

## RICS CPD FOUNDATION - SUMMER 2019

**Contract Administration under JCT**  
**The role of the JCT Contract Administrator**  
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## Role of CA in JCT Contracts

- **Named** in the Building Contract (e.g. Article 3 – SBC 2016)
- BUT not a party to that Building Contract:-  
(which is between the Employer and Contractor)
- Appointed under a Professional Appointment Contract
- Which fixes his contractual obligations to the Employer

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## **Role of CA in JCT Contracts (continued)**

- Although not a party to the Building Contract
- The CA has a role and duties to perform under it
- As he is responsible for its administration
- And for impartial certification under it

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## **Role of CA in JCT Contracts (continued)**

- So:-
  - a. He is at all times:-
    - i. Agent for the Employer
    - ii. Paid by the Employer

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## **Role of CA in JCT Contracts (continued)**

b. When he certifies, for example:-

Payment

Practical Completion

Making good

Final Certificate

He must be impartial and objective between the parties to the Contract

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## **Topics for this Talk**

(Using JCT SBC 2016 as the example contract):

1. Quality Control
2. Variations and Instructions
3. Practical Completion and the Rectification Period and making good
4. Communication and construction information (2.9) and information release schedule (2.11) and further drawings and details (2.12)

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## Quality Control – PART 1 – What are Contractor's Obligations?

- First thing is:-
- To know the Contractor's Duties and Obligations
- Mostly, these are found at section 2
- 2.1 – Contractor carries out and completes the work in a proper and workmanlike manner in compliance with the Contract Documents, Construction Phase Plan and Statutory Requirements

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## Quality Control – PART 1 – What are Contractor's Obligations? (continued...)

- 2.2 – If there is a Contractor's Designed Portion
- Contractor completes the design for it
- Including selection of any specifications not already described
- And complies with CA's Directions for integration of CPD design with design of the Works
- And complies with CDM

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## Quality Control – PART 1 – What are Contractor's Obligations? (continued...)

- 2.3 – materials, goods and workmanship.
- So far as procurable to be of the kinds and standards described in the Bills.
- Workmanship is to be of the standards in the Bill.
- Where the quality is stated to be a matter for the CA – quality and standards are to be to his reasonable satisfaction.

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## Quality Control – PART 1 – What are Contractor's Obligations? (continued...)

- Where there is a CDP
- The Contractor shall in respect of any inadequacy in such design
- Have the same liability to the Employer as would an Architect or appropriate professional designer.
- In other words – a reasonable skill and care duty.

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## Quality Control – PART 1 – What are Contractor's Obligations? (continued...)

- 3.17: inspection – tests
- CA may issue instructions for opening up and inspection or testing materials (whether or not incorporated)
- Cost is added to Contract Sum
- UNLESS:-
- Provided for in Contract Bills
- Or the test shows there is a fault.

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## Quality Control – PART 1 – What are Contractor's Obligations (continued...)

- 3.18 – work not in accordance with Contract:-
- CA can instruct removal or after consultation with Contractor and with Employer's consent – allow it to remain and make appropriate deduction.
- CA can issue reasonably necessary instructions as a consequence – no additional payment and no EOT.
- CA can also issue instructions (having regard to Code of Practice) so far as reasonable to establish similar non-compliance – no additional payment – but there may be an EOT unless tests shows non-compliance.

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## Quality Control – PART 1 – What are Contractor's Obligations (continued...)

- 3.19 – Workmanship
- Workmanship is not compliant.
- CA may issue instructions as reasonably necessary – no additional payment and no EOT.
- 3.20 – Where works are to be to CA's reasonable satisfaction:  
Where appropriate, he expresses his dissatisfaction - with reasons.

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## Sanction – non-compliance with instructions

- 3.11 – broadly, (subject to 3.10) if CA gives seven days notice to comply with an Instruction
- And Contractor does not comply.
- Employer may employ and pay other persons.
- Contractor is liable for additional costs.
- Appropriate deduction may be made from Contract Sum.

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## Appropriate Instruction where work not in accordance with Contract

- Under 3.18
- Case law is – CA cannot just say
- (For example) “Put right ingress of water”
- He must say what is to be removed and then issue any reasonably necessary variation instruction, specifically.

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## Quality Control – PART 2 – After Practical Completion

- Practical Completion is “the great divide”.
- According to case law it is “Completion for all purposes of the Contract”.
- (Emson (Eastern) Limited v EME)
- So there is a new regime for dealing with defects in the Rectification Period.
- See 2.38 for details.

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## Quality Control – PART 2 – After Practical Completion

- Defects to be specified in a schedule delivered to Contractor as an instruction not later than fourteen days after the end of Rectification Period.
- But CA may whenever he considers it necessary in the RP issue instructions for making good (he can't issue any further instructions after the schedule – or more than fourteen days after RP expires).

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## Quality Control – PART 2 – After Practical Completion

- The orthodox view is that the seven day notice under 3.11 does not apply to the RP – but that does not stop the CA issuing reasonable instructions and notices to the Contractor.
- He may “otherwise instruct” – telling the Contractor not to rectify – and making “an appropriate deduction”.

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## Instructions and Variations

- What is an Instruction?
- JCT forms SBC and DB do not define instructions.
- Only on matters where the Contract expressly empowers the CA.

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## Authority of Architects etc

- Employer's Agents and Architects/CAs may have authority to order variations to the Works. BUT they can't change the Contract.
- Hudson's Building and Engineering Contracts:
- *"It cannot be too strongly emphasised that Construction Professionals (unless the Contract gives their certificate or decision finality) will have no authority whatsoever to waive strict compliance with the Contract or to bind the Employer".*

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## Authority of Architects Etc

- If the Architect etc exceeds authority, he can be sued by Contractor for breach of warranty of authority.
- Example: there is no implication that completion to the Architect's design is possible.

If the Architect orders extra work as a variation to help the Contractor – the Employer is not bound to pay if the works would have been necessary to complete the Contract.

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## What is a Variation?

- Generally – it is whatever the Contract defines it to be
- Its consequences are whatever the Contract provides

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## JCT SBC Section 5

- In two parts

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## SBC Definition of Variations Part 1

5.1 The term 'Variation' means:

- .1 the alteration or modification of the design, quality or quantity of the Works 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 materials or goods brought thereon by the Contractor for the purposes of the Works other than work, materials or goods which are not in accordance with this Contract:

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## SBC Definition of Variations Part 2

- .2 the imposition by the Employer of any obligations or restrictions in regard to the matters set out in this clause 5.1.2 or the addition to or alteration or omission of any such obligations or restrictions so imposed or imposed by the Employer in the Contract Bills or 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.

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## SBC Section 5

- 5.1.1 seems straightforward – but raises the question “What is the extent of additions, omissions or substitutions that is allowed?”
- 5.1.2 –
- note that changes in sequence of working are a variation
- So from the Contractor's point of view, disturbance to sequence is best valued and claimed as a variation. **NOT** as loss and expense – loss and expense would have to be proved as a cost item

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## SBC Section 5 (cont...)

### Price and Time

- You don't just value changes to the works.
- You value time-related preliminaries
- You may have to re-rate unvaried work if carried out under substantial change in conditions due to the varied work
- The Contractor must claim extensions of time for delay – as soon as reasonably apparent

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## JCT – and... 5.9

*“If as a result of:*

*.1 compliance with any instruction requiring a Variation;...*

*there is a substantial change in the conditions under which any other work is executed (including CDP Works), that other work shall be treated as a Variation and shall be valued in accordance with the provisions of this section 5”*

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## JCT Variations – not the be all and end all

*“2.29 The following are the Relevant Events...*

- .1 Variations and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Variation; ...”*

*“4.22 The following are the Relevant Matters:*

- .1 Variations (excluding those where the amount of loss and/or expense has been agreed by Confirmed Acceptance of a Variation Quotation or Acceleration Quotation but including any other matters or instructions which under these Conditions are to be treated as a Variation); ...”*

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## SBC Section 5 (cont...)

- Omissions – may reduce an extended period but not the original contract period

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## Deemed Changes - JCT SBC – and... 3.18

*“If any work, materials or goods are not in accordance with this Contract the Architect/Contract Administrator, in addition to his other powers, may:*

*.1 issue instructions in regard to the removal from the site of all or any of such work, materials or goods;*

*...*

*.3 after consultation with the Contractor, issue such Variation instructions as are a reasonably necessary consequence of any instruction under clause 3.18.1 and/or any notification under clause 3.18.2 (but to the extent that such instructions are reasonably necessary, no addition shall be made to the Contract Sum and no extension of time shall be given);...*”

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Has the Contractor got to comply with Instructions?

Has the Contractor got to comply with Variations?

- Generally **YES**
- This is a major risk factor for Contractors
- On top of the obligation to complete and the obligation to do all necessary and incidental work
- And the risk in the ground and the existing structures

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Has the Contractor got to comply with Instructions?  
Has the Contractor got to comply with Variations?  
(cont...)

- For instructions under 5.1.2 – Right to give notice of reasonable objection
- So check if instruction falls under 5.1.2
- Under SBC 3.13, Contractor may request Employer to state which of the conditions empowers the instruction
- SBC 3.10.3 – Contractor’s 7 day notice of objection that instruction affects efficacy of his CDP design, or compliance with CDM

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## Supervision and “Certification”

- Failure by CA to require defects to be rectified as work goes on – even though they are visible:
  - a. Does not amount to a waiver by Employer of damages for defects.
  - b. Contractor remains liable for defects.

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## Supervision and “Certification” (Continued...)

- **BUT** positive “certification by CA is useful evidence.
- e.g. Practical Completion Certificate, making good defects certificate.
  
- Final Certificate is conclusive only as to matters expressly left to Architect’s satisfaction.

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## Practical Completion

- See JCT SBC 2.30
- When in the CA’s opinion Practical Completion of the Works or a Section is achieved
- And the Contractor has complied sufficiently with:
- 2.40 – (Contractor’s Designed Portion as built drawings) and 3.23 (CDM Reg’s)
- He issues PC Certificate or Section Completion Certificate
- And PC shall be deemed for all purposes of the Contract to have taken place

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## Non-Completion Certificate

- Issued if Contractor fails to complete Works or a Section by the relevant Completion Date.
- A new extension of time cancels that Certificate and a new Non-Completion Certificate is required.

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## Partial Possession

- JCT SBC 2.33
- Employer wishes to take possession of any part of the Works
- AND Contractor's consent has been obtained.
- CA gives Contractor Notice identifying part or parts taken into possession and the date.

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## Partial Possession

Note:-

1. It is of part of the Works – not necessarily geographical – e.g. it could be of mechanical services.
2. It is deemed Practical Completion:-
  - e.g. for:-
    - insurance
    - retention release
    - rectification
    - reduction of LADs proportionately

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## Practical Completion - Relevance

1. Its position relative to the contractual completion date or any extended completion date:
  - Liquidated damages
  - Contractor's additional prelims or loss and expense for prolongation
2. Bringing to an end the Contractor's liability to insure the works.
3. Beginning of rectification period.
4. Retention release.

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## Practical Completion – Relevance (Continued...)

- Achieved by Certificate – under main contracts (“traditional contracts”) with Architect/CA

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## Effective Communication

- Check the notice requirements under SBC 1.7
  - In writing
  - What has been agreed as formalities?
- 1.7.3 “Any effective means” is the default position.
- 1.7.4 – does notice have to be given under 1.7.4 – by hand or Recorded Signed or Special Delivery post?

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## Certificates

- See SBC 1.8 - issued to Employer and Contractor at same time.

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## Consents and Approvals

- SBC 1.11 – not to be unnecessarily delayed or withheld.

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## Supply of Documents and Information

- See SBC 2.8 to 2.12
- 2.8 – Immediately after execution:

Provide Contractor with:

- Contract Documents
- Two copies of Drawings and unpriced B of Q

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## Supply of Documents and Information

- 2.9 – Provide to Contractor “Descriptive Schedules or similar documents necessary for use in carrying out the Works.
- Make sure you get the programme from the Contractor – with critical path, where agreed.

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## Information Release Schedule

- SBC 2.11
- Information Release Schedule:- information is to be released at the time stated in the Schedule.
- SBC 2.12
- CA to provide “from time to time”
- Further drawings or details as reasonably necessary to explain and amplify Contract Drawings
- And issue such instructions as are necessary to enable a Contractor to carry out and complete the Works in accordance with the Contract.

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## Design Submission Procedure

- Is there a Contractor’s Designed Portion?
- If so – have full regard to Schedule 1
- And the timings (14 days) for return of Contractor’s Design Documents
- Marked A, B, or C.
- N.B. if not so marked in time – regarded as marked “A”

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## Levels and Setting Out

- Don't forget 2.10 – CA shall determine any levels required.
- Provide the Contractor by way of accurately dimensioned Drawings, with such information as shall enable him to set out Works.

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Thank you

Any Questions?

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