.12** If the Contractor's employment is terminated under any of clauses 8.9 to 8.11 or under clause 6.11.2.2 or 6.14:
- 1 no further sums shall become due to the Contractor otherwise than in accordance with this clause 8.12;
  - 2 the Contractor shall:
    - 1 with all reasonable dispatch, remove or procure the removal from the site of any temporary buildings, plant, tools and equipment belonging to the Contractor and Contractor's Persons and, subject to the provisions of clause 8.12.5, all goods and materials (including Site Materials); and
    - 2 provide to the Employer copies of the documents referred to in clause 2.37 then prepared;
  - 3 where the Contractor's employment is terminated under clause 8.9 or 8.10, the Contractor shall as soon as reasonably practicable prepare and submit an account or, where terminated under clause 8.11, 6.11.2.2 or 6.14, the Contractor shall at the Employer's option either prepare and submit that account or, not later than 2 months after the date of termination, provide the Employer with all documents necessary for the Employer to do so, which the Employer shall do with reasonable dispatch (and in any event within 3 months of receipt of such documents). The account shall set out the amounts referred to in clauses 8.12.3.1 to 8.12.3.4 and, if applicable, clause 8.12.3.5, namely:
    - 1 the total value of work properly executed at, and of any design work properly carried out before, the date of termination of the Contractor's employment, ascertained in accordance with these Conditions as if the employment had not been terminated, together with any other amounts due to the Contractor under these Conditions;
    - 2 any sums ascertained in respect of direct loss and/or expense under clause 4.20 (whether ascertained before or after the date of termination);
    - 3 the reasonable cost of removal under clause 8.12.2;
    - 4 the cost of materials or goods (including Site Materials) properly ordered for the Works for which the Contractor then has paid or is legally bound to pay;
    - 5 any direct loss and/or damage caused to the Contractor by the termination;
  - 4 the account shall include the amount, if any, referred to in clause 8.12.3.5 only where the Contractor's employment is terminated either:
    - 1 under clause 8.9 or 8.10; or
    - 2 under clause 8.11.1.3, if the loss or damage to the Works was caused by the negligence or default of the Employer or any Employer's Person;
  - 5 after taking into account amounts previously paid to the Contractor under this Contract, the Employer shall pay to the Contractor (or vice versa) the amount properly due in respect of the account within 28 days of its submission to the other Party, without deduction of any Retention. Payment by the Employer for any such materials and goods as are referred to in clause 8.12.3.4 shall be subject to those materials and goods thereupon becoming the Employer's property.