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About this publication

This publication provides guidance on the JCT Standard Form of Building Contract, 1998 Edition, Local Authorities version. It provides advice on the amendments necessary to the contract to comply with Government and Departmental policy, as well as good professional practice in respect of use by NHS bodies (NHS trusts, health authorities and any other centrally-funded bodies).
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1.0  JCT Standard Form of Building Contract, 1998 Edition, Local Authorities (as amended)

The contract

1.1  The JCT organisation comprises representatives from employers, surveyors, architects, contractors and subcontractors and is responsible for the drafting and revision of different forms of building contract. It also issues practice notes for clarification. The JCT Standard Form of Building Contract, 1998 Edition (JCT 98) is published for the Joint Contracts Tribunal (JCT) by:

RIBA Publications Ltd
Construction House
53–64 Leonard Street
London, EC2A 4LT.
(Tel: 0171 251 0791)

The Nominated Sub-Contract Conditions (NSC/C) are published for the JCT by:

Construction Industry Publications Ltd
63 New Coventry Road
Sheldon
Birmingham B26 3AY.

1.2  The 1998 edition is based on the 1980 edition, incorporating amendments 1 to 18 together with various corrections.

1.3  It should be noted that, although references are made in the 1998 edition to other documents that should be used in conjunction with this form, these publications may not be available immediately. Until the documents are available, NHS bodies should continue to use the publications produced for use with the 1980 edition of the form, making any amendments as necessary.

1.4  Extracts from the documents and sub-contracts for JCT 98 have been reproduced with the permission of the copyright holders: JCT Ltd.

1.5  The contract is published in different versions for use by the private sector and local authorities either:

a. With Quantities;
b. With Approximate Quantities;
c. Without Quantities.

1.6  The local authorities versions are appropriate for NHS use.

1.7  The contract can be adapted by the incorporation of separately published supplements for:

a. fluctuations;
b. completion of the works by sections;
c. contractor’s designed portion.

1.8  Except for certain documents which must be used when sub-contractors are nominated, the contract does not stipulate the use of particular administration forms. However, a range of forms is available from RIBA Publications Ltd for use with JCT 98 (see Appendix 2).

JCT Practice Notes

1.9  JCT Practice Notes are published separately from the forms of contract and contain comment and guidance on various aspects of the forms and their use. NHS bodies should require staff responsible for the management of contracts to study the Practice Notes and apply them except where they are incompatible with Government and Departmental policies (see Appendix 1).
2.0 Government and Department of Health policy requirements

Introduction

2.1 Government and Departmental policy on matters such as:
- contract strategy;
- selection of contractors and consultants;
- contract conditions;
- EC Works Directives etc


2.2 NHS bodies are reminded that they must comply with the policies laid down in ‘Contracts and commissions for the NHS estate – Policy’ or in Scotland, ‘ScotConcode’, which is complementary to the Scottish Capital Investment Manual for Contract and Commission Policies. These policy documents were produced to assist NHS bodies in the implementation of Government and Departmental policies.

2.3 NHS bodies are referred particularly to the following chapters of ‘Contracts and commissions for the NHS estate – Guide to contract procedures’ when using the JCT Standard Form of Building Contract, 1998 Edition:

- a. 3 Requirements of European Community Directives;
- b. 18 Construction industry tax deduction scheme;
- c. 19 Value Added Tax;
- d. 20 Execution of contracts with firms;
- e. 21 Liquidated and ascertained damages*;
- f. 22 Loss/expense claims and settlements;
- g. 24 Fluctuations;
  NHS bodies – insurances*;
  Works insurance*.

* Further guidance on these subjects is given later in this section

Project director

2.4 NHS bodies should appoint a project director for all projects on which JCT 98 is used. This may be a senior member of management with responsibility for a specific major contract. The project director will be an officer of the NHS body who, where they are not technically qualified or experienced, should obtain appropriate professional support. When referring to guidance produced by the Procurement Practice and Development (PPD), HM Treasury, NHS bodies should substitute the term “project sponsor” for project director. NHS bodies should refer to Section 2 of the ‘Project Organisation’ and Sections 1, 3 and Appendices 5 and 6 of the ‘Management of Construction Projects’ parts of the ‘Capital Investment Manual’ or in Scotland the ‘Scottish Capital Investment Manual’ for more details on the roles and duties of the project director/sponsor. In addition to the above, the duties/actions of the project sponsor are identified within the ‘Agreement for the appointment of project managers for construction projects in the National Health Service’ (see Schedule 2 of the Memorandum of Agreement).

Project manager

2.5 NHS bodies must appoint project managers for all major capital schemes of £1 million gross value or over.

Co-ordinated Project Information (CPI)

2.6 The Department recommends the use of CPI which aims to improve the technical content of documents and also the effectiveness of the co-ordination between them. CPI emphasises the relationship between quality and timeliness of project information and the quality, speed and cost of construction on site. The conventions of CPI aim to promote co-ordination via recommendations concerning:

- a. procedures for production documents;
- b. technical content of documents; and
- c. arrangement of documents.

Further information is contained in ‘Co-ordinated Project Information for building works, a guide with examples’ obtainable from RIBA Publications Ltd.
Use of JCT 98 in the NHS

2.7 JCT 98 is suitable for major works which are partly or wholly building and/or engineering and follow the traditional method of procurement. The contractor is responsible for carrying out the work, and design is substantially in the hands of the professional consultants engaged by the employer (the NHS body). The employer can require the contractor to tender a lump sum price or give an indication only of price at tender stage with the work re-measured as executed and priced on the basis of rates set out in bills of approximate quantities. For projects that are wholly engineering then a more suitable form of contract should be considered. When the limited fluctuations basis is used, the project must be thoroughly pre-planned.

2.8 When using the traditional method of procurement, the Department recommends that bills of firm quantities should be prepared for building and engineering works (including domestic and nominated sub-contract works) if the project exceeds a reasonable limit of size and/or complexity and £500,000 or more at 1998 prices. Tenders are based on bills of quantities and drawings.

2.9 The “Without Quantities” version may be used on major projects where bills of quantities are not considered suitable. This may be due to the nature of the proposed works, or if the detailed provisions of the Intermediate Form of Building Contract (IFC 98) are not considered adequate. Tenders are based on a specification or schedules of work and drawings.

2.10 Although the Department recommends the use of bills of quantities for engineering work for major schemes, NHS bodies have discretion as to the extent to which these are adopted; whether as part of a combined building and engineering contract or the subject of a wholly engineering contract. NHS bodies should ensure that detailed quantified schedules of rates are provided by the contractor and sub-contractor for engineering services in cases where engineering bills of quantities are not used.

2.11 Bills of approximate quantities should only be used in exceptional circumstances. Examples could be the need to repair fire damage or due to the actual nature of the work itself (but not just the allowance of insufficient time to prepare detailed contract documentation in the absence of other factors). In these circumstances it is only practicable to draw up bills of approximate quantities before tenders are invited.

2.12 In respect of any building and engineering works to be carried out, the scope and extent of the works must be fully detailed and described in the tender documents. The tender documents must also state:

a. a form of contract to be used;

b. the JCT amendments to be incorporated;

c. the amendments that the employer will make to the printed form when preparing the documents for execution.

Liquidated and ascertained damages

2.13 JCT 98 contains a provision to enable the employer to recover liquidated and ascertained damages in the event that the contractor does not complete the works by the completion date or by a new completion date fixed under the contract conditions. The rate of liquidated and ascertained damages must be a genuine pre-estimate of the damage likely to be sustained by the employer. The rate must be carefully assessed by the NHS body for each project in the light of its particular circumstances and it is likely that it will include some or all of the following:

- additional costs arising from extra time spent by administrative, professional, supervisory and other staff (including the NHS body’s own officers) in the management of the contract;
- direct losses and expenses arising from the necessity to rent or use alternative accommodation while a new building is not available;
- loss of revenue;
- loss of amenities for providing healthcare (that is since health building schemes mostly provide additional facilities, there is a loss of expected amenities when the scheme is not completed on time).

2.14 Additional staff costs and direct losses and expenses can be easily estimated, but loss of amenities cannot normally be assessed by any generally acceptable calculation other than expressing the loss as being equivalent to a return, by way of interest, on the anticipated contract sum.

2.15 There are two alternative methods of estimating the damages; the choice between them being dependent on the particular project:

a. where loss of amenities is not a significant feature of the project, damages may be assessed by estimating additional costs and direct losses and expenses;

b. where loss of amenities is significant (which it frequently will be for NHS projects), a rate of interest of 15% per annum of the anticipated contract sum (pre-tender estimate) should be adopted instead. This rate (which includes 2½% for additional staff costs) has been adopted by other Government departments and is independent of short-term changes in general interest rates.
2.16 It is emphasised that the loss of amenities method is an alternative to estimating direct costs, losses and expenses, but nevertheless, the Department would not expect to see a rate which represented much less than 15% per annum on a contract without special features.

2.17 When calculating the rate of liquidated damages, the NHS body’s Director of Finance should be asked if there are any special revenue features of the project which would warrant a sum different from that based upon the loss of amenities method.

2.18 Clause 24 of JCT 98 requires the rate of liquidated and ascertained damages to be stated in the appendix to the contract as a specific sum of money per period of delay. Where the damages have been assessed by taking a percentage of the anticipated contract sum, the amount obtained should be divided by 365, “rounded” appropriately and stated as £ per day.

2.19 NHS bodies should note that the Courts have held that an arbitrarily fixed “penalty” is not acceptable. It is therefore not possible to incorporate “penalty” clauses into a contract that attempt to force a contractor to perform to time.

2.20 Clause 25 sets out the detailed procedures for claiming, granting and reviewing an extension of time and fixing a new completion date so that the contract does not become “at large”.

2.21 If the contractor fails to complete the works by the completion date, the architect/contract administrator must issue a certificate to that effect.

2.22 A certificate of non-completion must be issued before liquidated damages can be claimed by the employer. In addition, the employer must give notice in writing to the contractor stating an intention to deduct liquidated damages.

2.23 It is Government policy that the deduction of liquidated damages, by the employer, following unjustified delay in the completion of a project by the contractor, should be pursued vigorously.

Sub-contracting

2.24 JCT 98 includes provisions for:

   a. domestic sub-contractors to be selected by the contractor (clause 19.2);
   b. the contractor to select a domestic sub-contractor named in a list in the contract bills/specification/schedules of work (clause 19.3);
   c. Nominated sub-contractors to be selected and nominated by the architect/the contract administrator (clause 35).

2.25 Sub-letting a portion of the works under clause 19.2 is at the discretion of the contractor provided he obtains prior consent from the architect/the contract administrator.

2.26 It is open to an NHS body, in conjunction with the architect/the contract administrator to decide whether to provide a list of names of domestic sub-contractors or to nominate sub-contractors to carry out certain works (see paragraph 3.179). Where it is decided to use domestic sub-contractors under clause 19.3, the list of named persons in the contract documents must comprise not less than three persons.

2.27 Prior to the execution of a binding sub-contract difficulties may arise if less than three persons are able and willing to carry out the relevant work. Therefore it is prudent to list the same number (usually six but a minimum of four) as in a nominated sub-contract tender list. Enquiries should be made to ensure that the proposed persons will be able and willing to carry out the work before listing them. This gives some of the advantages of nomination in that the NHS body can list firms from its approved list of contractors.

2.28 Where the main contract value exceeds the threshold value in the EC Works Directive, the words “or equivalent” must be inserted after the listed firms. Any “equivalent” proposed by a tenderer must be accepted by the NHS body and the architect/the contract administrator prior to acceptance of the tender.

2.29 Work to be carried out by a sub-contractor chosen from a list of named domestic sub-contractors under clause 19.3 must be fully designed and set out in the contract bills/specification/schedules of work. The contract does not contain provisions which require the contractor or a named domestic sub-contractor to carry a design responsibility. Specific action has to be undertaken to incorporate a design obligation upon the sub-contractor through the contractor and is only available when using the “With Quantities” version (see paragraphs 7.1 to 7.17).

2.30 Where a project involves work which may require a specialist sub-contractor with design expertise, the sub-contractor should be nominated. However, the procedures set out in the main contract need to be followed carefully because of the intricacies of:

   a. tendering;
   b. programme;
   c. design responsibility;
   d. sub-contract provisions.

2.31 It is important to appreciate that all types of sub-contractor are under the control of the contractor. All communications and instructions between the architect/
the contract administrator and selected sub-contractors must be made through the contractor.

2.32 The procedures for nominating sub-contractors are dealt with in paragraphs 8.8 to 8.10.

2.33 Where the NHS body or the architect/the contract administrator (on their behalf) intends to list named domestic sub-contractors (clause 19.3) or nominate firms as sub-contractors (clause 35) or suppliers (clause 36), they must ensure that their technical competence and financial stability are assessed. This will minimise the possibility of giving grounds to the contractor for a claim based on the failure of such a firm. In any preliminary discussions with sub-contractors or suppliers, care must be taken not to give any commitment to select them before the appropriate stage of agreement has been reached. The contractor’s rights of objection must be preserved.

2.34 The responsibility for the technical competence and financial stability of domestic sub-contractors selected by the contractor (clause 19.2) rests with the contractor. The NHS body’s rights under the contract that the specified standard of materials, goods and workmanship are met are not affected by the fact that the work has been sub-contracted. If the contractor states the name of the proposed domestic sub-contractor, the architect/the contract administrator is at liberty to take into account any information or knowledge that they have about the firm when considering whether to give consent.

Suppliers

2.35 The difference between a sub-contractor and a supplier should be noted:

a. a sub-contractor supplies and fixes any materials or goods or executes work;

b. a supplier only supplies materials or goods which are to be fixed by the contractor.

2.36 Suppliers may be:

a. selected by the contractor (this does not require the approval of the architect/the contract administrator);  
b. specified in the contract bills/specification/schedules of work (clause 36.1.2), or  
c. nominated by the architect/the contract administrator (clause 36.1.1).

2.37 The practice of providing a list of specified suppliers is not specifically envisaged in clause 36.1.2. However, there appears to be no objection as it gives the contractor a greater degree of choice of suppliers than the clause requires.

2.38 To comply with the requirements of the EC Works Directive (Article 10), the words “or equivalent” must be added after specified suppliers (clause 36.1.2) regardless of whether the contract value falls above or below the relevant EC threshold. Any “equivalent” proposed by a tenderer must be accepted by the NHS body and the architect/the contract administrator prior to acceptance of the tender.

2.39 The procedures for nominating suppliers is dealt with in paragraphs 8.69 to 8.72.

2.40 Attention is drawn to the responsibility of the NHS body and the architect/the contract administrator to assess the technical competence and financial stability of suppliers specified under clause 36.1.2 (see also paragraph 2.33).

Component Data Base building components

2.41 The current building components are published in a series of Health Technical Memoranda (HTMs 54–71). Although information and guidance on component specification and design is provided in the HTMs, lists of suppliers are not. The architect/the contract administrator should prepare their own lists of suitable suppliers. Wherever possible, preference should be given to products and services from sources which have either been registered under BSI Quality Assurance Procedures under BS EN ISO 9000 (formerly 855750) or acceptable equivalent quality control procedures.

2.42 Information about project documentation and procurement of components is included in the User manual (HTM 54), User manual update (HTM 54.1) and in each Component Data Base HTM. Suppliers of components may be nominated using clause 36 or be specified by name in the contract bills/specification/schedules of work (see paragraphs 2.36 to 2.40).

2.43 Where component suppliers offer a site fixing service there is also the option of treating them as:

a. domestic sub-contractors under clause 19.2 (by the contractor);  
b. domestic sub-contractors under clause 19.3 (by the architect/the contract administrator);  
c. nominated sub-contractors under clause 35 (see paragraphs 2.24 to 2.34).
Insurances

2.44 General information on Government policy can be found in chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to contract procedures’.

2.45 NHS bodies have been provided with Departmental approval to make their own decisions on insurance matters. NHS bodies should therefore make a considered judgement whether:
   a. they are prepared to carry the particular risk themselves without taking out insurance;
   b. they require insurances to be taken out by the contractor at a cost to the employer (the trust).

2.46 NHS bodies are particularly referred to ‘Practice Note 22 and guide to the amendments to the insurance and related liability provisions: 1986’. This provides a commentary on the various related clauses in JCT 80 and advice on their operation in practice. This information can be adapted for use with JCT 98. If NHS bodies are in any doubt whatsoever on a particular situation, the Department recommends that they should obtain appropriate professional advice.

2.47 The Department has issues Health Service Circular ‘HSC 1998/174 – Insurance in the NHS’ (see Appendix 5), which contains information on new arrangements that will be in place for some categories of risk from 1 April 1999. The principal non-clinical risks cover employers’ liability, public liability, motor, buildings and property. The aim of this is to improve value for money by self-insurance against risk rather than taking out commercial insurance.

Electronic Data Interchange (EDI)

2.48 The NHS relies increasingly upon EDI to pass information between different NHS bodies. In 1992 the NHS adopted EDIFACT (Electronic Data Interchange for Administration, Commerce and Transport) for the electronic interchange of structured messages between NHS organisations and between the NHS and external organisations. EDIFACT is an international standard (ISO 9735) syntax for EDC transfer of structured textual information.

2.49 The Department recommends the use of EDI, which works on the principle that information produced by one information system is sent as a standard message to another application for further processing; there is minimal human intervention. EDI allows a much closer integration of business processes throughout the supply chain by ensuring that information on orders, schedules, invoices etc, which supports the business relationship between customers and suppliers, need only be entered once into the system. For NHS bodies to realise the benefits of EDI, management must be fully committed to its use.
3.0 JCT Standard Form of Building Contract, 1998 Edition Local Authorities with Quantities (as amended)

Incorporating Amendment 1: 1999

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<th>Commentary</th>
<th>Notes/amendments</th>
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**Introduction**

3.1 The Contract, “Local Authorities With Quantities” is examined and guidance is given on its completion and amendment. The tender bills of quantities must state:

- a. the form of contract to be used will be the JCT Standard form of Building Contract 1998 Edition Local Authorities With Quantities;

- b. the JCT amendments to be incorporated;

- c. clearly and set out all amendments that the employer will make to the printed form when preparing the document for execution by himself and the contractor.

3.2 It should be noted that the “NHS body” is described as “the Employer”.

3.3 Amendments are occasionally made to JCT forms of contract and are usually incorporated into the text of the contract at the next re-print. Meanwhile the separately issued amendments can be incorporated into the contract by, either:

- a. amending the printed wording of the contract in black ink before it is signed by the parties. Each separate amendment must be initialled by or on behalf of each of the parties; or

- b. attaching the relevant printed sheets carrying the amendments firmly to the form of contract. Each page must be initialled by or on behalf of each of the parties.

3.4 The Department recommends that the second option of attaching the printed sheets carrying the amendments is used.

3.5 This section and sections 4 and 5 are based on the reprint of the forms dated November 1998. JCT Amendment 1: 1999 should be incorporated as described in paragraphs 3.3 and 3.41.
Commentary

3.6 A summary of the contents of each JCT amendment incorporated and corrections included in a reprint are printed at the end of the contract.

3.7 All employer amendments to the contract must be in accordance with those stated in the tender bills of quantities. As with JCT amendments (paragraph 3.3) each amendment made by the employer must be initialled by or on behalf of each of the parties.

3.8 Where the wording of a printed clause is varied it is recommended that the printed clause is deleted entirely and a typed amendment slip is attached with the revised wording. Additional clauses should be incorporated in a similar way.

3.9 It is good practice for each amendment to be identified for initialling by the parties.

3.10 The contract drawings and the contract bills of quantities must be suitably identified and signed by or on behalf of the parties.

3.11 The originals of the contract documents (the executed contract, contract drawings and contract bills of quantities) must be retained by the employer in safe keeping and a certified true copy of the originals is provided by the employer, to the contractor free of charge.

3.12 Any parent company guarantee required relating to the main contract should normally be executed as a deed before the main contract is executed. The original is retained by the employer in safe keeping with the originals of the contract documents. Further guidance on parent company guarantees is contained in Appendix 16. Parent company guarantees may also be required relating to nominated sub-contracts (see paragraph 8.3).

Articles of agreement

3.13 The contract date will normally be entered after both parties have executed the contract and should be before the date of possession stated in the Appendix to the contract (see paragraph 3.36).

3.14 The names and addresses of the parties should be entered. The addresses will normally be the addresses to which certificates, instructions, notices etc should be sent. If either party wishes to have documents, communications etc. delivered to addresses other than those entered in the articles of agreement, then this should be clearly stated here.
3.15 The contract date and the names and addresses of the parties should also be entered on the back cover of the contract (see paragraphs 3.13 and 3.36 regarding the contract date).

Recitals

3.16 The recitals are statements which explain and set out the purpose of the contract and the facts upon which the contract is based.

First recital

3.17 Insert an adequate description to identify the work to be carried out and the location of the project. A full description of the works must be given in the bills of quantities. The project title and reference should be typed on the front cover to the contract.

Second recital

3.18 The second recital refers to the contractor having supplied the employer with a fully priced copy of the bills of quantities. It also provides for the contractor to supply a priced activity schedule.

Third recital

3.19 The contract drawings should be identified by numbers with an appropriate revision suffix and be strictly in accordance with the contract drawings list given in the bills of quantities and the drawings issued with the invitation to tender.

3.20 If space does not permit a complete entry, a precise reference should be made to a schedule which is firmly attached to the executed form of contract and on which titles and numbers of all contract drawings are listed. Each page must be initialled, by or on behalf of, each of the parties.

3.21 Note that the recital confirms that the contract drawings and the contract bills of quantities have been signed, by or on behalf of, the parties.

3.22 The contract drawing must be sufficient to adequately indicate the scope, extent and, where applicable, order of execution of the works. These must also be completely in accord with the bills of quantities and nominated sub-contract and nominated supplier documentation. The list of drawings should include structural, mechanical and electrical engineering and lift installation drawings as appropriate.
Sixth recital

3.23 This allows the employer to include an information release schedule that states what information the architect/contract administrator will release and when. The timing of the release of information may be varied, by agreement, as the work proceeds irrespective of whether an information release schedule is included or not the architect/contract administrator will need to issue further drawings, details or instructions as necessary. If this recital is retained, NHS bodies should ensure that the architect/contract administrator will be able to provide the information at the time required. NHS bodies should note that under the Capital Investment Manuals procedures a “Certificate of Readiness to Proceed to Tender” is required.

The certificate contains assurances from the design team that the design:

- has been completed to the degree appropriate to the contract strategy;
- complies with Building Regulations and codes of Practice, including Health Service Fire Standards, mandatory standards published by NHS Estates, EC or British Standards, including the requirements of environmental authorities where appropriate; and
- fulfils the requirements of the brief.

Seventh recital

3.24 The seventh recital allows NHS bodies to request bonds on terms other than those agreed between the JCT and the British Bankers Association. These terms must be copied to the contractor. The use of the Local Authorities version does not include the provision for an advance payment bond which accords with Government policy (see Appendix 16). For guidance on the use of bonds for payment of off site material see paragraphs 3.133 to 3.141.

Articles

3.25 The articles incorporate the Conditions and other Contract Documents by reference.

3.26 When the printed form is modified by a JCT Amendment not yet included in the re-printed form and it is desirable to incorporate the JCT Amendment in the executed contract, the Department recommends an additional Article should be inserted. This Article should be inserted after the last Article and the relevant printed sheets specified in the instructions on use of the JCT Amendment should be firmly attached to the executed contract after the attestation and before the Conditions.

Insert the following additional Article to incorporate a JCT Amendment not yet included in the re-printed form being used:

*Article….

Amendment – The Conditions shall have effect as modified by the amendments in Amendment ** attached hereto.

Notes: *Allocate the next available number

**Insert the relevant amendment number(s).
3.27 It should be noted that an additional Article will be required if the Sectional Completion Supplement is incorporated (see paragraph 6.9).

**Article 2**

3.28 Insert the Contract Sum (excluding VAT) in words and figures. The Contract Sum will normally be the tender sum unless it has been varied by agreement of the parties. Copies of the following should be bound into the contract bills of quantities to become part of the Contract Documents:

a. the accepted tender with supporting document returned with the tender by the Contractor;

b. copies of any letters, document etc varying the tender sum or the Conditions upon which the tender was invited.

**Article 3**

3.29 Delete either article 3A or 3B depending on whether a registered Architect or a person from some other discipline is to be the Contract Administrator.

3.30 Insert the name and address of the practice or department administrating the contract on behalf of the Employer. It is generally preferable to give the name of the organisation or title of an official rather than the name of an individual.

3.31 Strike out the words in italics regarding the Contractor’s right of objection in the case of a nominated replacement who is an official of the Employer. **Delete “not being a person ….. with article 5”.**

**Article 4**

3.32 Insert the name and address of the practice or department carrying out the functions of Quantity Surveyor. It is generally preferable to give the name of the organisation or title of an official rather than the name of an individual.

3.33 Strike out the words in italics regarding the Contractor’s right of objection in the case of a nominated replacement who is an official of the Employer. **Delete “not being a person ….. with Article 5”**

**Article 5**

3.34 This article notes that any dispute or difference arising under this contract may be referred to adjudication by either party.
Commentary

**Article 6.1 and 6.2**

3.35 NHS bodies need to decide whether all of the Construction (Design and Management) Regulations 1994 apply or just regulations 7 and 13. Where the full regulations apply insert either the address of the architect or the name and address of the person acting as planning supervisor. If only regulations 7 and 13 apply articles 6.1 and 6.2 should be deleted.

**Articles 7A and 7B**

3.36 Amendment 18 contains the provision to delete the option of arbitration and to make disputes the subject of legal proceedings. The decision on whether to retain arbitration is a matter of commercial judgement. If disputes are to be decided by arbitration Clause 41B in the Appendix should be retained. Clause 41B in the Appendix should only be deleted if disputes are going to be decided by legal proceedings.

**Attestation**

3.37 Page 9 of the contract is left blank for the form of wording of the attestation to be typed in depending on whether the contract is to be executed as a simple contract ("under hand") or as a deed (formerly "under seal").

3.38 The Department normally expects all contracts entered into using the JCT Standard Form of Building Contract, 1998 Edition to be executed as a deed.

3.39 Specimen attestation clauses are given in Appendix 4.

3.40 The Contractor should complete his attestation before the Employer. The contract should be dated when the Employer completes his/her attestation.

**JCT Amendment(s)**

3.41 The JCT has published TC/94 to cater for terrorism cover. It has also issued a guide that explains that the amendments are not to be a permanent amendment and therefore will not be incorporated in future reprints. The address of the company where insurance cover can be obtained is:

Pool Reinsurance Company Ltd
51 Gresham Street
London EC2V 7HQ
(Tel: 0171 216 7534)

Appendix

Either delete clause 41B if disputes are going to be decided by legal proceedings or retain 41B if they are going to be resolved by arbitration.
**Commentary**

**3.42** JCT Amendment TC/94 should be incorporated in the executed contract following the principles in paragraph 3.3. An additional Article therefore needs to be inserted.

**The conditions: Part 1: General**

**Clause 1.7: Employer’s representative**

**3.43** This clause allows NHS bodies to give a written notice to the contractor that a named individual will discharge the function attributed to the Employer. Any exceptions must be clearly stated. To avoid confusion over the distinct roles of the architect and quantity surveyor neither of these should be appointed to act as employer’s representative.

**Clause 2: Contractor’s obligations**

**3.44** Clause 2 should be retained without alteration. The terms of the contractor’s obligation should be noted. The obligation does not require the contractor to undertake or be responsible for:

a. design;

b. specifying material or goods.

**3.45** All these matters must be fully determined by the architect/the contract administrator and be set out in the contract documents (or later instructions). The contractor should not be required to prepare and submit drawings. Every drawing necessary for executing the works (other than any “shop drawings” that the contractor may choose to prepare for his/her own convenience) must be prepared by or on behalf of the architect/the contract administrator.

**3.46** If the contract has been modified by the JCT contractor’s designed portion supplement the contractor may be required to design part of the works. (See paragraph 7.5).

**3.47** It should be noted that under clause 2.2.1 nothing contained in the contract bills can override or modify the application or the interpretation of that which is contained in:

a. articles of agreement;

b. the conditions;

c. the appendix of the executed form of contract.

**3.48** The contract provides a mechanism for clearing up any errors in the contract bills and any discrepancies in, or divergences between, documents.
Clause 3: Contract sum – additions or deductions – adjustment – interim certificates

3.49 Attention is drawn to this clause which should be accepted by NHS bodies. NHS bodies are subject to Government policy on prompt payment of accounts and should therefore pay any sums due to the contractor under the provisions of this clause as soon as they have been certified as provided for in the contract.

Clause 5: Contract Documents – other documents – issue of certificates

Master programme

3.50 Clause 5.3.1.2 enables the NHS body as “Employer” to include an obligation on the contractor to provide two copies of the master programme as soon as possible after the execution of the contract, and for it to be amended under the terms of the contract. Although the master programme is not a contract document, the provision should be retained and enforced as the programme assists the architect/the contract administrator in evaluating the contractor’s notices of delay. This assists in resolving certain aspects of contractual claims. Where the contractor submits a programme indicating a completion date for the works earlier than that stated in the appendix to the conditions, NHS bodies should confirm the contractual completion date when noting the contents of the master programme. It should be noted that if the programme does include an earlier completion date that this does not override the conditions of contract.

Limit to use of documents

3.51 Clause 5.7 – “Limits to use of documents” as it stands would bar the use of tender information by statistical or indexing purposes, for example, by the Building Cost Information Service (BCIS). A sentence should be added at the end of clause 5.7.

Clause 6: Statutory obligations, notices, fees and charges

Clause 6.4: Race Relations

3.52 NHS bodies are subject to the legislation on Racial Discrimination (including the penalties for contravention). They are required to remind contractors of the need to comply with the provisions of the Race Relations Act 1976 or any statutory modification or re-enactment thereof relating to discrimination in employment. While the onus on complying with the requirements of the legislation rests with the contractor, an additional clause, 6.4 should be included in the contract.

Insert the following additional sentence at the end of clause 5.7:

“The use of such rates or prices for compiling cost records or statistical analyses of the cost of construction Works shall not constitute a breach of this clause.”

Insert the following additional clause after clause 6.3:

“Race Relations
6.4 The Contractor shall not unlawfully discriminate within the meaning and scope of the provisions of the Race Relations Act 1976 or any statutory re-enactment thereof relating to discrimination in employment.

The Contractor shall take all reasonable steps to ensure the observance of the provisions of the preceding paragraph by all servants, employees or agents of the Contractor and all Sub-Contractors.”
Clause 8: Work, materials and goods

3.53 NHS bodies should remind contractors that the provisions of clause 8.6 – “Exclusion from the Works of persons employed thereon” will be applied by the architect/the contract administrator in cases of breach of health, safety and welfare requirements.

Clause 13: Variations and provisional sums

3.54 Under clause 13.4.1 there are three ways of valuing variations. It is important to note the differences between these options.

a. 13A variation instruction – Contractor’s quotation in compliance with the instruction.

This option applies to an instruction for a quotation from the contractor which the employer may require. Sufficient information must be supplied by the employer regarding the nature and extent of the work to enable the contractor to accurately price the work. If the quote is accepted by the employer and confirmed by the architect/contract administrator the adjustment to the contract sum stated in the confirmed acceptance is in place of any valuation under clause 13.4.1 and any loss and expense under clause 26 including the cost of preparing the quotation. An adjustment to the time for completion of the works together with any revised completion date if the confirmed acceptance is in place of any fixing under clause 25.3. The amount payable to nominated sub-contractors, where applicable, should be included in the quotation.

b. Alternative A: Contractor’s Price Statements

This option applies to a variation and provisional sum work or work under approximate quantities that the contractor has to carry out under the contract and the employer has to pay. The contractor may submit his price for:

(i) a variation the architect/contract administrator has instructed;
(ii) work for which an approximate quantity has been included in the contract bills; or
(iii) the expenditure of a provisional sum.

The contractor can separately attach an amount for any ascertainment of direct loss and or expense and any adjustment to the time for completion. The employer can agree the price statement but not the amounts for direct loss and/or expense and any adjustment to the time for completion.

c. Alternative B

This applies instead of Alternative A where the contractor does not submit a price statement or where a price statement has been submitted but
not agreed and the disagreement has not been submitted to adjudication. In this instance the quantity surveyor would value the variation.

**Clause 15: Value Added Tax – supplemental provisions**

3.55 Clause 15.2 provides an alternative method (clause 1A of the VAT agreement) for dealing with the assessment of VAT which is due from the employer on VAT-exclusive amounts in all Interim Certificates and in the Final Certificate. Clause 1A of the VAT agreement can only apply where the contractor is satisfied at the date of signing the contract that his output tax on all supplies to the employer under the contract will be either at a positive or zero rate of tax. The relevant item in the appendix to the contract must be completed to state whether or not clause 1A of the VAT agreement is to apply. Where clause 1A applies at the commencement of the contract, either party may revoke the use of clause 1A by written notice to the other and thereafter the provisional assessment procedure will apply.

3.56 The inclusion of clause 1A of the VAT agreement in the contract does not involve the architect/the contract administrator in certifying the VAT due from the employer since he only certifies as to the VAT-exclusive amount due. The amount shown on the certificate for VAT is merely the application by the architect/the contract administrator of the system instituted by the employer and the contractor in having entered into a contract in which the alternative clause 1A is applicable.

3.57 General guidance on the application of VAT is included in Chapter 19 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’.

**Clause 17: Practical completion and defects liability**

3.58 The defects liability period has to be specified in the appendix in relation to clause 17.2 and is six months unless otherwise stated. Where the works include mechanical and electrical types of engineering work, it may be considered necessary to specify a period of 12 months in order to give test operation though one complete climatic year, but the period should never extend beyond 12 months. On no account should any attempt be made to specify different periods for “building” and “engineering”. There must be only one period and this will apply to the whole of the works. Longer term protection against latent defects is given under the law of contract or the law of tort.
Clause 18: Partial possession by employer

3.59 This clause provides a facility for the employer to take possession of a part of the works prior to practical completion of the works as a whole, subject to agreement with the contractor at the time. (See paragraphs 6.5 and 6.6 regarding the distinction between sectional completion and partial possession).

3.60 The architect/the contract administrator shall issue to the contractor a written statement identifying the part or parts of the works taken in possession and giving the date when the employer took possession.

3.61 The clause provides that the defects liability period for a part of the works taken over by the employer, shall commence on the date the employer takes possession of that part. It also provides that the rate of liquidated and ascertained damages applicable to the remainder of the works shall thereupon be reduced from that stated in the appendix. The reduction should be the same proportion as the value of the part taken over to the contract sum.

3.62 Guidance on valuations following the operation of clause 18 is given in Part C of Practice Note 22.

3.63 See Notes/amendments opposite if the contract is for works in, or extensions to, existing structures.

Clause 19: Assignment and sub-contracts

Clause 19.1: Assignment

3.64 To provide for possible future transfer of the contract by the employer to another NHS body without the consent of the contractor, a sentence should be added at the end of clause 19.1.1.

3.65 Clause 19.1.2 (which can apply or not at the employer’s option) is for use where the employer intends to transfer an interest in the works referred to in the clause to a purchaser or tenant immediately upon practical completion. Any proceedings which an assignee may wish to bring must be in the name of the employer under such arrangements on costs, etc. of such proceedings that the employer and assignee may have agreed. NHS bodies should note that the arrangements on costs of proceedings are not dealt with by the clause and must be separately made. NHS bodies should note that this clause will not normally apply and the appendix to the contract should be completed to reflect this situation. The Department should be consulted in cases where the clause is to apply (see also paragraphs 3.97 to 3.99).

It should be noted that if the contract is for works in, or extensions to, existing structures there will be consequential amendments to clause 18 if NHS insurance of the works clauses 22G, 22J and 22P are selected (see paragraph 3.92).

Insert the following additional sentence at the end of clause 19.1.1:

“However, the Contractor’s consent shall not be required to the assignment of this Contract by the Employer to another NHS body.”
Sub-letting

3.66 Where the sub-contractors are not nominated and are therefore domestic sub-contractors, domestic sub-contract DOM/1a articles of agreement, 1998 edition (as amended), and domestic sub-contract conditions for use with domestic sub-contract DOM/1c, 1998 edition (as amended) issued by Construction Industry Publications Ltd for use with JCT 98 are available. The use of these is at the discretion of the contractor.


Clause 19.3: Sub-letting – list in contract bills

3.68 When the facility to list domestic sub-contractors under clause 19.3 is used (see paragraph 2.27), to avoid the possibility of having to appraise further firms under pressure of time, it is recommended that the second sentence of clause 19.3.2.1 is modified.

Clause 19.4: Sub-letting – conditions of any sub-letting

3.69 Clause 19.4.3 requires the contractor to incorporate into any domestic sub-contract the provision to pay interest on an overdue payment.

Clause 20: Injury to persons and property and indemnity to employer

3.70 See notes/amendments opposite if the contract is for works in, or extensions to, existing structures.

3.71 Amendments will also be required if the NHS body wishes to make the contractor responsible in cases of vandalism or theft of site materials (see paragraph 3.96).

Data Protection Act 1984

3.72 NHS bodies are subject to the legislation on data protection (including the penalties for contravention thereof). They must ensure any contractors they employ indemnify them against any contravention of the provisions of the Data Protection Act 1984 or any statutory modification or re-enactment thereof relating to data protection. NHS bodies should, therefore, include an additional clause in the contract after clause 20.3.

In clause 19.3.2.1, second sentence, delete “Either the Employer (or the Architect/ the Contract Administrator on his behalf) or the Contractor shall be entitled with the consent of the other” and insert “The Employer (or the Architect/ the Contract Administrator on his behalf) shall be entitled with the consent of the Contractor”.

Insert the following side heading and clause after clause 20.3:

“Data Protection indemnity to the Employer

20.4 if during the subsistence of this contract the Contractor or any Sub-Contractor, or any employee servant or agent of them, is furnished by the Employer upon any medium with, or otherwise obtains (with or without the knowledge or consent of the Employer), access to confidential or personal or commercial data owned or held by the Employer either in relation to the Employer’s own affairs or those of others, and at any time either directly or indirectly discloses or copies or makes improper use of any such data to a third party or allows a
Clause 21: Insurance against injury to persons or property

Contractor’s insurance

3.73 The appendix contains an item referring to clause 21.1.1 where the employer must state the sum of insurance cover for any one occurrence, or series of occurrences, arising out of one event in respect of claims to which clause 21.1 applies. The sum stated by the employer is the minimum sum of cover as the clause provides for the contractor to insure for a greater sum if he so chooses.

3.74 The sum that the employer should state must depend on the particulars of each contract, for example, value, location, extent of risk etc. While it is therefore not possible for the Department to recommend a sum that has general applicability, it is recommended that a minimum sum of £5 million at 1998 prices be inserted.

3.75 Before a contract is executed, an insurer’s certificate of insurance cover in respect of injury to persons and/or damage (clause 21.1) must be obtained from the proposed contractor. NHS bodies must subsequently monitor that the insurance is maintained at least until the expiry of the defects liability period, or the date of issue of the certificate of completion of making good defects, whichever is the later. In no circumstances should cover be terminated at the date of practical completion and the Department considers it is prudent to keep the cover in force until the issue of the final certificate.

Insurance – liability etc of employer

3.76 NHS bodies need to consider whether insurance, under clause 21.2.1, for loss or damage to adjoining property or to property in which the works are being carried out is to be maintained by the contractor. This insurance is in respect of any injury or damage to property due to the negligence, breach of statutory duty, omission or default of the contractor or for whom the contractor is responsible for under clause 20.2. The appropriate entry in the Appendix should be made together with any amount of indemnity that may be required.
3.77 In order to ensure that contracts awarded by the NHS correctly implement Government policy, NHS bodies should observe the following guidance and make the stated amendments to the contract (see Chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’) and paragraphs 2.44 to 2.47.

3.78 The insurance options available to NHS bodies are as shown in Table 1.

<table>
<thead>
<tr>
<th>Clause 22A</th>
<th>Clause 22B</th>
<th>Clause 22C</th>
<th>Clauses 22G, 22J and 22P</th>
</tr>
</thead>
<tbody>
<tr>
<td>New building</td>
<td>New building</td>
<td>In, or extension to existing structure</td>
<td>In, or extension to, existing structures</td>
</tr>
<tr>
<td>Insurance by Contractor</td>
<td>Insurance by Employer</td>
<td>Insurance by Employer</td>
<td>Risks taken by Employer</td>
</tr>
<tr>
<td>NHS bodies</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Guidance paragraphs</td>
<td>3.88 to 3.91</td>
<td>–</td>
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</tbody>
</table>

Table 1 Insurance options

3.79 Particular attention is drawn to the guidance on insurance matters contained in:

a. ‘JCT Practice Note 22’ and Guide to the Amendments to the Insurance and Related Liability Provisions 1986’;

b. the printed contract footnotes (m) to (o).

3.80 The appendix to the contract contains an item referring to clauses 22A, 22B.1 or 22C.2, as applicable, which requires an entry in the executed contract stating the percentage of the value of the works to cover professional fees. NHS bodies must make an assessment of the percentage and state it in the tender documents. In assessing the percentage, NHS bodies must take into account the range of professional design consultants and clerks of works (both NHS bodies’ own officers and private consultants) engaged on the contract. The cost of their services, together with allowances for expenses and VAT should be expressed as a percentage applies to the pre-tender estimated costs of the works. NHS bodies should note that where clause 22A applies they are entitled to deduct the professional fees properly incurred by them in the restoration, replacement or repair of the loss or damage to the works and site materials from any insurance proceeds paid to the employer.

3.81 When clause 22A is used, the policy must be a “Joint Names Policy”: a policy of insurance which includes the contractor and the employer as the insured (see JCT 80 – Clause 22.2: Definitions).
3.82 It is essential that NHS bodies regularly review that the insured sum of single policy insurance is adequate. Recognition should be taken of the cost of any instructions of the architect/the contract administrator and the increased costs that will be incurred when restoration takes place, including that resulting from inflation.

3.83 Where a single policy for the works is taken out, its duration will normally be expressed as ending at the contract date for completion. However, if:
   a. the date for completion is extended so that a new date for completion is fixed; or
   b. if the certificate of practical completion is not issued until after the completion date has passed.

It is essential that the single policy is extended so as to expire on the date of issue of the certificate of practical completion. It is essential that NHS bodies regularly review the anticipated dates of the issue of certificates to see that policies are kept in force until those dates. Should it become apparent that the date of practical completion of a project will exceed the duration of the policy, NHS bodies must take steps to ensure:
   a. the issue of necessary extension endorsements; and
   b. payment of additional premiums by the contractor if clause 22A applies.

3.84 The term “full reinstatement value” is used in the contract to emphasise that the sum insured must reflect the actual cost of reinstatement at the time of reinstatement, whenever that maybe. The term, however, is only intended to cover:
   a. the actual cost the contractor incurs in reinstating the works;
   b. site materials lost or damaged;
   c. the cost of removing debris in order to prepare for reconstruction;
   d. any additional sum prescribed in the contract for professional fees.

3.85 The term is not intended to include consequential loss such as:
   a. the increased cost of carrying out work not undertaken at the time of the damage and delayed in its completion by reason of that damage;
   b. loss suffered by the employer (the NHS body) due to the delay in securing the completed works.
Commentary

3.86 See Notes/amendments opposite if the contract is for works in, or extensions to, existing structures.

3.87 Where, for VAT purposes, the employer (NHS body) is exempt or partially exempt, the full reinstatement value of the works and materials is inclusive of any VAT.

Clause 22A: Erection of new buildings – all risks insurance of the works by the contractor

3.88 If the contract is for the erection of a new building and the insurance of the works is provided by the contractor, clause 22A will apply and clauses 22B and 22C should be deleted in their entirety.

3.89 The insurance provided by the contractor may be a single policy for a particular contract (clause 22A.2) or an annual policy maintained by the contractor (clause 22A.3).

3.90 Clause 22A sets out the conditions that apply if the contractor takes out a single policy insurance.

3.91 When a contractor maintains an annual policy, the NHS body must obtain a certificate of insurance completed by the contractor’s insurers before the contract is executed and subsequently monitor that the insurance is maintained. The last sentence of clause 22A.3.1 provides for the contractor to supply the annual renewal date of the policy which is entered in the appendix to the contract.

Clause 22G: Works in, or extensions to, existing structures – loss or damage to the works by the risks covered by the definition in clause 22.2 “All risks insurance”

Clause 22J: Works in, or extensions to, existing structures – loss or damage to the structures and contents – risks covered by the definition in clause 1.3 of specified perils

Clause 22P: Loss or damage caused by negligence

3.92 Where the work is in, or extensions to, existing structures and the risk of loss or damage to the existing structures and their contents and the works is taken by the employer (NHS body), amendments to clauses 18, 20, 22, 23 and 25 should be made. Clauses 22A, 22B and 22C should be deleted in their entirety and the additional headings and clauses 22G, 22J and 22P included.

Notes/amendments

If the contract is for works in, or extensions to, existing structures there will be consequential amendments to clause 22 if NHS insurance of the works clauses 22G, 22J and 22P are selected (see paragraph 3.92).

Delete clauses 22B and 22C in their entirety if clause 22A applies.

Delete clauses 22A, 22B and 22C in their entirety if clauses 22G, 22J and 22P apply, insert the headings and clauses 22G, 22J and 22P in Table 2. In addition make the consequential amendments listed to clauses 18, 20, 22 and 23 together with the amendment to clause 25 (paragraph 3.103).
Table 2  Clauses 22G, 22J and 22P

Notes/amendments

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>22G</strong></td>
<td>Works in or extensions to, existing structures – loss or damage to the Works by the risks covered by the definition in clause 22.2 “All risks insurance”</td>
</tr>
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</table>

**Definitions**

<p>| | |</p>
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<tr>
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<tbody>
<tr>
<td><strong>22G.1</strong></td>
<td>The definitions in clauses 1.3 and 22.2 shall apply to this clause.</td>
</tr>
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</table>

**Loss or damage to the Work at risk of Employer**

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<tbody>
<tr>
<td><strong>22G.2</strong></td>
<td>Subject to the provisions of clause 22P, all work executed and all Site Materials shall be at the risk of the Employer in respect of loss or damage by the risks covered by the definition of “All Risks Insurance” up to and including the date of issue of the certificate of Practical Completion or up to and including the date of determination of the employment of the Contractor under clause 22G.3.2 or clause 27 or clause 28 (whether or not the validity of such determination is contested) Whichever is the earlier or, where clause 18 has been operated, up to the relevant date in respect of the relevant part.</td>
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</table>

**Restoration etc of loss or damage – obligations of Contractor and Employer**

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<tr>
<td><strong>22G.3</strong></td>
<td>If any loss or damage affecting work executed or any part thereof or any Site Materials is occasioned by any one or more of the risks covered by the definition “All Risks Insurance” then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect/the Contract Administrator and to the Employer of the extent, nature and location thereof and</td>
</tr>
<tr>
<td><strong>22G.3.1</strong></td>
<td>the occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this Contract;</td>
</tr>
<tr>
<td><strong>22G.3.2.1</strong></td>
<td>if it is just and equitable so to do the employment of the Contractor under this Contract may within 28 days of the occurrence of such loss or damage be determined at the option of either party by notice by registered post or recorded delivery from either party to the other. Within 7 days of receiving such a notice (but not thereafter) either party may give to the other a written request to concur in the appointment of an Arbitrator under Article 7 and clause 41 in order that it may be determined whether such determination will be just or equitable;</td>
</tr>
<tr>
<td><strong>22G.3.2.2</strong></td>
<td>upon giving or receiving by the Employer or such a notice of determination or, where a reference to arbitration is made as aforesaid, upon the Arbitrator upholding the notice of determination, the provisions of clause 28.2 (except clause 28.2.2.6) shall apply.</td>
</tr>
<tr>
<td><strong>22G.4</strong></td>
<td>If no notice of determination is served under clause 22G.3.2 or, where a reference to arbitration is made as aforesaid, if the Arbitrator decides against the notice of determination, then</td>
</tr>
<tr>
<td><strong>22G.4.1</strong></td>
<td>the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which</td>
</tr>
</tbody>
</table>
have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Works; and

Valuation of restoration etc work – Employer’s right of deduction from valuation

22G.4.2 the restoration, replacement or repair of such loss or damage and removal and disposal of debris shall be treated as if they were a Variation required by an instruction of the Architect/the Contract Administrator under clause 13.2 and valued accordingly and paid by the Employer. In making that payment the Employer may deduct from the amount of the valuation that part (up to but not exceeding the whole of the valuation) which relates to the restoration, replacement or repair of loss or damage and the removal and disposal of any debris to the extent that the loss or damage was caused by the negligence of the Contractor or of any Nominated or Domestic Sub-Contractor. Provided that on or after the earlier of the relevant Terminal Data (as defined in the Nominated Sub-Contract Conditions NSC/C) the provisions of model clause 8G.4 shall apply in respect of any loss or damage to the relevant Nominated Sub-Contract Works.

22J Works in, or extensions to existing structures – loss or damage to the structures and contents – risks covered by the definition in clause 1.3 of Specified Perils

Definitions

22J.1 The definitions in clause 1.3 shall apply to this clause.

Existing structures and contents

22J.2 Subject to the provisions of clause 22P, the existing structures (which shall include from the relevant date any relevant part to which clause 18.1 refers) together with the contents thereof owned by him or for which he is responsible shall be at the risk of the Employer in respect of the full cost of reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils.

Modification of clauses

22J.3 Any reference in a clause to clause 22C shall be deemed to be a reference to clause 22G or clause 22J where appropriate.

Loss or damage caused by negligence

22P Notwithstanding the matters set out in clauses 22G and 22J for which the Employer bears the risk under these clauses the Employer may have recourse against the Contractor if the loss or damage to the Works or Site Materials (clause 22G) or to the existing structures and their contents owned by the Employer or for which he is responsible (clause 22J) is caused by the negligence of the Contractor, his servants or agents or of any Sub-Contractor, his servants or agents employed upon or in connection with the Works or any part thereof including their failure to take precautions to prevent loss or damage to the Works or existing structures or extensions, to minimise any such loss or damage or to act upon instructions issued by the Architect/the Contract Administrator in relation to these matters.
The amendments to be made to clauses 18, 20, 22 and 23 and the consequential amendments to the appendix when additional clauses 22G, 22J and 22P are used are:

a. clause 18.1:
   In the last line delete “22.3.1 and 22C.1” and insert “22G.2”;

b. clause 18.1.3:
   delete sub-clause and insert “(Number not used)”;

c. clause 20.2:
   (i) in line 1, delete “22C.1” and insert “22J”;
   (ii) in line 3, after “property real or personal” insert “including loss or damage by the Specified Perils”;

d. clause 20.3.1:
   (i) in line 1, after “clause 20.3.2” insert “and 22P”;
   (ii) in line 6, delete “22C” and insert “22G”;
   (iii) in line 6, delete “22C.4.3” and insert “22G.3.2”;

e. clause 22.1:
   delete sub-clause and insert “(Number not used)”;

f. clause 22.3:
   delete sub-clause and insert “(Number not used)”;

g. clause 23.3.1:
   delete sub-clause and insert “(Number not used)”;

h. clause 23.3.2:
   in line 2 after “writing of the Contractor” insert “(which consent shall not be unreasonably withheld)”;

j. clause 23.3.3:
   delete sub-clause and insert “(Number not used)”;

k. Appendix:
   (i) delete entries relating to clause 22.1 “insurance of the Works – alternative clauses” and insert “clauses 22G, 22J and 22P apply”;
   (ii) against clause 22A, 22B.1 and 22C.2 “Percentage to cover professional fees “ insert “not applicable”;
   (iii) Against clause 22A.3.1 “Annual renewal date of insurance as supplied by Contractor” insert “not applicable”.

Commentary Notes/amendments

3.0 JCT Standard Form of Building Contract, 1998 Edition Local Authorities with Quantities (as amended)
Vandalism and theft of site materials

3.93 An amendment to clause 22P will be required if the NHS body wishes to make the contractor responsible in cases of theft of site materials or vandalism (see paragraph 3.94 and 3.95).

3.94 Where clauses 22G and 22J are used, the employer may receive claims from contractors for losses resulting from vandalism or theft of site materials, etc. in cases where the contractor is not negligent. NHS bodies may wish to consider an amendment to clauses 20.2, 20.3 and 22P to avoid such claims. NHS bodies should be aware that the incorporation of these amendments into the contract may result in contractors taking out additional insurance and the cost of such insurance may be reflected in their tender prices.

3.95 Where clause 22A is used, the same situation, but in respect of theft only, could arise.

3.96 If the NHS body wishes to make the contractor responsible in cases of vandalism or theft of site materials, the amendments given opposite should be made.

The following amendments should be made if the NHS body wishes to make the contractor responsible in cases of vandalism or theft of site materials:

- a. clause 20.2:
  - after “whatsoever” in line 3 insert “including theft of Site Materials or vandalism”;

- b. clause 20.3.1:
  - after “Site Materials” in line 2 insert “except that which is lost or damaged as a result of theft or vandalism”;

- c. clause 22P:
  - after “thereof” in line 10 insert “or is due to theft (if applicable) of Site Materials or vandalism”.

Clause 22D: Insurance for employer’s loss of liquidated damages – clauses 25.4.3

3.97 Clause 22D gives the employer the option to require the contractor to arrange for insurance to compensate the employer for the amount of damages which he is not contractually able to recover under clause 24: Damages for non-completion. This is because of the extension of time given by the architect/the contract administrator in respect of the occurrence of the relevant event in clause 25.4.3: “loss or damage occasioned by any one or more of the Specified Perils”, which has caused loss or damage to the works or to work executed or to site materials, or temporary buildings, plant and equipment for use in connection with and or adjacent to the works.
3.98 The option can be operated by the employer by stating in the appendix to the contract that the employer may require insurance under clause 22D and by inserting the period of time for which the employer requires the sum insured to be paid. The cost to the contractor of taking out and maintaining the insurance is added to the contract sum.

3.99 Where specific loss of income in the event of delay can be identified by an NHS body, consideration should be given to instructing the contractor to obtain insurance quotations. Cases where this will happen are expected to be few and the Department should be consulted. The appendix to the contract will usually be completed to state that the insurance to which clause 22D refers is not required.

Clause 23: Date of possession, completion and postponement

3.100 The wording of the contract anticipates unimpeached possession of the whole site from a specific date. Where phased or serial possession is envisaged, this must be clearly defined in the tender documentation and the contract appropriately amended (see paragraph 6.4).

3.101 Clause 23.1.2 (which can apply or not at the employer’s option) enables the employer to defer giving possession of the site to the contractor until the date of possession referred to in clause 23.1.1. The relevant item in the appendix to the contract must be completed by the employer to state whether or not the clause is to apply; the period of deferment is six weeks unless a lesser period is stated.

3.102 The department recommends that clause 23.1.2 should be selected to apply, as, without it, the contract would be silent as to the position arising if the stated date of possession is not adhered to. Nevertheless, NHS bodies should make every effort to avoid being late in giving possession of the site as any deferment is expressly stated as a ground for an extension of time (see clause 25.4.13) and for the reimbursement to the contractor of direct loss and/or expense so incurred (see clause 26.1).

3.103 See Notes/amendments opposite if the contract is for works in, or extensions to, existing structures.

Date of possession and date for completion

3.104 In order that all tenders are based on the same information, the Department recommends that for tender purposes the date of possession is normally given as a number of days (normally not exceeding 60 days) from the date of acceptance of contract. In addition, the date for completion should be given as a specific number of...
consecutive calendar weeks after the date of possession. Specific dates for possession and completion should not be given at tender stage since they will need to be established with the successful tenderer and inserted in the appendix.

3.105 Tenderers, if they wish, should not be precluded from submitting an alternative tender for consideration based on a different construction period to that stated in the tender documents. These alternatives should be carefully evaluated before acceptance.

3.106 The period for the execution of the works stated in the tender document is normally assessed by the architect/the contract administrator in consultation with the design team and the employer.

Clause 24: Damages for non-completion

3.107 The appendix to the contract requires the rate at which liquidated and ascertained damages will be deductible to be specified when the contract is drawn up for execution, notice of which will have been given in the tender documents.

3.108 The methods of assessment of the rate for damages is discussed in paragraphs 2.14 to 2.24.

3.109 NHS bodies should note that where they intend to withhold or deduct liquidated and ascertained damages a written notice that conforms to the requirements of clause 30.1.1.4 or clause 30.8.3 must be given to the contractor.

Clause 25: Extension of time

3.110 Clause 25 sets out the detailed procedures for the claiming and granting of an extension of time for completion of the works and lists the grounds (referred to as “relevant events”) on which an extension of time may be granted.

3.111 Clause 25.4.2 provides for an extension of time to be granted for exceptionally adverse weather conditions. Government policy is to encourage improvements in productivity in the construction industry, especially by looking to contractors to take all reasonable steps to mitigate the effects of exceptionally adverse weather conditions. To comply with this general policy the Department requires that the preliminaries section of the tender documents and contract documents must include the following clause:

“Building in adverse weather conditions

The Contractor, as part of his best endeavours to prevent delay in the progress of the Works, will be expected to adopt all reasonable measures to prevent or minimise
harmful effects of weather conditions on the Works. The extent to which he has taken such measures will be taken into account by the architect/the contract administrator when considering any notice of delay due to exceptionally adverse weather conditions under Contract Condition clause 25."

3.112 It is Government policy that it should not place itself in a position where it is not possible to recover the cost of loss or damage caused by the negligence of other parties. Clause 25.4.3 (loss or damage occasioned by any one or more of the specified perils) should therefore be amended.

3.113 NHS bodies should note that it is necessary to prove negligence and that the architect/contract administrator will be required to value work and the employer to deny payment as well as seeking the recovery of liquidated and ascertained damages. In the event of a serious delay these damages may prove very substantial.

3.114 An alternative to amending clause 25.4.3 is for the employer to arrange insurance which covers loss of revenue/additional cost resulting directly from the extension of time which would otherwise be granted. In order to offset the cost of such insurance, alternative quotations can be sought from the contractor, that is with and without the amendment to clause 25.4.3.

3.115 This insurance is not confined to the contractor’s/sub-contractor’s negligence and gives added value where the extension of time under clause 25.4.3 would otherwise have to be granted.

Clause 26: Loss and expense caused by matters materially affecting regular progress of the works

3.116 The attention of NHS bodies is particularly drawn to the list of matters in clause 26.2 which may give rise to a claim for direct loss and/or expense from a contractor or sub-contractor. NHS bodies must manage contracts so that, as far as possible, situations are avoided which may give rise to claims for additional payments.

3.117 It should be noted that the provisions of clause 26 are without prejudice to any other rights and remedies which the contractor may possess.

3.118 Clause 26.2.10 enables contractor’s to suspend performance of their obligations under the contract. This is because under clause 30.1.4 the contractor has the right, subject to written notice not having been given, to suspend the works for non-payment of a sum due. Should this occur then NHS bodies must immediately take expert insurance advice on the effect of suspending any of the Contractor’s obligations.

Notes/amendments

The following amendments will be made to clause 25.4.3:

a. where clause 22A is used, insert “provided that this is not due to any negligence, omission or default of the Contractor, his servants or agents or of any Sub-Contractor, his servants or agents “at the end of the clause; or

b. where clauses 22G and 22J are used, insert “provided that this is not due to any negligence, omission or default of the Contractor, his servants or agents or of any Sub-Contractor, his servants or agents for which the Contractor is liable under clause 20.2 “ at the end of the clause.
Claims and settlements are discussed in Chapter 22 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’.

Clause 27: Determination by employer

3.120 As the reference to the Local Government Act 1972 in clause 27.4 is irrelevant in the NHS, this should be deleted.

Clause 29: Works by employer or persons employed or engaged by employer

3.121 Clause 29 provides for work not forming part of the works to be executed by the contractor to be carried out by the employer himself or by persons employed or otherwise engaged by him. Every person employed or otherwise engaged for the purpose of clause 20 (Injury to persons and property and indemnity to employer) is deemed to be a person for whom the employer is responsible and not to be a sub-contractor.

3.122 Clause 29 work does not form part of the contract and thus will not be within the meaning of the word “Works” or the phrase “Works executed and/or Site Materials” which are covered for “All Risks Insurance”. Therefore under clause 22A, the employer (NHS body) needs to consider what cover is required for the clause 29 work.

3.123 Full descriptions of work to be executed by the employer or persons employed or otherwise engaged by him must be given in the tender documents and the contract documents together with details of any attendance and builder’s work to be provided by the contractor. In addition, the estimated date for commencement and duration related to the date for completion and/or the date for possession given in the appendix should also be given.

Clause 30: Certificates and payments

3.124 This clause contains the provisions regarding:
   a. interim payments to the contractor;
   b. payment of simple interest on amounts the employer has failed to pay;
   c. the deduction and release of retention;
   d. the final adjustment of the contract sum (that is the “final account”);
   e. the issue of the final certificate;
   f. the legal effects of interim certificates and the final certificate.

Delete “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 any amendment or re-enactment thereof.”
3.125 General guidance on the prompt settlement of accounts and the provision of facilities for auditing accounts by NHS bodies’ treasurers’ departments is given in Chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’. No amendments should be made to the clause to make the completion of auditing a condition for the issue of the “Final Certificate”. This is, in any case, largely unnecessary, as clause 30.9.1.2 allows the amount of a final payment to be re-opened if it is subsequently found that there has been any accidental inclusion or exclusion of any work, material goods or figure in any computation or any arithmetical error in any computation.

3.126 The following paragraphs draw attention to particular points of detail.

*Interim certificates and valuations*

3.127 Clause 30.1 concerns the preparation of interim certificates and the making of payments to the contractor.

3.128 Clause 30.1.1.1 requires the architect/contract administrator to state what any amount due to the contractor from the employer relates to and the basis on which that amount is calculated. It also makes provision for the employer to pay simple interest (5% over the base rate of the Bank of England), in addition to the amount not properly paid, where the employer fails properly to pay the amount, or part thereof by the final date for payment.

3.129 Clause 30.1.1.3 requires the employer to give written notice, no later than five days after the date of issue of an interim certificate, to the contractor stating the amount of the proposed payment and how that sum was arrived at.

3.130 Under clause 30.1.1.4 the employer, no later than five days before the final date for payment of an interim certificate, may give written notice to the contractor, specifying any sums to be withheld and/or deducted together with reasons and the amount for each.

3.131 If the quantity surveyor disagrees with any application for a gross valuation made by the contractor then, under clause 30.1.2.2, a written statement has to be sent to the contractor. This statement is sent at the same time as making the valuation and must identify any disagreement and be in similar detail to the contractor’s application.

3.132 Clause 30.1.4 permits the contractor to suspend the works, subject to any notice under clause 30.1.1.4, for failure by the employer in paying the full amount due by the final date for payment. This suspension is not to be treated as a suspension under clauses 27.2.1.1 or 27.2.1.2. See also paragraph 3.118.
Clause 30.2.1.2 provides for the value of materials and goods on-site (subject to certain provisos) to be included in interim payment certificates and upon payment the property of the materials and goods becomes vested in the employer. The decision in the Romalpa case (Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd (1976) 1WLR 676) suggested that the employer may be required to pay the contractor for materials and goods which the contractor does not own. Should the contractor subsequently become insolvent without having paid for the material and goods, the employer may find himself having paid for them but having no title.

In order to provide additional safeguards for NHS bodies in the event of contractors becoming insolvent after having received payment for unfixed materials and goods on-site, the Department recommends that an additional paragraph be inserted in clause 30.1.3.

Clause 30.3 provides for the value of off-site materials, goods or pre-fabricated items to be included in interim payment certificates. The employer must list these items in a list supplied to the contractor and annexed to the contract bills.

Two types of listed items can be paid for namely “uniquely identified listed items” for example a boiler from a supplier, and “listed items” for example a quantity of bricks. Where the employer wishes to make payment for listed items provision is made in the contract for a bond to be provided in favour of the employer. For listed items that are not uniquely identified the contractor must supply a bond. However, NHS bodies should note that such a bond will only be required for “uniquely identified listed items” if this is stated in the appendix. If the employer wishes to use a bond other than the one in the contract then copies of these terms must be given to the contractor, see seventh recital.

When the employer wishes to include the value of off-site materials, good or pre-fabricated items in an interim certificate, he should satisfy himself that the provisions of clause 30.3 are fully complied with, the contractor holds full title to the materials, goods or pre-fabricated items and that they are adequately insured by the contractor.

A certificate of vesting the off-site materials and goods in the employer with supporting documentation should be completed by the contractor confirming that the provisions of clause 30.3 have been fully complied with, that a policy of insurance protecting the interests of the employer and contractor is maintained and that the contractor holds the full title before certification is made.

Insert the following additional paragraph in clause 30.1.3:

“Prior to payment of any Interim Certificate or issue of the Final Certificate for payment the Contractor shall if requested by the Architect/the Contract Administrator, satisfy him that any amount due to a sub-contractor or supplier of materials or goods for incorporation in the Works which is included in any previous Interim Certificate has been paid”.

NHS bodies must make the appropriate amendments in the appendix when they intend to pay for off-site materials.
3.139 Where clause 30.3 is operated and the employer has paid for off-site materials, good or pre-fabricated items, clause 16.2 provides that they become the property of the employer. The contractor remains responsible for any loss or damage and the cost of storage and handling.

3.140 NHS bodies should note that clause 30.3.5 provides for the insurance cover on listed items to be in respect of the specified perils only (see definition of specified perils in clause 1.3) and not all risks (see definition of all risks clause 22.2).

3.141 Where the operation of clause 30.3 is under consideration, the employer (NHS body) should decide if the insurance cover for listed items is to cover perils additional to the specified perils for example impact, theft or vandalism. The insurance cover provided under clause 30.3 must also cover the transit of the listed items to the site of the works.

Retention percentage

3.142 Clause 30.4.1.1, Footnote[s] and an item in the appendix to the contract refer to the retention percentage and stipulate 5%, or where the employer at tender stage estimates the contract sum to be £500,000 or over, a maximum of 3%.

3.143 The Department recommends that for contracts up to £1m the figure should be 3% and for contracts above that amount, 2½%.

3.144 Contractors who are accustomed to the provisions of the “Private” version of the contract may request that the employer should place the retention in a separate bank account so designated as to identify the money as being held on trust for the contractor and nominated sub-contractors.

3.145 The Local Authorities version does not contain such a specific provision and as a NHS building is financed from public funds, it would be contrary to Government accounting rules to take funds earlier than they are required. However, to make the contract clear on this subject, the Department recommends that amendments are made to clause 30 to remove the employer’s fiduciary interest in retention as trustee for the contractor and any nominated sub-contractor so that retention monies are not required to be placed in a separate bank account.

3.146 The acceptance by the employer of the obligation to release the retention as an eventual charge on public funds gives a sufficient safeguard to contractors’, and nominated sub-contractors’ interests.

The following amendments should be made to clause 30:

a. In clause 30.1.1.2, lines 1-2, delete: “Notwithstanding the fiduciary interest of the Employer in the Retention as stated in clause 30.5.1. the”. Insert “The”.

b. In clause 30.5.1, lines 1-2 delete – entire clause.

Insert “Notwithstanding the provisions of clauses 4.22.1 and 4.22.2 of NSC/C (Conditions of Nominated Sub-Contract) the Employer shall not hold Nominated Sub-Contract Retention in a fiduciary capacity as a trustee.”
3.147 Clauses 30.6 and 30.8 cover the preparation of the final account and the making of the final payments to the contractor.

Period of final measurement and valuation

3.148 Clause 30.6.1.1 requires the contractor to send to the architect/the contract administrator or quantity surveyor all documents (including those of nominated sub-contractors and nominated suppliers) necessary for the purposes of the adjustment of the contract sum not later than six months after practical completion.

3.149 Clause 30.6.1.2 requires a statement of all adjustments to the contract sum and an ascertainment of all amounts of loss and/or expense (clauses 26.1, 26.4.1 and 34.3) to be prepared within three months of receipt of the documents referred to in clause 30.6.1.1. The architect/the contract administrator is required immediately to send a copy of the statement and ascertainment to the contractor and the relevant extract therefrom to each nominated sub-contractor.

3.150 The intention therefore is that the statement and ascertainment should be prepared with a maximum of nine months from practical completion.

Period for issue of final certificate

3.151 Clause 30.8 sets out a strict timetable for the issue of the final certificate and provides for that issue not later than two months after the occurrence of whichever of the following events occurs last:

a. the end of the defects liability period;

b. the completion of making good of defects (clause 17.4);

c. the date on which the architect/the contract administrator sent a copy of the statement and ascertainment to the contractor (clauses 30.6.1.2.1 and 30.6.1.2.2).

3.152 Clause 30.8 contains similar provisions regarding notices as clause 30.1

Clause 31 Construction Industry Scheme (CIS)

3.153 From August 1999 NHS bodies who spend £1 million per annum on construction operations will become a “Contractor” and the appropriate deletion from the item in the appendix to the contract should be made.
The conditions: Part 2: Nominated sub-contractors and nominated suppliers

Clause 35: nominated sub-contractors

General

3.154 The conditions relating to nominated sub-contractors are contained almost entirely in clause 35, though there are relevant references in other clauses, particularly in clause 30 regarding interim and final payments to nominated sub-contractors.

Contractor’s tenders for nominated sub-contract work

3.155 Clause 35.2 sets out the conditions under which the contractor may be permitted to submit a tender for any work which is indicated in the contract bills as reserved for a nominated sub-contractor. The appendix to the contract contains an item referring to clause 35.2 which must be completed when drawing up the contract for execution, to identify any work reserved for nominated sub-contractors for which the contractor desires to tender: the form of tender for the main contract should include a space for the contractor to express such a desire. The receipt of a tender from the contractor for nominated sub-contract work is however stated in clause 35.2.1 to be conditional upon the architect/the contract administrator being prepared to receive it.

3.156 Any tender by the contractor under clause 35.2 should be submitted before the main contract tender is accepted and be inclusive of “general attendance” and “other items of attendance” that a nominated sub-contractor would have required. (See paragraphs 8.56 to 8.58.)

3.157 Any work that is passed to the contractor under this procedure must be fully designed before the tender is submitted as the contract does not contain any provisions for design work to be carried out by the contractor.

3.158 The JCT contractor’s designed portion supplement (paragraph 7.3) is not suitable for work tendered for in this way.

3.159 The Department recommends that in cases where the architect/the contract administrator has already decided prior to inviting the main tenders that he/she will not be prepared to receive tenders from the contractor for any particular nominated sub-contract work, the tender bills of quantities should contain a statement to that effect.
The 1991 procedure for nomination of a sub-contractor

3.160 Clause 35.4 lists the documents relating to nominated sub-contractors which are published by the JCT for use with the contract. The use of all of the documents is mandatory. Detailed guidance on the use of the documents and on the amendments necessary to suit NHS requirements are given in paragraphs 8.1 to 8.64.

3.161 The documents relating to nominated sub-contractors are listed later in this guidance.

3.162 Descriptions of the provisions and uses of the various documents are given in paragraphs 8.6 to 8.64.


3.164 ‘Management of Construction Projects’ procedures Stage 3: tender and contract states that the project director must ensure that a total funding package is available to meet the approved sum, including contingency and allowances for inflation. It also states that when all these arrangements are completed, the contract can be awarded and the contract formally executed.

3.165 The method of nomination does not create any difficulty in complying with the ‘Management of Construction Projects’ requirement as stipulation 2 on page 8 of the sub-contractor’s tender NSC/T part 2 recognises that the identity of the main contractor may not be known at the time that the tender is submitted to the architect/the contract administrator.

Amendment to form

3.166 The Department recommends that a note be inserted after clause 35.7.2 stating that the contractor will be required to execute the articles of nominated sub-contract agreement NSC/A as a deed where the main contract is to be executed as a deed.

3.167 To ensure complete compatibility of the conditions of the sub-contract with the amended main contract conditions an additional heading and a clause 37.7.3 should be included.

Clause 36: nominated suppliers

3.168 The difference between a sub-contractor and a supplier should be noted. A sub-contractor carries out work on the site, whereas a supplier only supplies materials or goods and delivers them to site.
Clause 36 contains virtually all the conditions regarding suppliers, including those relating to payments to them.

Clause 36.1 sets out the conditions which constitute nomination by the architect/the contract administrator of a supplier and thus define a nominated supplier.

Suppliers not nominated

Clause 36.1.2 makes a most important distinction in that a supplier shall not be regarded as having been nominated if he is named in the contract bills (without any prime cost sum being stated) even if he is the only source of supply for the particular materials or goods specified. Practice note 15 contains further comments and guidance on the subject of nominated suppliers.

NHS bodies are reminded that they must comply with the requirements of the Public Works Contracts Regulations 1991 by adding the words “or equivalent” after the named firm regardless of whether the contract falls above or below the relevant EC threshold. The reason for this is that NHS bodies must be willing to consider works products or equipment which meet the required level of performance and which are fit for the intended purpose but are not obtained from the named supplier.

To ensure complete compatibility of the conditions of the contract of sale with the amended main contract an additional clause 36.4.10 should be included.

The JCT standard form of tender by nominated supplier

This form is in two parts. The first part (Tender TNS/1) provides standard and properly-based documentation for the invitation and receipt of tenders from potential nominated suppliers. It also reproduces clauses 36.3 to 36.5 of the conditions of the main contract so as to acquaint the tenderer with the conditions of sale with which he must comply if he is to be eligible for nomination by the architect/the contract administrator.

The second part of the contract (Warranty TNS/2) provides for the nominated supplier to give warranties direct to the employer which are broadly similar to those given by nominated sub-contractors under agreements NSC/W. The use of the warranty is of importance to the employer as it is only through the warranty that there is any privity of contract between the employer and the nominated supplier. (The employer is not party to the actual contract of sale; this is between the main contractor and the nominated supplier).

Insert the following clause 36.4.10 after clause 36.4.9:

“36.4.10 The Contractor shall incorporate in the contract of sale such consequential amendments as are necessary to ensure complete compatibility with the amended main contract.”
3.176 The JCT has not made the use of this form mandatory but strongly recommends it. The Department also considers the use of the contract to constitute good practice and recommends that NHS bodies adopt it as the normal procedure. Tender TNS/1 contains an optional provision (item 3) which, if deleted, enables Tender TNS/1 to be used on its own (that is, without Warranty TNS/2). However, it is likely that if the materials or goods to be supplied and their delivery to site at the intended time are of sufficient importance to make the nomination of the supplier advisable, then the employer will wish to obtain the supplier’s warranties. The Department therefore expects NHS bodies to use the contract in its entirety in almost all cases of nomination of a supplier.

3.177 It is essential that form TNS/2 is completed by both parties “under hand” or executed as a deed as appropriate before Tender TNS/3 is accepted.

3.178 Detailed guidance on the use of both parts of the contract is given in paragraphs 8.66 to 8.72.

Department’s recommendations on nomination of sub-contractors and suppliers

3.179 Except for work or materials and goods of a specialised nature or where a design input is required from a nominated sub-contractor or supplier, the Department recommends that nomination of sub-contractors and suppliers should be avoided wherever possible. The Department recommends that the main contract provisions to “list” sub-contractors and suppliers should be used. When “naming” or listing sub-contractors and suppliers, NHS bodies must add the words “or equivalent” to ensure compliance with the provision of the Public Works Contracts Regulations 1991.

3.180 Prospective nominated sub-contractors must be made aware at the time of preparing their tenders that the Standard Conditions of Nominated Sub-Contract NSC/C which is incorporated by reference in the Standard Form of Articles of Nominated Sub-Contract Agreement between a Contractor and a Nominated Sub-Contractor (Agreement NSC/A) shall incorporate such consequential amendments as are necessary to ensure complete compatibility with the amended main contract.

3.181 The information supplied with the invitation to tender to potential nominated sub-contractors and nominated suppliers must include details of all amendments to be made to the form of contract, the employer’s requirements affecting the order of the works (if any), and full information on the various other requirements, obligations and restrictions to be imposed by the employer. This is best achieved by attaching a main copy of the preliminaries element or section of the main contract.
Potential nominated sub-contractors and nominated suppliers should be advised that where the main contract is executed as a deed, the contractor will require the Agreement NSC/A and contract of sale to be executed as a deed.

3.182 Where the nomination procedures for sub-contractors and suppliers are used, the main contract preliminaries and invitations for sub-tenders should state that the employer/sub-contractor agreement (NSC/W) and the employer/supplier warranty (TNS/2) will be required to be executed as a deed where the main contract is executed as a deed.

Part 3: Fluctuations

General

3.183 An outline description of provisions in tenders and contracts for fluctuations and a statement of the Government’s policy relating to them is given in Chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’. This policy can be briefly summarised as requiring tenders to be on a limited fluctuations basis where the estimated execution of the works does not exceed two years, but permitting tenders on a full fluctuation basis where the estimated duration exceeds two years.

3.184 When the limited fluctuations basis is used, the project must be thoroughly pre-planned.

3.185 The contract contains four clauses (37 to 40) covering fluctuations and these permit (by the selection by the employer of the appropriate alternative clause) either a limited fluctuations or a full fluctuations contract to be set up. (There are no provisions in the contract for a fixed price contract). These clauses apply only to work carried out by the contractor or domestic sub-contractors. Other clauses in the contract deal with fluctuations in the amounts payable to nominated sub-contractors and nominated suppliers. VAT is also dealt with separately.

Clause 37: Choice of fluctuation provisions

3.186 Clause 37, and an item in the appendix referring to clause 37, states which of the detailed alternative clauses (38, 39 or 40) the employer has selected to apply. The contract bills must state at tender stage how this item in the appendix will be completed. Clause 37.2 states that clause 38 shall apply if neither clause 39 nor clause 40 is identified in the appendix. The Department recommends that, even when clause 38 has been selected, a positive statement to that effect should be made.
3.187 Footnote [x] to clause 37 points out that the detailed clauses 38, 39 and 40 are published in a separate booklet and that notwithstanding the provision in clause 37.1 on deemed incorporation of the selected clause, the parties may wish to include a copy of the selected clause in the executed contract. The Department recommends that for convenience and in the interests of legal certainty, a copy of the selected clause should be included. This clause should be amended as described in paragraphs 3.214 to 3.217. Care must be taken to select the appropriate local authorities edition “With Quantities” clause as other clauses are available for the “Without Quantities” and “With Approximate Quantities” versions. The publishers of the booklet have given their agreement to the use of photocopies of the relevant pages of the booklet for this purpose.

The selection of clause 38, 39 or 40: Clause 38: Contribution, levy and tax fluctuations

3.188 Clause 38 limits adjustment of the contract sum in respect of price fluctuations to those arising from changes in statutory impositions as defined in clause 38.1.9 with regard to labour and in clause 38.2.1 with regard to materials.

3.189 Clause 38 should be selected by the employer in cases where Government policy requires a limited fluctuations contract. (It should be noted that “fixed price” would be an incorrect description for a contract incorporating this clause, since it permits adjustment of the contract sum in respect of changes in statutory impositions).

Clause 39: Labour and materials cost and tax fluctuations

Clause 40: Use of price adjustment formulae

3.190 Clauses 39 and 40 permit adjustment of the contract sum in respect of a wider range of price fluctuations than that permitted by clause 38. The costs of wages and materials are included in addition to statutory impositions.

3.191 Either of these clauses may be selected by the employer in cases where Government policy permits a full fluctuation contract. (See footnotes [w] and [y] to clause 37). The choice between clause 39 and clause 40 may be made by NHS bodies in the light of professional advice. It is important that the fundamental difference between the methods of calculation provided for by the two clauses is understood.
3.192 Under clause 39, the basic principle is that the price fluctuations are calculated by comparing the contractor’s costs for statutory impositions, wages and materials as actually incurred during the progress of the works, with the amounts that he would have paid had these costs remained unchanged from those he allowed for in his tender.

3.193 Under clause 40, the basic principle is that the tendered price for the work executed in each month is adjusted:

a. by reference to a set of rules (the JCT formula rules); and

b. to a series of nationally applicable index numbers which are published monthly and compiled so as to reflect changes in costs to the construction industry as a whole. The amounts of the adjustments so calculated are regarded as being an acceptable measure of the price fluctuations.

Particulars to be established at tender stage

3.194 In addition to the completion of the appendix item referring to clause 37 described above, the operation of clauses 38, 39 and 40 all require further particulars to be established before and during the tender period, as described in the following paragraphs.

Craftsmen’s wage rates

3.195 In connection with clauses 38.1.4 and 39.1.4, the JCT has advised that in cases where the contractor employs craftsmen under two or more wage-fixing bodies, it should be agreed with the contractor at tender stage what craft rate will be referred to for the purpose of whichever of those clauses has been selected by the employer.

Lists of materials, basic charges, market prices etc

3.196 Clause 38.2.1 requires the submission by the contractor of a list of the materials, goods, electricity and fuels on which he/she requires any fluctuation on the types and rates of duty and tax to be the subject of amendment under clause 38.2.2. The list has only to name the items; it is not necessary for the list to quote the type and rates of duty and tax that may be in force at the time of tender.

3.197 Clause 39.1.5 refers to the submission by the contractor of a list of basic transport charges. Such a list is necessary only where the contractor provides his own transport to and from the site or other workplace for his workpeople.
### Commentary

3.198 Clause 39.3.1 requires the submission by the contractor of a list of materials, goods, electricity and fuels on which he requires any fluctuation in prices to be the subject of adjustment under clause 39.3.2. The list must show the market prices of each item current at the date of tender.

3.199 The inclusion of fuels on the lists required for clauses 38.2.1 and 39.3.1 is dependent on the contract bills specifically stating that they should be included. The Department recommends that fuels should be included and NHS bodies should therefore ensure that contract bills contain statements to this effect.

3.200 Clause 40.3 requires the submission by the contractor of a list of articles manufactured outside the United Kingdom which fall within the definition given in rule 4(ii) of the Formula Rules, together with the market prices of the articles.

3.201 It is important to note that the clauses require that the lists referred to, are to be submitted by the contractor. The former practice adopted by some employers of preparing the lists and issuing them as part of the tender documents is no longer admissible.

3.202 NHS bodies should ensure that tender documents make it clear that the list or lists relevant to the particular fluctuations clause selected are to be submitted as part of the tenders. This is important to enable compliance with the requirements that the lists have to be attached to the contract bills and because NHS bodies will need to study the lists as part of their procedure for the valuation of tenders. It will be necessary to take into account not only the sums tendered, but also the varying amount of price fluctuations that would arise from any differences in the items and prices on the lists submitted by the tenderers.

### Percentage additions

3.203 The appendix to the contract contains an item referring to clauses 38.7 and 39.8 where the employer must state the percentage additions to be made to price fluctuations.

3.204 It is Government policy for public sector contracts that the percentage addition for use with clause 38.7 should be nil and for use with clause 39.8 should be up to 15% only. NHS bodies may insert a lower figure if they consider it appropriate. The contract bills must state at tender stage how this item in the appendix will be completed.
Application of the formula rules

3.205 The appendix to the contract contains an item referring to clause 40.1.1.1 where the employer must state three particulars needed for the application of the formula rules.

3.206 The month entered as the base month will normally be the calendar month prior to that which the employer has laid down for the receipt of tenders.

3.207 It is Government policy that the non-adjustable element should be 10%.

3.208 The choice between Part I and Part II of Section 2 of the formula rules may be made by NHS bodies in the light of professional advice.

3.209 The rules in Part I, under which the relevant work category indices are applied individually, offer some advantage over those in Part II under which work categories are combined together into a smaller number of work groups. This combination process can result in the calculation of the price adjustment being less sensitive to changes in the indices than if they were applied individually. In addition, a domestic sub-contractor carrying out work in only one category may suspect that the price adjustment attributable to his/her work may have been adversely affected by the process of combining his category with other categories which are of no relevance to his/her work.

3.210 The method of dealing with “fix-only” work (Rule 3) should be stated in the tender documents.

3.211 When the works are partly or wholly engineering and are executed by an engineering main contractor, Part III of Section 2: “Specialist engineering installation carried out by the Contractor as Contractor’s specialist work” will apply and additional information will have to be entered in the appendix to the form.

Base date

3.212 In the interests of avoiding confusion, it should be noted that for purposes of clauses 38, 39 and 40.3, the expression “Base Date” is defined as being the date ten days before the date fixed for the receipt of tenders by the employer. Price fluctuations are related to the base date as defined and not to the date on which tenders are received.

3.213 When clause 40 has been selected, price fluctuations are related to the base month as described in paragraph 3.206.
3.214 Clauses 38, 39 and 40 all contain provisions whereby, in cases where the contractor is in default in regard to completing the work by the date for completion or any revised date fixed by the architect/the contract administrator, the price fluctuations are “frozen” at the rates current at the date when the contractor should have completed the works. The provisions are dependent upon clause 25 (extensions of time) being used as printed without amendment and upon the architect/the contract administrator having dealt with all applications for extension of time. It has, however, already been recommended in paragraph 3.112 that where clauses 22A, 22G and 22J are used, clause 25 should be amended.

3.215 When clause 39 has been selected, an additional clause 39.6.5 should be included.

3.216 When Clause 40 has been selected an additional clause 40.1.5 should be included.

3.217 Consequent upon the amendment to clause 25 (paragraph 3.115) an amendment should be included in the selected fluctuation clause.

Insert the following clause 39.6.5 when clause 39 has been selected:

“39.6.5 The non-productive element of overtime worked at the Contractor’s option.”

Insert the following clause 40.1.5 when clause 40 has been selected:

“40.1.5 For the purpose of the application of the Formula Rules and Sub-Contract/Works Contract Formula Rules, specialist engineering equipment delivered to site and placed in final position (with or without fixing) will be deemed to be incorporated in the Works and the value thereof included in the value of work properly executed.”

The following amendment should be made to:

Clause 38.4.8.1 or
Clause 39.5.8.1 or
Clause 40.7.2.1

After “clause 25 is unamended”

Part 4: Settlement of disputes –
Adjudication – Arbitration – Legal
Proceedings

3.218 Attention is drawn to the guidance contained in Chapter 22 of ‘Contracts and commissions for the NHS estate – Guide to Contract Procedures’ regarding adjudication, arbitration and litigation.

Adjudication

3.219 Clause 41A, which is referred to in Article 5 set out the provisions for settlement of disputes or differences by adjudication.
### Commentary

**3.220** NHS bodies should note that the adjudication clause contains strict time limits that must be complied with.

### Notes/amendments

**For disputes to be decided by legal proceedings and not by arbitration** delete “Clause 41B applies” in the Appendix.

### Arbitration/legal proceedings

**3.221** NHS bodies should note that the JCT form of contract contains an option for parties to take disputes either to arbitration or for them to be the subject of legal proceedings. The guidance notes to Amendment 18 of JCT 80 list the advantages of arbitration and legal proceedings. NHS bodies must decide on which method they wish disputes to be resolved.

**3.222** Clause 41B, which is referred to in Article 7A, sets out the provisions for the settlement of disputes by arbitration. Where two or more related arbitral proceedings on the same project are under separate arbitration proceedings any person required to appoint an arbitrator must consider whether the same or different arbitrator should be appointed. Unless there are sufficient reasons the same arbitrator should be used.

**3.223** Where the works are situated in Scotland, the forms issued by the Scottish Building Contract Committee, which contain Scots proper law, adjudication and arbitration provisions, are the appropriate documents. It should be noted that the provisions of the Arbitration Act 1996 do not extend to Scotland.

**3.224** If arbitration is used, NHS bodies should be aware that the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR) (Clause 41B.6) contain stricter time limits than those prescribed by some arbitration rules or those frequently observed in practice. NHS bodies must note that failure by them or an agent of theirs to comply with the time limits incorporated in these rules may affect their situation adversely. The Department’s view is that clause 41B.6 should be retained. It is in the interest of all parties that any dispute should be settled as soon as possible.

### Code of practice: referred to in clause 8.4.4

**3.225** The purpose of the code of practice is to assist the architect/ the contract administrator and the contractor in the fair and reasonable operation of clause 8.4.4.

**3.226** This clause allows the architect/ the contract administrator to instruct the contractor to open up for inspection or to test to establish the likelihood or extent of any further similar non-compliance. No addition to the contract sum is made for any workmanship, materials or goods found to be not in accordance with the contract.
### Commentary

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Notes/amendments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>3.227</strong> The appendix is an integral and important part of the executed contract. This sets out the information required to be established for each contract by the various clauses of the conditions and must be completed with care.</td>
<td></td>
</tr>
<tr>
<td><strong>3.228</strong> This appendix is for use when the contract is not adapted by the modification in the sectional completion supplement (see paragraphs 6.1 to 6.11).</td>
<td></td>
</tr>
<tr>
<td><strong>3.229</strong> The information to be provided in the tender documents regarding the completion of the appendix is summarised below. Other information will need to be agreed with the successful tenderer.</td>
<td></td>
</tr>
<tr>
<td>Clause etc</td>
<td>Construction Industry Scheme (CIS)</td>
</tr>
<tr>
<td>-----------</td>
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<tr>
<td>CDM Regulations</td>
<td></td>
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<tr>
<td>Dispute or difference – settlement of disputes</td>
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<td></td>
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<tr>
<td>Base date</td>
<td></td>
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<tr>
<td>Date for completion</td>
<td></td>
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<tr>
<td>VAT Agreement</td>
<td></td>
</tr>
<tr>
<td>Defects liability period (if none other stated, is six months from the day named in the certificate of Practical Completion of the Works)</td>
<td></td>
</tr>
<tr>
<td>Assignment by employer of benefits after practical completion</td>
<td></td>
</tr>
<tr>
<td>Insurance cover for any one occurrence or series of occurrences arising out of one event</td>
<td></td>
</tr>
<tr>
<td>Insurance – liability of employer required (paragraph 3.76)</td>
<td></td>
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<tr>
<td>Insurance of the works: alternative clauses</td>
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<td></td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage to cover professional fees</td>
<td></td>
</tr>
<tr>
<td>Annual renewal date of insurance as supplied by contractor</td>
<td></td>
</tr>
</tbody>
</table>
Insurance for employer’s loss of liquidated damages – clause 25.4.3

Normally delete “may be required” paragraphs 3.97 to 3.99)

Joint fire code

Normally delete “does not apply” and delete the appropriate option on whether the project is a “Large Project”.

Date of possession

A specific date must be inserted

Deferment of the date of possession

Delete “does not apply” (paragraph 3.104)

Liquidated and ascertained damages

Insert rate per day (paragraphs 3.107 and 3.108)

Period of suspension

It is essential that one be inserted since otherwise no period of delay would be prescribed. Insert “one month”, “three months” and “one month” respectively

Period of interim certificates (if none stated is one month)

Insert “one month”

Gross valuation

Delete either “is” or “is not”

Listed items off site

Delete if no bond is required or insert a sum for the amount of bond

Delete if clause 30.3.2 is not to apply or insert a sum for the amount of bond

Retention percentage (if less than 5 per cent)

Insert “3%” or “2½%” (paragraph 3.143)

Work reserved for nominated sub-contractors for which contractor desires to tender

(See paragraph 3.155 to 3.159)

Fluctuations: (if alternative required is not shown clause 38 shall apply)

Delete the clauses that are not to apply (paragraphs 3.186 to 3.193)

Percentage addition

If clause 38 applies, insert “Nil” or if clause 39 applies insert a figure not exceeding 15% (paragraphs 3.203 and 3.204)

Formula rules

If clause 40 applies:

Insert the base month

Insert 10% 

Delete the part of Section 2 of the Formula Rules which is not to apply (paragraphs 3.205 to 3.209)

If Part III of Section 2: Specialist Engineering Installations carried out by the Contractor as Contractor’s Specialist Work applies (paragraph 3.211), on a separate sheet to be attached to the executed contract, insert the following rules, as applicable, together with the various weighting of
labour and materials and other information as required by the Formula Rules.

rule 43 Weightings of labour and materials – electrical installations or heating, ventilating and air-conditioning installations or sprinkler installations:

<table>
<thead>
<tr>
<th></th>
<th>Labour</th>
<th>Materials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrical</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Heating, ventilating and air-conditioning</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Sprinkler</td>
<td>%</td>
<td>%</td>
</tr>
</tbody>
</table>

rule 55A The separate materials index for sprinkler installations:
- will/will not apply

rule 61A Lift installations. Adjustment shall be effected:
- upon completion of manufacture of all fabricated components
- upon delivery to site of all fabricated components

rule 64 Structural steelwork installations:
(i) Average price per tonne of steel delivered to fabricator’s works
   £
(ii) Average price per tonne for erection of steelwork
    £

rule 70A Catering equipment installations:
Apportionment of the value of each item between:
(i) materials and shop fabrication;
(ii) supply of factor items;
(iii) site installations;
is as set out in the list attached.

In rule 10 and 30 (i) above, delete “Part I/Part II” and insert “Part III”.
- (Delete as applicable)

Adjudication – nominator of adjudicator (if no nominator is selected the nominator shall be the President of or a Vice-President of the Royal Institute of British Architects)
41A.2 Delete appointers that are not to apply

Arbitration – appointer (if no appointer is selected the appointer shall be the President or a Vice-President of the Royal Institute of British Architects).
41B.1 Delete appointers that are not to apply

Performance Specified Work
42.1.1 Identify each item of Performance Specified Work either separately on this page or on a separate sheet for each item, together with the relevant reference in the Contract Bills.

Incorporating Amendment 1: 1999

Introduction

4.1 The fundamental difference between the “With Approximate Quantities” version of the JCT Standard Form of Building Contract and the “With Quantities” version is made clear by the headnote to the articles of agreement which reads:

“This Form is for use where the Works have been substantially designed but not completely detailed so that the quantities shown in the Bills are approximate and subject to remeasurement.”

4.2 The contract should not be used where only certain sections of the quantities in the bills are approximate (for example abnormal foundations, drainage, external works). In such cases, the Standard Form With Quantities should be used and the relevant items in the contract bills marked “Provisional”.

4.3 The “With Quantities” form and “With Approximate Quantities” form are identical in very many respects. However, there are some important changes which flow from and recognise the approximate nature of the information on which the contract is based. The principal differences are highlighted in the following paragraphs. Further information on the changes is given in JCT Practice Note 7.

4.4 The commentary and contract amendments set out previously regarding the “With Quantities” form apply equally to the “With Approximate Quantities” version and should be followed with only such changes as are clearly necessary to preserve sense.

Principal changes from the “With Quantities” form

Articles of agreement

4.5 The first recital states that the bills of approximate quantities describe the work to be done and are “intended to set out a reasonably accurate forecast of the quantity of the work to be done”. This important qualification is intended to prevent the use of this form for works which have not been substantially designed with the result that the quantities do not set out a reasonably accurate forecast of the quantity of the works. For the position where this intention is not fulfilled see paragraphs 4.8 and 4.9.

4.6 The second recital provides for the insertion of a “tender price” which is the total of the prices inserted by the contractor in the bills of approximate quantities instead of a “Contract Sum”. The tender price will always be converted as a result of the provisions on remeasurement and valuation contained in the contract conditions. The total payment to be made to the contractor is referred to in Article 2 and throughout the conditions as the “ascertained final sum” as distinct from the “adjusted Contract Sum” in the “With Quantities” version.

The conditions

4.7 Clause 13: variations and provisional sums in the “With Quantities” version is replaced by a similar worded clause 14: measurement and valuation work including variations and provisional sums. However, the word “quantity” has been excluded from the definition of the term “variation” in the “With Approximate Quantities” version (clause 14.1), as the quantity of work included in the tender price is only approximate. The actual work carried out in accordance with the contract drawings and the architect’s/the contract administrator’s instructions is remeasured. Such remeasurement is not a variation under this contract since the quantity of work to be carried out has never been fixed and cannot therefore be subject to a variation.

4.8 Clause 14.5: in the “With Approximate Quantities” version contains the rules for the valuation of measured work which follow those in clause 13.5 of the “With Quantities” edition. This clause relates to the valuation of variations and work executed in accordance with the architects/the contract administrator’s instructions as to the expenditure of a provisional sum. The main difference is that clause 14.5.1.2 provides for the situation where, contrary to the intention expressed in the articles of agreement (see paragraph 4.5), the approximate quantities were not a reasonably accurate forecast of the quantity of the work. Work whose quantity is not reasonably accurately forecast is never valued under clause 14.5.1.1 (work of similar character and executed under similar conditions) but under clause 14.5.1.2.
4.9 Clause 25: Extension of time in the “With Approximate Quantities” version contains an additional “relevant event” (clause 25.4.13) namely “the execution of work the quantity of which was not reasonably accurately forecast in the Contract Bills”. Clause 26: loss and expense caused by matters materially affecting regular progress of the works, contains a similar additional heading (clause 26.2.8) as grounds for the contractor submitting a claim.

4.10 The “With Approximate Quantities” version only provides for the use of the full fluctuations clauses 39 and 40. Clause 38, permitting limited fluctuations is not included and should not be added although the estimated duration of the execution of the works may not exceed two years. Limited fluctuations are not appropriate as the work is not thoroughly pre-planned when using the “With Approximate Quantities” form and the contractor is therefore not in a position at an early stage to obtain and place firm orders for the work.

4.11 Where clause 40: formula adjustment is selected, it should be noted that Part II: work groups of the formula rules, does not apply to the “With Approximate Quantities” version. The quantities, being approximate, would not be suitable for use in preparing work group indices which require the use of the tender weighting of the work in the various work categories.

4.12 Care must be taken to select the appropriate “With Approximate Quantities” fluctuation clause 39 or clause 40 for inclusion in the executed contract (see paragraph 3.187).

Introduction

5.1 The “With Quantities” form and “Without Quantities” form are similar in many respects but there are nonetheless some important changes which flow from the use of a specification or schedules of work instead of bills of quantities. The principal differences are highlighted in the following paragraphs.

5.2 The commentary and contract amendments set out in Section 3 regarding the “With Quantities” form apply equally to the “Without Quantities” version and should be followed with only such changes as are clearly necessary to preserve sense.

5.3 Care must be taken to select the appropriate “Without Quantities” fluctuation clause 38, clause 39 or clause 40 for inclusion in the executed contract (see paragraph 3.187).

Principal changes from the “With Quantities” form

Tendering

5.4 Tendering takes place based on drawings and specifications or drawings and schedules of work instead of the contractor pricing bills of quantities.

5.5 The employer may provide schedules of work as an alternative to the provision of a specification which together with the drawings show and fully describe the works.

5.6 The contractor can be required to either:

a. price in detail the specification or the schedules of work with the total of that pricing being the contract sum (alternative A of second recital); or

b. state the sum required for carrying out the works shown on the drawings and described in the specification and to supply either an analysis of that sum (“the Contract Sum Analysis”) or a schedule of rates on which that sum is based (alternative B of second recital).

5.7 The contractor is required to base the contract sum on any quantities stated in the contract documents; any change required in these quantities would be a variation (clause 2.2.2.2).

Articles of agreement

5.8 The first recital should be completed to state whether a “specification” or “schedules of work” has been prepared and the second recital to state whether “alternative A” or “alternative B” applies. In the second recital, the priced specification/the priced schedules of work (alternative A) or the contract sum analysis or schedule of rates (alternative B) are referred to in the contract conditions as “the priced document” (see paragraphs 5.11 to 5.15).

5.9 It should be noted that if alternative B in the second recital applies, the contract sum analysis/the schedule of rates do not become contract documents. They should however be attached to the executed contract with any other relevant documents and signed by or on behalf of the parties.

5.10 Articles of agreement are provided which permit either the appointment of a quantity surveyor (article 4A) or the appointment of a person to exercise the functions ascribed by the conditions to the quantity surveyor (article 4B). The decision as to which of these two articles the employer selects will depend on the nature and/or complexity of the contract works. For example, if the contract is being used for works which are mainly or wholly engineering services, it might be appropriate to appoint an engineer under article 4B rather than a quantity surveyor under article 4A.

Priced document

5.11 The “priced document” referred to in the contract may be one of the following:

a. the specification or the schedules of work provided by the employer and priced by the contractor (second recital, alternative A);

b. a contract sum analysis prepared and provided by the contractor (second recital, alternative B). Practice
Note 23: ‘Contract Sum Analysis’ gives guidance on this subject,

c. a schedule of rates (an alternative choice to a contract sum analysis) provided by the contractor (second recital, alternative B).

5.12 The “priced document” is essential to the financial management of the contract as it is required to be used in the valuation of variations and of expenditure of provisional sums and in the final adjustment of the contract sum (clauses 13.5 and 30.6.2).

5.13 The second recital, alternative B which requires the contractor to supply a schedule of rates if this option is chosen, is not seen as preventing the employer from preparing the blank (that is unpriced) document in which the contractor enters his rates. The Department considers that the employer’s interest is best served if the blank schedule of rates is prepared by the quantity surveyor or by the person exercising the functions of the quantity surveyor and issued for the contractor to price.

5.14 The Department recommends that the “priced document” should be returned at the same time as the tender but in a separate package endorsed with the tenderer’s name. In this way, the “priced document” of tenders not considered for acceptance can be returned unopened.

5.15 The Department considers that the employer can be best assured that the “priced document” separately identifies all the items and their quantity, rates and prices that may need to be referred to in using the document for the purposes which the contract requires if it is examined by the quantity surveyor or the person exercising the functions of quantity surveyor prior to acceptance of the tender.

Introduction

6.1 The sectional completion supplement enables the JCT Standard Form of Building Contract, “With Quantities” and “With Approximate Quantities” to be adapted so as to be suitable where the employer requires the works to be completed by phased sections. The standard form, when adapted by incorporating the supplement, is referred to as “the adapted contract”. A similar supplement and Practice Note 1A is produced for the “Without Quantities” form.

6.2 The supplement is published in a booklet which includes detailed instructions on the incorporation of the supplement into the executed contract and also JCT Practice Note 1 which discusses and explains relevant points. It is important to note that care should be taken when preparing the table of modifications on pages 10/1 to 10/8 of the supplement for incorporation into the executed contract. This is to ensure that additional amendments to the standard form are taken into account when preparing the modifications for sectional completion.

6.3 The words “with sectional completion supplement” should be added to the title printed at the top of the endorsement on the outside back cover of the contract form. To Indicate where the conditions have been modified by the incorporation of the additional article and table of changes, insert the symbol (T) (or some other indication) in the margin beside the modified clauses.

Distinction between section completion and partial possession

6.4 It is important to distinguish between sectional completion (as provided for by the supplement) and partial possession (as provided for by clause 18 of the JCT Standard Form).

6.5 Sectional completion of the works is a contractual requirement laid down by the employer prior to Inviting tenders, whereas partial possession by the employer of part or parts of the works prior to practical completion of the works must be the subject of an agreement made at the time between the employer and the contractor. Partial possession cannot take place without the contractor giving his consent, following an approach from the employer. The adapted contract modifies clause 18 but does not rule out the possibility of the employer and the contractor making an agreement for partial possession of part of any section prior to practical completion of the section.

Procedures for obtaining sectional completion

6.6 The procedures for obtaining sectional completion can only be used when the employer has decided prior to inviting tenders that he requires the works to be carried out in phased sections, of which he will take possession of each section on practical completion.

6.7 The tender documents (that is the proposed contract drawings and contract bills/specification/schedules of work) must identify the sections into which the works are to be divided. These sections must be numbered serially and each must have:

a. its own value, (ascertained after tender from the contract bills/-priced document);
b. defects liability period;
c. date of possession;
d. date for completion; and
e. rate of liquidated and ascertained damages.

The appendix to the sectional completion supplement provides for the foregoing particulars for each section to be entered, in addition to the other customary appendix items. Usually the rate of liquidated and ascertained damages entered for each section will be pro-rata to the value of the section, but this is not a contractual requirement and may not be appropriate where there are special circumstances attaching to one or more sections. It should be noted that the adapted contract remains a single contract and there is therefore only one final certificate, there is no provision for separate final certificates for each section.
Dates of possession and dates for completion of sections of works

6.8 The Department’s recommendations regarding the date of possession and the date for completion in tender documents and the executed contract for contracts which have not been adapted by the sectional completion supplement are given in paragraphs 3.104 to 3.106.

6.9 The following additional recommendations should be taken into account for contracts incorporating the sectional completion supplement for tendering purposes:

a. the date of possession for the first section should be given as described in paragraphs 3.104 to 3.106. For subsequent sections insert periods in days or weeks relative to the day to be named in the certificate of practical completion of the relevant preceding section;

b. do not enter dates for completion of section, but Insert periods in days or weeks relative to the date of possession of that section. The date for completion of the final section must be given as a specific number of consecutive calendar weeks after the date of possession of the first section.

6.10 Specific dates for possession and completion of each section and/or periods for the execution of the work in each section will need to be established with the successful tenderer and inserted in the appendix (sectional completion supplement).

6.11 If specific dates for possession and completion for each section are entered in the executed document, great care must be taken by the architect/the contract administrator when granting an extension of time for completion of a section (clause 25). Consideration must be given to its effect on the dates of possession and dates for completion of subsequent sections.
Introduction

7.1 The contractor’s designed portion supplement enables the JCT Standard Form of Building Contract, “With Quantities” and “Without Quantities”, 1998 Edition, to be modified so as to be suitable where the employer requires a portion of the works to be designed by the contractor. The supplements are published in a booklet which also contains detailed instructions on the incorporation of the supplements, including supplementary appendices, into the executed contract.

7.2 These supplements are not considered appropriate for use where a purchase of the contractor’s standard units is desired, which would be more akin to product purchase for which other contractual arrangements would be appropriate.

7.3 The supplements are not suitable for nominated sub-contract work tendered by the contractor under the provisions of clause 35.2 of JCT 98.

7.4 The words “With Contractor’s Designed Portion Supplement” should be added to the title printed at the top of the endorsement on the outside back cover of the contract form.

Practice Note CD/2

7.5 The Practice Note CD/2 which discusses and explains points relevant to the use of the supplement, is published separately. Although this practice note is based on the use of JCT 80 its contents are still relevant. Subjects covered include:

a. the employer’s requirements;

b. the contractor’s proposals;

c. the analysis of the contract sum;

d. insurance: contractor’s design liability;

e. commentary on the modifications in the supplement;

f. application of formula price adjustment.

Examination of the supplement

The employer’s requirements

7.6 The employer’s requirements must clearly define in the tender documents the extent and purpose of the portion of the works to be designed by the contractor. The employer should ensure that suitable provisions are made to enable them to copy and use the contractor’s design to facilitate future extension, alteration, maintenance or repair of the works. The employer’s requirements must also include any conditions regarding form and content of the contractor’s proposals and the analysis and any supporting design proposals, drawings, calculations, etc to be submitted with the tender to enable the contractor’s proposals to be evaluated.

7.7 The tender documents must also state:

a. if clause 2.7.2 (Defective Premises Act 1972) applies;

b. that clause 2.7.3 (limit of contractor’s liability for use, etc) does not apply (see paragraphs 7.11 to 7.16).

The contractor’s proposals

7.8 The contractor’s proposals, in accordance with the employer’s requirements, should be submitted at the same time as the tender. The analysis and any supporting documents should also be submitted at the same time as the tender but in a separate package endorsed with the tenderer’s name. In this way the analysis and any supporting documents of tenders not considered for acceptance can be returned unopened.

7.9 The contractor’s proposals and supporting documents must be carefully evaluated to establish that the employer’s requirements and the contractor’s proposals are consistent and do not contain any conflicting provisions. (Seventh recital of the supplement refers.)

The analysis of the contract sum

7.10 The analysis is required for the valuation of variations and provisional sum work in respect of the
contractor’s designed portion (clause 13.8 of the supplement) and where clause 40 (use of the price adjustment formulae) applies. The analysis also facilitates the determination of the amounts to be included in payment certificates.

**Contractor’s liability for design**

7.11 Clause 2.7.1 of the supplement places on the contractor a similar obligation with regard to design work carried out by him/her under the contract as would be placed on an architect under a commission from a client. Under the latter arrangement no limit is placed on the architect’s liability to the client and the Department sees no reason why any limit should be set when a contractor designs instead of an architect.

7.12 The Department recommends that the supplementary appendix item regarding clause 2.7.3 should be completed by deleting “2.7.3 applies with limit of £”. The item will then read “2.7.3 does not apply”, that is to say, no limit will be placed on the contractor’s liability set out in clause 2.7.1.

7.13 It is, however, important to appreciate that the supplement does not include any requirement that the contractor’s liability (which could be substantial) shall be covered by insurance. This point is discussed at length in Practice Note CD/2 and the Department considers it important that NHS bodies should adopt a procedure to ensure that suitable insurance cover is taken out by the contractor and maintained not only during the period of the contract, but also for a reasonable period of years thereafter. (Design defects may well not become apparent for a considerable time after completion of the works.)

7.14 The Department recommends that NHS bodies should adopt a procedure broadly similar to that used in regard to professional consultants’ insurance. At tender stage, the NHS body should require submission of the contractor’s insurer’s certificate and make it a condition of the contract that the contractor shall take appropriate cover lasting six years from the date of practical completion of the works. The NHS body should make an annual check that the necessary cover is being maintained, by obtaining further certificates from the insurer.

7.15 The certificates, which should be given by the contractor’s insurer/insurance broker (not by the contractor himself/herself), should be to the effect that the contractor is currently insured for the period ending … (date) for all claims arising as a direct result of any negligent act, error or omission in the conduct and execution of designs entrusted to him or entrusted by him to any other party. The limit of indemnity for each and every claim and the amount of any excess (if any) carried by the contractor on each and every claim should be stated.

7.16 Should it be found that the contractor does not carry insurance covering liability for design work, his/her suitability for the award of the contract should be reconsidered.

**Use in the NHS**

7.17 Passing responsibility for design for a portion of the works from professional designers to contractors is contrary to the Department’s view that NHS bodies should prepare as full design details as possible prior to inviting tenders if a traditional contract strategy is being used. However, there may be circumstances involving specialised design where it is advisable to draw on the expertise of manufacturers. This can normally be achieved by nominating a sub-contractor or a supplier which will also secure warranties to the employer with regard to the design work, but in exceptional circumstances the use of the contractor’s designed portion supplement may be considered.
8.0 Nomination of sub-contractors and suppliers

Introduction

8.1 NHS bodies are referred to paragraphs 3.179 to 3.182 regarding the Department’s recommendations on the nomination of sub-contractors and suppliers.

8.2 Reference has been made in paragraphs 3.154 to 3.182 to clauses 35 and 36 in the JCT Standard Form of Building Contract and to the related JCT ‘NSC’ and ‘TNS’ documents. These enable the architect/the contract administrator to reserve to himself/herself the final selection and approval of firms to undertake portions of the works included in a contract with a contractor. The procedures require the nomination, to the contractor, of firms that the architect/the contract administrator has asked and approved following receipt by him/her (or the employer) of tenders from them. Only one firm is nominated for each portion of the works; the contractor is not given any choice. But he does have a right of reasonable objection to any nominated firm.

8.3 The general principles to be followed by NHS bodies regarding the use of selective competitive tendering and the invitation, receipt and evaluation of tenders and use of parent company guarantees apply to tenders from potential nominated sub-contractors and suppliers, NHS bodies, and the architect/the contract administrator must also comply with the provisions of the Public Works Contracts Regulations 1991 if they are applicable to the contract. Any “equivalent” proposed by a tenderer must be approved by the NHS body and the architect/the contract administrator prior to the issue of an instruction nominating the tenderer.

8.4 The paragraphs which follow contain guidance on the documentation and procedures to be used in the nomination of sub-contractors and suppliers.

8.5 The intention of the JCT is that the standard documentation for nominated sub-contractors and nominated suppliers (having been carefully compiled to be completely compatible with the JCT form of main contract) should be used without amendment. However, as the requirements of Government and Departmental policy necessitate amendments to be made by NHS bodies to the main contract, it is necessary for them to ensure that amendments to the main contract are reflected in the ‘NSC’ and ‘TNS’ documents. This ensures that compatibility is maintained between the form of main contract (as amended) and the form of sub-contract and contract of sale. (The amendments to the ‘NSC’ and ‘TNS’ documents arise mainly, but not entirely, from the Government’s policy regarding loss or damage to its buildings described in chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to contract procedures’ and paragraphs 2.44 to 2.47.

Nomination of sub-contractors under the 1991 procedure

Documentation

8.6 The 1991 procedure of nomination which is covered by clauses 35.3 to 35.9 of the JCT Standard Form of Building Contract requires the mandatory use of the following documents:

<table>
<thead>
<tr>
<th>Name of document</th>
<th>Identification term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part 1: The Architect’s/the Contract Administrator’s Invitation to Tender to a Sub-Contractor.</td>
<td></td>
</tr>
<tr>
<td>Part 2: Tender by a Sub-Contractor.</td>
<td>Part 2</td>
</tr>
<tr>
<td>Part 3: Particular Conditions (to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 clause 35.6).</td>
<td></td>
</tr>
<tr>
<td>The Standard Form of Articles of Nominated Agreement Sub-Contract Agreement between a Contractor and a Nominated Sub-Contractor, 1998 Edition</td>
<td>NSC/A</td>
</tr>
<tr>
<td>The Standard Form of Employer/Nominated Sub-Contract Agreement, 1998 Edition</td>
<td>NSC/N</td>
</tr>
<tr>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor.</td>
<td></td>
</tr>
</tbody>
</table>

8.7 For the operation of the 1998 procedure:

a. employers require:

   i. a copy of Conditions of Sub-Contract NSC/C;
b. architects/contract administrator require:
   (i) pads of the Invitation to Tender NSC/T Part 1;
   (ii) pads of Employer/Sub-Contractor Agreements NSC/W;
   (iii) pads of Nomination Instruction NSC/N;
   (iv) a copy of Conditions of Sub-Contract NSC/C;

c. sub-contractors require:
   (i) pads of Tender by a Sub-Contractor NSC/T Part 2;
   (ii) a copy of Conditions of Sub-Contract NSC/C;

d. contractors require:
   (i) pads of the Particular Conditions NSC/T Part 3;
   (ii) pads of Nominated Sub-Contract Agreement NSC/A;
   (iii) a copy of Conditions of Sub-Contract NSC/C.

Nomination procedures

8.8 Normally the nomination of a sub-contractor should only be made after selective competitive tendering procedure amongst an adequate number of eligible firms. NHS bodies should take into account the requirements of the EC Works Directive if they are applicable.

8.9 The steps to be followed leading to the execution of a nominated sub-contract agreement between the contractor and a nominated sub-contractor are as follows:

Step 1

The architect/the contract administrator draws up, in conjunction with the employer/project manager, a list of firms to be Invited to tender (“the potential subcontractors”).

Step 2

The architect/the contract administrator:

a. undertakes the following for each potential sub-contractor:
   (i) completes an Invitation to Tender NSC/T Part 1;
   (ii) prepares the numbered tender documents, that is:
   (iii) sub-contract drawings;
   (iv) bills of quantities/specification/schedules of work;
   (v) extract(s) from the main contract bills of quantities (or specification/schedules of work) including the appendix to the main contract as it is or is anticipated it will be completed;
   (vi) amendments to be made to sub-contract NSC/C etc;

b. sends to each potential sub-contractor the completed Invitation to Tender NSC/T Part 1 and numbered tender documents together with the Employer/Nominated Sub-Contractor Agreement NSC/W with page 1 completed.

Step 3

Each potential sub-contractor:

a. completes his tender on NSC/T Part 2;

b. enters into the Employer/Nominated Sub-Contractor Agreement NSC/W (by completing his section by signing as a simple contract or as a deed as instructed by the architect/the contract administrator. (The Agreement NSC/W should be executed as a deed when the main contract is or will be executed as a deed and the nominated sub-contract is an important portion of the works);

c. submit his tender together with completed Agreement NSC/W.

Step 4

The architect/the contract administrator:

a. ascertains that the tender is open for acceptance for sufficient time to enable the process of nomination to take place and the sub-contract to be concluded (Step 5);

b. confirms that the sub-contract information contained in Tender NSC/T Part 2 conforms with the sub-contract information given in the Invitation to Tender NSC/T Part 1;

c. evaluates, in conjunction with the employer/project manager, the tenders received and selects the firm he proposes to nominate;

d. arranges for the employer to sign (or signs on his behalf) the tender of the successful sub-contractor to signify approval and for the employer to execute and date the Agreement NSC/W as a simple contract or as a deed, to retain that Agreement and to give to the architect/the contract administrator forthwith a certified true copy thereof;

e. issues his nomination instruction on form Nomination NSC/N and sends this to the contractor (JCT 98 clause 35.6) together with a copy of:
   (i) his invitation to tender and the applicable sub-contractor’s tender (the completed NSC/T Parts 1 and 2);
   (ii) the numbered tender documents including any additional documents and/or amendments he has made or agreed thereto;
   (iii) a certified true copy of the executed Employer/Nominated Sub-Contractor Agreement NSC/W;
f. sends a copy of his nomination instruction to the sub-contractor thereby nominated together with a copy of:
   (i) a certified true copy of the executed Employer/Nominated Sub-Contractor Agreement NSC/W; and
   (ii) the completed appendix to the executed main contract.

**Step 5**

The contractor (JCT 98 clause 35.7):

a. checks that the main contract details in the tender NSC/T Parts 1 and 2 and the numbered tender documents attached accurately reflect his main contract;

b. agrees with the sub-contractor the matters set out in NSC/T Part 3 to signify such agreement (note the procedures set out in clauses 35.8 and 35.9 where the agreement is not already obtained); and

c. enters into a sub-contract as a simple contract or executed as a deed with the sub-contractor on Agreement NSC/A;

d. sends the architect/the contract administrator a certified true copy of the executed Agreement NSC/A and of the agreed and signed NSC/T Part 3.

**Step 6**

The sub-contractor:

a. checks that any differences between the appendix to the main contract sent to him/her by the architect/ the contract administrator with the invitation to tender and that sent with the nomination instruction are acceptable;

b. agrees with the contractor the matters set out in NSC/T Part 3 and signs this to signify such agreement;

c. enters into a sub-contract as a simple contract or executed as a deed with the contractor on Agreement NSC/A.

**8.10** The architect/the contract administrator should provide the employer with copies of all documents relating to nominated sub-contracts.

**Completion of the documents**

**8.11** Examination of the steps of the procedure referred to in the previous paragraphs shows that the various documents need to have items of information entered on them by various parties at various steps of the procedure. Appendix 6 contains a set of the documents to be used in the 1991 procedures. Where appropriate the documents have been annotated for guidance to draw attention to the type of information required. The documents themselves include side notes relating to the completion of the document which should be observed.

**8.12** The annotation of the documents in Appendix 6 draws attention to points where a choice has to be indicated and it also indicates at which point in the procedures the information is entered, for example, “the architect/the contract administrator (2)” indicates that the information is to be entered by the architect/the contract administrator at Step 2 of the procedure.

**Invitation to Tender NSC/T Part 1 (Appendix 7)**

**8.13** The Invitation to Tender NSC/T Part 1 is completed by the architect/the contract administrator and sent to each potential sub-contractor (Step 2).

**8.14** The introduction to the Tender NSC/T Part 1 on page 2 provides for the architect/the contract administrator to specify the type of tender to be submitted that is “a VAT-exclusive sub-contract sum” or “a VAT-exclusive tender sum”. Where the design of the sub-contract works is incomplete necessitating the re-measure and valuation of the sub-contract works, a VAT-exclusive tender sum should be obtained (see side note b).

**8.15** Except in exceptional circumstances, the Department recommends that all tenders for nominated sub-contract works should be invited on a VAT-exclusive sub-contract sum basis that is the sub-contract works are fully designed, detailed and specified before tenders are invited. The exceptions are in:

   a. design;
   b. the selection of materials and goods;
   c. the satisfying of stipulated performance requirements.

**8.16** These are left to the responsibility of the nominated sub-contractor under the terms of the Employer/ Nominated Sub-Contractor Agreement NSC/W (see paragraphs 8.37 to 8.43).

**8.17** The names and addresses of the various parties connected with the main contract are entered on page 3. Where the functions of the quantity surveyor under the nominated sub-contract will not be exercised by the quantity surveyor named in the main contract, this must also be stated and the person who will exercise the quantity surveyor’s functions named, for example for a specialist sub-contract such as mechanical and engineering installations where the services engineer may be carrying out the quantity surveyor functions.
8.18 The Department recommends that items 3, 7, 8, 9 and 11 are completed as shown in paragraphs 8.19 and 8.20. Alternative 1 (paragraph 8.19) may be used when the preliminaries section of the main contract bills of quantities (or of the specification/schedules of work) is available at the time of issuing Tender NSC/T Part 1 while alternative 2 (paragraph 8.20) may be used when the preliminaries section is not at the time available. The Department strongly recommends that alternative 1 (paragraph 8.19) is used by NHS bodies.

8.19 Alternative 1

Item 3  **Insert** “Details of the amendments to the main contract are given in the preliminaries element of the main contract bills of quantities (or specification/schedules of work) which is annexed hereto numbered “*” (**insert** reference as appropriate)

Item 7, 8, 9 and 11  **Insert** under each item “Details are given in the preliminaries element of the main contract bills of quantities (or specification/schedules of work) which is annexed hereto numbered “*” (**insert** reference as appropriate).

8.20 Alternative 2

Item 3  **Insert** “Details of the amendments to the main contract are given in document numbered * annexed hereto” (**insert** reference as appropriate). The numbered document must contain full details of all amendments to be made to the main contract which are given in paragraphs 3.1 to 3.8.

Item 7, 8, 9 and 11  **Insert** the appropriate information under each item or annex the numbered tender documents containing this information. Concise but comprehensive details must be given.

8.21 The JCT amendments deemed to be incorporated in the Standard Conditions of Nominated Sub-Contract NSC/C (to be stated in Item 12 of the Invitation to Tender NSC/T Part 1) should be consistent with those JCT amendments incorporated in the main contract.

8.22 Item 12 of the Invitation to Tender NSC/T Part 1 further requires a schedule of modifications to be attached if the Standard Conditions of Nominated Sub-Contract NSC/C is amended. In order to ensure that the amendments to the main contract are incorporated into Sub-Contract NSC/C the following should be added to the numbered document listing the amendments to NSC/C:

“The Standard Conditions of Nominated Sub-Contract NSC/C shall be deemed to incorporate such consequential amendments as are necessary to ensure complete compatibility with the amended main contract.”

8.23 Item 12 of the Invitation to Tender NSC/T Part 1 requires that the period for the architect/the contract administrator to approve drawings after their receipt be inserted. The main purpose of such approval is to enable the architect/the contract administrator to:

a. ensure that the drawings are consistent with the specifications;

b. prepare information for the main contractor in connection with any builder’s work required;

c. ensure the co-ordination of the nominated subcontractor’s design and the overall design for the project.

8.24 NHS bodies should take care to ensure that any “approval” by the architect/the contract administrator does not reduce the design responsibility of the nominated sub-contractor.

8.25 The Department recommends that item 17 of the Invitation to Tender NSC/T Part 1 (sub-contract fluctuations) should be completed by the architect/the contract administrator and not left for the sub-contractor to choose when submitting his tender NSC/T Part 2. (See paragraphs 8.59 to 8.64 regarding choice of fluctuation provision.)

8.26 A priced schedule of rates is essential for the financial management of the nominated sub-contract as it is used for:

a. valuation of variations and provisional sum work (or the valuation of all work if a VAT-exclusive tender sum is accepted for sub-contract works which will be re-measured and valued);

b. interim and final payments due to the sub-contractor.

8.27 Where blank bills of quantities are not provided as a tender document, the Department recommends that a blank (that is unpriced) tender sum analysis and schedule of rates are supplied in which the tenderer can enter his prices and rates. The Department considers that the employer’s interest is best served if the blank tender sum analysis and schedule of rates are prepared by the quantity surveyor or by the person exercising the functions of the quantity surveyor.

8.28 The Department recommends that the priced tender sum analysis is returned attached to the tender on NSC/T Part 2 and that the priced bills of quantities or priced schedule of rates are returned at the same time as the tender but in a separate package endorsed with the tenderer’s name. In this way the priced bills of quantities and priced schedule of rates of tenders not considered for acceptance can be returned unopened.
8.29 Tenders should be delivered and opened as directed by the employer. The Department recommends that tenders for major sub-contract works, for example mechanical and electrical engineering installations, should be delivered to the employer at the same time as the main contract tenders.

Tender by a Sub-Contractor NSC/T Part 2 (Appendix 8)

8.30 This document is completed by the sub-contractors submitting a tender (Step 3). The successful tender is signed by the employer or the architect/the contract administrator on his/her behalf to signify approval (Step 4).

8.31 The Department considers that the quantity surveyor or the person exercising the function of the quantity surveyor should examine the sub-contractor’s schedule of rates, prices or daywork prices prior to the approval of the tender by or on behalf of the employer. This will identify all the items and their quantity, rates and prices that may need to be referred to in using this document for the purposes which the sub-contract requires.

Nomination Instruction NSC/N (Appendix 12)

8.32 This document is completed by the architect/the contract administrator and sent to the contractor, with a copy to the nominated sub-contractor (Step 4).

8.33 The Department recommends that an addition should be made on page 2 of NSC/N. This requires the contractor to inform the architect/the contract administrator if, in agreeing the matters referred to in the Particular Conditions NSC/T Part 3 and/or in the Articles of Nominated Sub-Contract Agreement NSC/A, the sub-contractor requires any alteration of his tender or of any other matter affecting the progress and/or the price of the works and the sub-contract works.

8.34 Where the nominated sub-contractor requires “attendance items” to be provided free of charge to him in addition to those already listed in the Invitation to Tender NSC/T Part 1 and has stated these additional requirements in his Tender NSC/T Part 2, the architect/the contract administrator by his Nomination Instructions confirms that these additional requirements and any consequential costs have been approved by him/her. This action may give an advantage to the selected sub-contractor over other subcontractors To ensure that all sub-contract tenders are compatible the architect/contract administrator should consider requiring withdrawal or amendment of such conditions.

Particular Conditions NSC/T Part 3 (Appendix 9)

Articles of Nominated Sub-Contract Agreement NSC/A (Appendix 10)

8.35 These documents are agreed and completed by the contractor and the nominated sub-contractor (Steps 5 and 6). The matters to be agreed before NSC/T Part 3 is signed by both parties include:

- sub-contract periods;
- insurance cover;
- names of the adjudicator and trustee-stakeholder;
- the way in which VAT is to be dealt with;
- any other matters, for example safety, site security;
- any changes or additions to the information given in NSC/T Part 1, for example obligations or restrictions imposed by the employer, order or works, employer’s requirements, type and location of access;
- the body for appointing an arbitrator.

8.36 The numbered tender documents enclosed with the Invitation to Tender NSC/T Part 1 together with any additional documents and/or amendments thereto approved by the architect/the contract administrator become the numbered documents referred to in Agreement NSC/A.

Employer/Nominated Sub-Contractor Agreement NSC/W (Appendix 11)

8.37 The architect/the contract administrator completes page 1 of this document and issues it with the Invitation to Tender NSC/T Part 1 to each potential sub-contractor (Step 2).

8.38 Each potential sub-contractor completes his section of the Agreement NSC/W on page 7 either as a simple contract or as a deed as instructed by the architect/the contract administrator in the Invitation to Tender NSC/T Part 1 (Step 2) and returns it with his tender NSC/T Part 2 (Step 3).

8.39 At the same time as the successful tender is signed as approved by the employer (or the architect/the contract administrator on his behalf), the employer executes and dates the agreement, retains the document and gives the architect/the contract administrator a certified true copy thereof (Step 4).

8.40 The Department recommends that Employer/ Nominated Sub-Contractor Agreement NSC/W be executed as a deed where both the main contract and Articles of Nominated Sub-Contract Agreement NSC/A are executed as a deed as stated in paragraph 3.166.
8.41 The executed agreement provides the following warranties by the nominated sub-contractor to the employer to:

a. be responsible (in so far as such matters are left to him) for the design, the selection of materials and goods and the satisfying of any stipulated performance requirements in the sub-contract works;

b. supply the architect/the contract administrator with any necessary information (including drawings) to enable him/her to issue necessary instructions in good time to the contractor;

c. carry out the sub-contract works so that the contractor will not become entitled to an extension of time for the completion of the works as a whole;

d. perform his obligations under the sub-contract so that the architect/the contract administrator will not be under a duty to consider the issue of an instruction to determine the employment of the sub-contractor.

8.42 Other provisions in the executed agreement permit the architect/the contract administrator to instruct the sub-contractor to proceed with the design or with the ordering or fabrication of materials for the sub-contract works prior to NSC/N being issued. Payment for such work will normally be through the contractor in the usual way (after the issue of NSC/N and execution of the sub-contract NSC/C) but there are arrangements for direct payment by the employer in specified circumstances. This facility may be of value to NHS bodies in instances where the design or ordering or fabrication of the sub-contract works require a considerable period of time prior to the execution of the main contract and/or prior to the commencement of the sub-contract works on site.

8.43 Benefits of the executed agreement to the sub-contractor include:

- rights of early final payment through the contractor on completion of the sub-contract works;
- direct payment by the employer to the sub-contractor in specified circumstances;
- right of recourse to arbitration in the event of a dispute or difference arising between the employer, or the architect/the contract administrator on his/her behalf, and the sub-contractor.

Amendment to Agreement NSC/W

8.44 After clause 2.1.3 insert additional clause 2.1.4

“4 the carrying out of the sub-contract works in a proper and workmanlike manner”.

Further aspects of nominated sub-contract documentation

Order of working

8.45 The main contract and nominated sub-contract drawings and bills of quantities/specification/schedules of work should specify whether the works and/or the nominated sub-contract works are to be commenced and/or completed in any specific order of execution and if the works are to be completed by phased sections. Where the order of the nominated sub-contract works differs from the main contract it should be stated and described in both the main contract and the sub-contract documentation.

Objections to withdrawal of sub-contract tender

8.46 A contractor may make a reasonable objection to the nomination of a sub-contractor not later than seven working days from receipt of the instruction of the architect/the contract administrator. (JCT 98 clause 35.5.)

8.47 A sub-contractor may withdraw his tender in the following circumstances which are set out in the stipulations in the Tender by a Sub-Contractor NSC/T Part 2:

a. after the identity of the contractor has been notified to the sub-contractor if he was unaware of the identity at the time of submitting his tender;

b. if the sub-contractor is unable to agree with the contractor the matters set out in the Particular Conditions NSC/T Part 3.

8.48 If any of the circumstances described in paragraphs 8.46 and 8.47 above occur the architect/the contract administrator is required to issue further instructions; overcoming the objection or difficulty concerning the nomination, omitting the work which was the subject of the nomination or nominating another sub-contractor (JCT 98 clauses 35.5 and 35.9).

8.49 The issue of further instructions by the architect/the contract administrator may give rise to the extension of time and payment for loss and expenses to the contractor if he has not received necessary instructions in due time (JCT 98 clauses 25.4.6 and 26.2.1). Therefore, if it becomes necessary to issue any instructions it is important to issue them quickly to minimise any time and cost penalties the employer may incur.

8.50 In neither of the circumstances identified in paragraph 8.47 does the employer have any redress against a successful sub-contractor who withdraws his tender. The successful sub-contractor however is entitled to be paid any sums that may be due under the Employer/Nominated Sub-Contractor Agreement NSC/W.
Sub-sub-contractors and sub-suppliers

8.51 The method for the nomination of sub-contractors and the standard documentation for this method have been described in preceding paragraphs, however, there are further provisions in the JCT Standard Form of Building Contract (JCT 98) which have implications concerning the preparation of documents for nominated sub-contracts.

8.52 Clauses 13, 35 and 36 of JCT 98 make it clear that the architect/contract administrator can only nominate sub-contractors and suppliers to the contractor and that he has, therefore, no power to nominate sub-subcontractors or sub-suppliers. It follows that sub-contract documents must not contain prime cost sums, as these would require to be followed by nominations which the architect/the contract administrator has no power to make. Clause 13.3 of JCT 98 does however place a duty on the architect/the contract administrator to issue instructions in regard to the expenditure of provisional sums included in sub-contracts. It is therefore in order for sub-contract documents to contain provisional sums in cases where their use is unavoidable.

8.53 Clause 1.7.1 of the Nominated Sub-Contract Conditions NSC/C recognises that nominated sub-contractors may be required to enter into (domestic) sub-sub-contracts or into contracts of sale with (domestic) sub-suppliers. Such requirements will arise when the nominated sub-contract bills and/or specification/schedules of works specify single named firms whose installations or materials and goods are to be incorporated into the sub-contract works. In order to comply with the requirements of the Public Works Contracts Regulations 1991 NHS bodies must provide the sub-contractor with the opportunity to provide works, products or equipment which meet the required level of performance and which are fit for their intended purpose but are not obtained from the named firm. This is done by the addition of the words “or equivalent” after the named firms. The nominated sub-contractor will need to obtain quotations from the named or his proposed “equivalent” firm on which to base his own tender. When such work has not been fully designed or specified, there is no alternative but to take the work out of the nominated sub-contract altogether and to make separate nominations leading to separate nominated subcontractors or nominated suppliers under clauses 35 and 36 respectively of the main contract.

8.54 Particular care regarding responsibility is necessary when design work is being entrusted to sub-contractors (see paragraphs 8.37 to 8.43 regarding the mandatory use of the Employer/Nominated Sub-Contractor Agreement NSC/W).

8.55 Occasionally there may be a need to hold a pretender selection process in order to establish a single named firm whose installation or materials and goods are to be specified for incorporation into the sub-contract works. This firm will in due course become a sub-sub-contractor or a sub-supplier. This situation may arise particularly when designers need to complete the detailed design and accommodation of mechanical and electrical engineering services into the building and is at the discretion of the NHS body. (NHS bodies should note the requirements of the Public Works Contracts Regulations 1991 when specifying single named firms and insert “or equivalent” after the named firm.) Where this has been done, a copy of the selected quotation obtained at the pre-tender stage could, if desired, be sent out as a numbered tender document with NSC/T Part 1 – Invitation to Tender as part of the technical specification to advise the potential sub-contractors of the specification and price quoted in the pre-tender selection. If this procedure is adopted, care must be taken to avoid the pre-tender quotation being regarded as a prime cost or provisional sum. The sub-contractor must always obtain his own quotation from any sub-sub-contractors and sub-suppliers.

Attendance on nominated sub-contractors

8.56 The Invitation to Tender NSC/T Part 1 provides at item 16 the definition of “general attendance” and for the architect/the contract administrator to set out the details of “other items of attendance” (other than “general attendance”) which the contractor will provide free of charge to the sub-contractor. The Tender by a Sub-Contractor NSC/T Part 2 further provides for changes, if any, from the other items of attendance set out in NSC/T Part 1 and/or any further attendances to be provided free of charge to be inserted.

8.57 Experience indicates that sufficient information is usually available to anticipate with reasonable certainty the likely extent of “other items of attendance” that will be required by a nominated sub-contractor. The note on the completion of item 16 of the Invitation to Tender NSC/T Part 1 contains examples of the types of other items of attendance that may be appropriate.

8.58 Where it is impractical to obtain sub-contract tenders sufficiently early to enable the tender requirements of “other items of attendance” to be included in the main contract documents, a provisional sum should be included in the main contract to cover any changes and/or additions.

Fluctuations

8.59 The Government’s policy on provisions for fluctuations is stated in chapter 24 of ‘Contracts and commissions for the NHS estate – Guide to contract procedures’ and summarised in paragraph 3.183. The principles apply equally to nominated sub-contracts.
8.60 Fluctuations in the costs or work carried out by nominated sub-contractors are covered by clauses 4.42 and 4.43 together with Sections 4A-4B-4C: Fluctuations as appropriate of Nominated Sub-Contract Conditions NSC/C. These provisions are very similar to the corresponding clauses 37 to 40 in the main contract JCT 98 which are discussed in paragraphs 3.183 to 3.217.

8.61 The fact that full fluctuations under clauses 39 or 40 may be chosen to apply to the main contract (JCT 98) does not mean that the corresponding provisions need necessarily be chosen for nominated sub-contracts under Section 4B or 4C of the Conditions of Nominated Sub-Contract NSC/C. It is perfectly permissible to adopt (in appropriate cases) limited fluctuations under Section 4A of the NSC/C while the main contract permits full fluctuations.

8.62 The Invitation to Tender NSC/T Part 1 provides at item 17 for the architect/the contract administrator to specify the fluctuation clause applicable or state that it is to be chosen by the sub-contractor. Where the architect/ the contract administrator has specified the clause applicable, only the items relevant to the clause specified should be completed.

8.63 Where the applicable clause is to be that chosen by the sub-contractor, the architect/the contract administrator should complete the items for all three clauses.

8.64 Clauses 4.17 and 4.23 or 4.24 of the Conditions of Nominated Sub-Contract NSC/C include provisions for incorporating the adjustment for fluctuations due to nominated sub-contractors in Interim Certificates and the Final Certificate issued by the architect/the contract administrator under clauses 30 and 35 of the main contract conditions.

Nomination of suppliers

Documentation

8.65 The nomination of a supplier requires the use of the following documents:

a. a tender (recommended to be on Tender TNS/1);

b. a warranty agreement (optional at the employer’s choice, recommended to be on Warranty Agreement TNS/2);

c. a nomination (on an architect’s/contract administrator’s instruction);

d. an order from the contractor to the nominated supplier accepting the tender (no prescribed form).

Amendments to Tender TNS/1 and Warranty Agreement TNS/2

8.66 Neither of these documents require any amendments to comply with Government or Departmental policies, but it should be noted that, dependent upon which Insurance clauses are selected from clause 22, the architect/the contract administrator will need to insert one of the following in Schedule 1 item 8 of Tender TNS/1:

a. where clause 22A of JCT 98 is used, insert:

‘Clause 25.4.3 will be amended by the addition of the following words at the end of the clause – “provided that this is not due to any negligence, omission or default of the Contractor, his servants or agents or of any Sub-Contractor, his servants or agents”.’

b. where clauses 22G and 22J are used, insert:

‘Clause 25.4.3 will be amended by the addition of the following words at the end of the clause – “provided that this is not due to any negligence, omission or default of the Contractor, his servants or agents or of any Sub-Contractor, his servants or agents for which the Contractor is liable under clause 20.2”.’

8.67 As the reference in JCT 98 regarding joinder has been amended, the cross-reference to clauses 41.2.1 and 41.2.2 in Schedule 2 of Tender TNS/1 is no longer relevant.

8.68 Alternatively, the above information can be given to tenderers by attaching a copy of the preliminaries element of the main contract bills of quantities/specification/schedules of work.

Procedures

8.69 The JCT has not set out any detailed description of a procedure for nominations of suppliers.

8.70 The following procedure has been derived from Tender TNS/1, Warranty Agreement TNS/2 and main contract clause 36 and is recommended by the Department:

the architect/the contract administrator:

a. draws up the list of firms to be invited to tender (“the potential suppliers”) in conjunction with the employer/project manager;

b. settles with the employer/project manager whether or not Warranty Agreement TNS/2 is to be used;
c. completes for each potential supplier those parts in Tender TNS/1 (an original and in two copies thereof), which are for completion by him or on his behalf, deleting paragraph 3 if Warranty Agreement TNS/2 is not being used;

d. sends this Tender TNS/1 (an original) and two copies to each potential supplier, together with Warranty Agreement TNS/2 (if it is being used);

each potential supplier:

a. completes those parts of the Tender TNS/1 and its two copies which remain for completion by him;

b. signs the Tender TNS/1 and its two copies;

c. executes the Warranty Agreement TNS/2 (if it is being used) as a simple contract or as a deed as instructed by the architect/the contract administrator (this should be as a deed when the main contract is, or is to be a deed, and the contract of sale is for an important portion of the works as a whole);

d. sends back the Tender TNS/1 with its two copies and the Warranty Agreement TNS/2 (if being used) to the architect/the contract administrator;

the architect/the contract administrator:

a. ascertains that the tender is open for acceptance for sufficient time to enable due process of nomination to take place and the contract of sale concluded (Step 6). Also that any sale conditions attached to the tender do not incorporate provisions which purport to override or modify the main contract conditions;

b. evaluates, in conjunction with the employer/project manager, the tenders received and selects the firm he proposes to nominate (“the proposed supplier”);

c. arranges for the employer to execute and date the Warranty Agreement TNS/2 (if being used), as a simple contract or as a deed to retain that warranty agreement and to give the architect/the contract administrator withheld with a certified true copy thereof;

d. completes (if necessary) items 1C and 7C in Schedule 1 of Tender TNS/1 and in its two copies;

e. issues to the contractor an instruction nominating the supplier under standard form clause 36.2 together with:

(i) the Tender TNS/1 (the original) as now completed;

(ii) an information copy of Warranty Agreement TNS/2 (if it is being used) as executed by the employer and the proposed supplier;

f. certifies one copy of the Tender TNS/1 as now completed and sends it to the proposed supplier together with a copy of the instruction nominating the proposed supplier and the certified copy of Warranty Agreement TNS/2 (if it is being used) as executed by the employer;

g. retains the second copy of the Tender TNS/1;

the contractor:

a. checks carefully that the details in the tender are acceptable to him as the basis of a contract of sale with the Nominated Supplier;

b. retains the information copy of the signed Warranty Agreement TNS/2 (if it is being used);

the contractor and the nominated supplier:

a. settle items 6C and 9 in Schedule 1 of Tender TNS/1 with regard to delivery programme and execution of contract of sale;

b. proceed so as to conclude a contract of sale as a simple contract or as a deed as provided in item 9 of the Tender TNS/1, Schedule 1.

8.71 The Department recommends that the nomination should include a requirement that the contractor sends to the architect/the contract administrator a copy of any entries in the Tender TNS/1 completed in agreement with the supplier together with a copy of the executed contract of sale.

8.72 The architect/the contract administrator should provide the employer with copies of all documents relating to nominated suppliers.

Fluctuations

8.73 It will be noted that item 7 of Schedule 1 of Tender TNS/1 provides for any provisions for fluctuations in the price of rates tendered by a nominated supplier and these provisions operate quite separately from and independently of the fluctuations clauses in the main contract. Payment of any fluctuations will be made in accordance with clause 36 of the main contract as “the amount of any price adjustment properly payable to or allowable by the supplier” which is referred to in clause 36.3.1.3.

Completion of the documents

8.74 The annotation of the documents in appendices 13 and 14 draws attention to points where a choice has to be indicated and it also Indicates at which point in the procedure the information is entered, for example “the Architect/the Contract Administrator (2)” indicates that the information is to be entered by the architect/the contract administrator at Step 2 of the procedure. The documents themselves include side notes relating to the completion of the document which should be observed.
Letters of intent to proposed nominated sub-contractors and nominated suppliers

8.75 Except as permitted by the terms of the Employer/Nominated Sub-Contractor Agreement NSCAW (when in force), NHS bodies must avoid entering into any contractual agreements with proposed nominated subcontractors or suppliers when inviting, receiving or evaluating tenders from them.

8.76 Letters of intent should not be issued by NHS bodies to proposed nominated sub-contractors and suppliers because of the risk of inadvertently creating a contractual relationship between NHS bodies and firms.
Appendix 1

JCT documents, Practice Notes and published amendments

1.0 This appendix lists the JCT documents, Practice Notes and published amendments to the forms which have been considered and incorporated in this guidance.

JCT documents

d. JCT Fluctuation Clauses Supplement for use with the Local Authorities Standard Form of Building Contract, 1998 Edition (Clauses 38, 39 and 40).
k. JCT Standard Form of Nominated Sub-Contract JCT documents Tender, 1998 Edition:
   Part 1: The Architect’s/Contract Administrator’s Invitation to Tender to a Sub-Contractor. (NSC/T Part 1)
   Part 2: Tender by a Sub-Contractor. (NSC/T Part 2)
   Part 3: Particular Conditions to be agreed by a Contractor and Sub-Contractor. (NSC/T Part 3)
m. JCT Standard Conditions of Nominated Sub-Contract. (NSC/C)
n. JCT Standard Form of Articles of Nominated Sub-Contract Agreement between a Contractor and a Nominated Sub-Contractor, 1998 Edition. (NSC/A)
q. JCT Standard Form of Nomination Instruction for a Sub-Contractor, 1998 Edition. (NSC/N)
s. JCT Standard Form of Tender by Nominated Supplier, Tender TNS/1 including Warranty Agreement by a Nominated Supplier, TNS/2. 1980 Edition.

Practice Notes for use with the JCT Standard Form of Building Contract, 1980 Edition

Practice Note 1 – (Included with Sectional Completion Supplement see [f] above.)
Practice Note 1A – (Included with Sectional Completion Supplement see [g] above.)
Practice Note 2 – Clauses 21,22 and 30.3: Insurance provision
Practice Note 3 – Clause 21.2: Insurance, liability, etc of employer – provisional sum
Practice Note 4 – Clauses 5.2.2 and 5.4: Drawings – additional copies
Practice Note 5 – Clauses 30.3 and 16.2: Payment for off-site materials and goods
Practice Note 6 – Clause 15: Value Added Tax (withdrawn)

{ Withdrawn: matters now covered in Practice Note 22
{ In one booklet June 1981; issued in present form October 1987 (text unchanged)
Appendix 1

Practice Note 7 – Standard Form of Building Contract for use with Bills of Approximate Quantities
Practice Note 8 – Finance (No. 2) Act 1976 – Statutory Tax Deduction Scheme, Clause 31 (out of print)
Practice Note 9 – Domestic Sub-Contractors
Practice Note 10 – Nomination of Sub-Contractor (Note: the 1991 Procedure is published in a separate booklet.)
Practice Note 11 – Employer/Nominated Sub-Contract Agreement (NSC/2 or NSC/2a) Out of print
Practice Note 12 – Direct Payment and Final Payment to Nominated Sub-Contractors
Practice Note 13 – Proposed Nomination of a Sub-Contractor not effected and Re-Nomination
Practice Note 14 – Variations and Provisional Sum Work
Practice Note 15 – Nominated Suppliers
Practice Note 16 – Extensions of Time and Liquidated Damages
Practice Note 17 – Fluctuations
Practice Note 18 – Payment and Retention
Practice Note 19 – Application of Practice Notes 9-18 to contracts in Scotland and subject to Scots Law
Practice Note 20 – Deciding on the Appropriate Form of JCT Main Contract (Revised July 1984, July 1988 and August 1993.)
Practice Note 21 – The Employer’s position under the 1980 Edition of the Standard Form of Building Contract compared to the 1963 Edition
Practice Note 23 – Contract Sum Analysis (Out of print)
Practice Note 24 – Insolvency of Main Contractor
Practice Note 25 – Performance Specified Work -Treatment in JCT 80 clause 42
Practice Note 26 – Valuation and certification for interim payments including variations
Practice Note 27 – The application of the Construction (Design and Management) Regulations 1994 to Contracts on JCT Standard Forms of Contract
Practice Note 28 – Mediation on a Building Contract or Sub-Contract Dispute
Practice Note CD/2 – Contractor’s Designed Portion Supplement (Revised July 1994)

Practice Notes for use with the JCT Standard Form of Building Contract, 1998 Edition
Practice Note 1 – Construction Industry Scheme (CIS)

Publisher's amendments to JCT documents included in ‘Concode’ guidance
JCT Standard Form of Building Contract 1998 Edition
– With Quantities
– With Approximate Quantities
– Without Quantities

Amendment 1: June 1999 Construction Industry Scheme (CIS)
Appendix 1

JCT 98: Sectional Completion Supplement with quantities and with approximate quantities (with Practice Note 1); without quantities (with Practice Note 1A)

JCT 98 With Quantities Contractor’s Designed Portion Supplement 1998 Edition
   a. November 1998

JCT 98 Without Quantities Contractor’s Designed Portion Supplement 1998 Edition
   a. November 1998

JCT Standard Form of Nominated Sub-Contract Conditions 1998 Edition (NSC/C)
   a. Amendment 1: June 1999 (Consequent to Amendment 1: 1999 to JCT 98)

JCT Standard Form of Nominated Sub-Contract Tender 1998 Edition (NSC/T)
   a. Amendment 1: June 1999 (Consequent to Amendment 1: 1999 to JCT 98)

Articles of Nominated Sub-Contract Agreement 1998 Edition (NSC/A)
   a. Amendment 1: June 1999 (Consequent to Amendment 1: 1999 to JCT 98)

Standard Form of Nomination Instruction NSC/N

JCT Standard Form of Employer/Nominated Sub-Contractor Agreement NSC/W 1998 Edition

JCT 80 Nominated Supplier Tender TNS/1

JCT 80 Nominated Supplier Warranty Agreement TNS/2 Revised 1991
Appendix 2

JCT administration forms

This appendix lists the administration forms for JCT 80 published by RIBA Publications Ltd. The use of the forms is not mandatory, but the Department recommends that NHS bodies should encourage architects and contract administrators to use them for the sake of consistency in the administration of contracts. Currently these forms are in the process of being updated.

Administration forms for JCT contracts

a. Interim Certificate and Direction (F801):
   pad of 50 sets of 4-part form;

b. Statement of Retention and of Nominated Sub-Contractor’s Values (F802):
   pad of 50 forms;

c. Notification to Nominated Sub-Contractor of amount included in certificates (F803):
   pad of 200 forms;

d. Certificate of Partial Possession by the Employer (F806):
   pad of 50 forms (where Am.2 not incorporated);

e. Certificate of Completion of Making Good Defects (F807):
   pad of 50 forms;

f. Notification of Revision to Completion Date (F808):
   pad of 50 forms;

g. Architect’s Instruction (F809):
   pad of 200 forms. Word-processing version (80 gsm paper)
   pad of 200 loose sheets;

h. Clerk of Works Direction (F810):
   pad of 50 sets of 3-part NCR form;

i. Architect’s Instruction (F809):
   pad of 200 forms. Word-processing version (80 gsm paper)
   pad of 200 loose sheets;

j. Certificate of Failure to Provide Proof of Discharge of Payment to NSC (F811):
   pack of 5 forms;

k. Statement of Partial Possession (F812):
   pad of 50 forms;

l. Certificate of Practical Completion of Nominated Sub-Contract Works (F815):
   pad of 50 forms;

m. Certificate of Failure to Complete Nominated Sub-Contract Works (F816):
   pad of 50 forms;

n. Supervising Officer’s Instruction (F819):
   pad of 200 forms;

o. Instruction continuation (F820):
   pad of 200 forms. Word-processing version (80 gsm paper)
   pack of 200 loose sheets;

p. Contract Administrator’s Instruction (F821):
   pad of 200 forms. Word-processing version (80 gsm paper)
   pack of 200 loose sheets;

q. Final Certificate (F852):
   pad of 10 sets of 4-part form;

r. Certificate of Practical Completion (F853):
   pad of 50 forms;

s. Certificate of Non-completion (F854):
   pad of 50 forms;

t. Cancellation of Certificate of Non-completion (F856):
   pack of 5 forms (where Am.9 not incorporated).
Appendix 3

References and Bibliography

Bibliography of additional recommended reading and list of addresses where the various documents listed in Appendices 1, 2 and 3 may be purchased.


JCT 80 Contract Administration Guide. RIBA Publications Ltd.


Concode: Guide to procedures for commissioning building and engineering consultants. The Stationery Office 1994

Concode: Contracts and commissions for the NHS estate – European Community Directives. The Stationery Office 1995

Concode: Contracts and commissions for the NHS estate – Policy. The Stationery Office 1995
Appendix 4

Attestation

The document included in this appendix ‘JCT Note to Users – Attestation’ has been reproduced with the permission of the copyright holder, The Joint Contracts Tribunal Limited 1998.
JCT contracts, sub-contracts and tender documents

Note to Users

Attestation

JCT forms of Contract and Sub-Contract and other agreements contain attestation provisions which provide for them to be entered into either 'under hand' i.e. by signature of, or on behalf of, the parties (a simple contract) or 'under seal' i.e. complying with the formalities for executing the agreement with the seals of the parties (a specialty). Different limitation periods under the Limitation Act 1980 apply to simple contracts and specialty contracts which are a specialty.

The law relating to sealing documents, including contracts, has been changed by the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 (c.44) and the Companies Act 1983 (c.60) which came into force at the end of July 1990. The Tribunal is therefore reviewing all the attestation provisions in its documents.

If parties wish to enter into a JCT Contract, Sub-Contract or other agreement in what would have been termed as entering into the Contract, Sub-Contract or agreement 'under seal', they should obtain advice on how this should be effected so that it is correctly executed as a specialty.

Where existing JCT forms of tender for sub-contracts or works contracts have been or are being used, items which refer to the main contract or to the sub-contract or works contract as being executed 'under hand/under seal' should be treated as referring to the relevant contract agreement as being executed as a simple contract (formerly 'under hand') or as a deed (formerly 'under seal').

Forms of wording for execution as a deed which have been prepared for inclusion in future reprints of the JCT Standard Form of Building Contract and other JCT forms of main contract are printed on the reverse of this Note. Users should check that the wording is adapted, if necessary, to suit the particular contract, sub-contract or agreement being entered into. Below is an example of execution as a deed by a sub-contractor, being an individual:

[A2]: AND AS A DEED BY THE SUB-CONTRACTOR
hereinbefore mentioned namely

Peter Carpenter trading as
P. Carpenter
whose signature is here subscribed

[A3]: by affixing hereunto its common seal

[A4]: in the presence of:

Norma Brown

Norma Brown (Mrs)
5 Long Street
Ashford, Hants.

Further copies of this sheet are available free on receipt of an addressed envelope by RIBA Publications at the address below.

JCT

Issued by the Joint Contracts Tribunal
September 1990, Revised December 1990
Published by RIBA Publications Ltd
Finsbury Mission, 39 Moreland Street, London EC1V 8BB
Appendix 4

AS WITNESS THE HANDS OF THE PARTIES HERETO

Signed by or on behalf of the Employer, \_[signature]\_  
in the presence of: \_[names]\_

Signed by or on behalf of the Contractor, \_[signature]\_  
in the presence of: \_[names]\_

EXECUTED AS A DEED BY THE EMPLOYER

hereinbefore mentioned namely

by affixing hereto its common seal  
in the presence of: \_[names]\_

* OR  
acting by a director and its secretary* / two directors* whose signatures are here subscribed:  
namely

[Signature]  
DIRECTOR

and:

[Signature]  
SECRETARY* /DIRECTOR*

AND AS A DEED BY THE CONTRACTOR

hereinbefore mentioned namely

by affixing hereto its common seal  
in the presence of: \_[names]\_

* OR  
acting by a director and its secretary* / two directors* whose signatures are here subscribed:  
namely

[Signature]  
DIRECTOR

and:

[Signature]  
SECRETARY* /DIRECTOR*

See reverse for example of execution of a sub-contract as a deed by a sub-contractor being an individual, in accordance with note (A6).

* Delete as appropriate
Appendix 5

Insurance in the NHS


Summary

1. Ministers have decided that NHS trusts should no longer insure commercially for non-clinical risks. They have asked officials to invite the NHS Litigation Authority (NHSLA) to look at ways of adapting their operations to take on-board a new section 21 (risk pooling) scheme or schemes. It is anticipated that new arrangements will be in place, at least for some categories of risk, from 1 April 1999. Interim arrangements are proposed for NHS trusts faced with commercial policy renewals before that date.

Background

2. Following extensive research into the scale and cost/financial benefits of current NHS dependency on commercial insurance, Ministers have decided that better value for money across the NHS as a whole will be achieved if in future NHS trusts (and in due course PCTs) no longer insure commercially, but instead self-insure in some way against non-clinical risks. Non-clinical risks cover a wide range but the principal ones are employers’ liability, public liability, motor, buildings and property.

3. Ministers have looked at a range of alternative ways of securing, through self-insurance, the same levels and breadth of cover as NHS trusts currently enjoy without losing the benefits of strong incentives for effective risk management, relative financial certainty and access to proven technical, actuarial and legal services which typically come as part of a commercial package. They have concluded that this will best be achieved by inviting the NHS Litigation Authority (NHSLA) to make proposals for a new national risk pool, or pools, and thereby extend their remit to include non-clinical as well as clinical negligence risk cover.

4. NHS trusts’ ability to form a national risk pool without the need to observe the requirements of legislation affecting insurance companies is founded on section 21 of the NHS and Community Care Act, 1990. The advantage offered by a section 21 scheme is that only enough cash has to be collected each year from participating scheme members to fund the payments required from the scheme in the year in question. Commercial insurers, on the other hand, have fully to fund each year against all potential future liabilities relating to that year.

Operational implications

5. It is too early as yet to give details about how the scheme will work in practice. However, the NHSLA’s existing Clinical Negligence Scheme for Trusts should be looked to as a general model. The NHS Executive is convening a working group of NHSLA officials, NHS trust and other NHS finance representatives to progress the work. Their job will be to tailor the scheme to the needs of NHS trusts and to ensure transition to the new arrangements is at a pace which is manageable, commensurate with the importance of the issue but with sensitivity to the wider demands of the NHS’s current demanding agenda. Ministers have indicated that they expect the framework of a new scheme to be in place in order for NHS trusts to take advantage of the cover on offer by the commencement of 1999/2000.

Renewing existing policies

6. Until a new section 21 scheme is in place (i.e. for the remainder of 1998/99) NHS trusts should continue to renew their commercial insurances as normal for a further year. Exceptionally, and only if particularly advantageous terms are on offer, NHS trusts may renew for up to a maximum of a further two years. NHS trusts looking to join the new scheme “mid-year” (i.e. at the next natural commercial renewal date) will not be financially disadvantaged in doing so.

7. Further details of the plans for and operation of the new scheme will follow as and when arrangements are firmed up.

This circular has been issued by:

COLIN L REEVES
DIRECTOR OF FINANCE AND PERFORMANCE

12 October 1998
Insurance in the NHS

The following is an extract from ‘HSC 1999/021 Insurance in the NHS: Employers’/Public Liability and Miscellaneous Risk Pooling’ regarding property cover:

Property cover

4. The new scheme will provide cover for buildings or contents up to a defined ceiling. Under this approach, NHS trusts would make contributions to the risk pool for losses or damage above some pre-set level of excess (similar to the arrangements which will operate for the employers’ liability element of the risk pool). However, at a given level of materiality, a ceiling would come into force and responsibility for making good the very unusual but significant event of, for example, a serious flood or fire would not fall on the risk pool. Under these circumstances, it is proposed that the relevant NHS Executive Regional Office, in conjunction with the affected local health bodies, would agree future service plans and funding requirements rather than automatically re-creating the asset as would occur under commercial insurance arrangements. The Regional Office would provide the necessary funding through revenue brokerage or reprioritising capital plans. For an exceptionally significant event in terms of materiality, the NHS Executive would provide national funding.

5. The level of materiality which will determine when the ceiling will come into operation will need to take into account:
   - the affordability for NHS trust base on such as the size of the claim as a percentage of income turnover or block capital.
   - delegated limits in respect of NHS trust business cases before consideration of future service plans require the approval of the Regional Office. These place NHS trusts in bands according to the size of turnover.

6. Some NHS trusts have existing commercial policies on a “claims made” basis. For that they will have had the benefit of substantially reduced premiums but insurers will only be liable to indemnify in respect of claims made before policy expiry or the end of a short defined period after expiry. All NHS trusts that have such policies should therefore immediately report to their insurers all events likely to give rise to a claim regardless of whether or not a claim has actually been made. NHS trusts should seek the advice of their brokers and insurers but should not accept refusal on the part of the insurer to accept such notification. The NHS Litigation Authority will offer advice to any individual NHS trust encountering difficulties of this kind.
Appendix 6

Completion of the documents relating to nominated sub-contracts under the 1998 nomination procedure

The documents included in appendices 7 to 11 have been reproduced with the permission of the copyright holder, The Joint Contracts Tribunal Ltd.

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Name of document</th>
<th>Identification term</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Part 1: The Architect’s/the Contract Administrator’s Invitation to Tender to a Sub-Contractor</td>
<td>NSC/T: Part 1</td>
</tr>
<tr>
<td>8</td>
<td>Part 2: Tender by a Sub-Contractor</td>
<td>NSC/T: Part 2</td>
</tr>
<tr>
<td>9</td>
<td>Part 3: Particular Conditions: to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 clause 35.6</td>
<td>NSC/T: Part 3</td>
</tr>
<tr>
<td>10</td>
<td>The Standard Form of Articles Agreement between a Contractor and a Nominated Sub-Contractor, 1998 Edition</td>
<td>NSC/A</td>
</tr>
<tr>
<td>11</td>
<td>The Standard Form of Employer/Nominated Sub-Contractor Agreement, 1998 Edition</td>
<td>NSC/W</td>
</tr>
<tr>
<td>12</td>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor nominated under JCT 98 clause 35.6</td>
<td>NSC/N</td>
</tr>
</tbody>
</table>

Appendix 7

NSC/T Part 1: Invitation to Tender

The completion and issue of invitation to tender NSC/T part 1

1. This document is completed and signed by the architect/the contract administrator and sent together with the numbered tender documents and a copy of the Standard Form of Employer/Nominated Sub-Contractor Agreement NSC/W to each potential Sub-Contractor (Step 2).

2. Attention is drawn to the side notes relating to completion of the contract which should be observed.
Part 1 – Invitation to Tender
to a Sub-Contractor

To be completed by or on behalf of the Architect/the Contract Administrator

Note: When issuing the instruction under JCT 98 35-6 on Nomination NSC/N nominating the Sub-Contractor, the Architect/the Contract Administrator must satisfy himself that there are no discrepancies between the completed NSC/T Part 1 and the completed NSC/T Part 2, both of which must accompany his Nomination Instruction on Nomination NSC/N.

The identification term in column 1 is used in NSC/T Part 1 for the document whose full title is given in column 2.

<table>
<thead>
<tr>
<th>Identification term</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSC/T</td>
<td>The Standard Form of Nominated Sub-Contract Tender, 1998 Edition, which comprises:</td>
</tr>
<tr>
<td>– Part 2</td>
<td>Part 2: Tender by a Sub-Contractor.</td>
</tr>
<tr>
<td>– Part 3</td>
<td>Part 3: Particular Conditions: to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
<tr>
<td>Nomination NSC/N</td>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
<tr>
<td>Item</td>
<td>Commentary</td>
</tr>
<tr>
<td>------</td>
<td>------------</td>
</tr>
<tr>
<td>(b)</td>
<td>Normally delete “a VAT-exclusive Tender Sum”. See paragraphs 8.14 and 8.15.</td>
</tr>
<tr>
<td>(c)</td>
<td>Normally insert name and address of employer; submission of sub-contract tender at same date as the main tender. See paragraphs 8.28 and 8.29. Insert date for return of tender: a minimum of four working weeks should normally be allowed for tendering for major works.</td>
</tr>
<tr>
<td>(c1)</td>
<td>The period to be inserted that the tender should be open for acceptance should be sufficient to enable the due process of nomination to take place and the sub-contract to be concluded (steps 5 and 6). Where sub-contract tenders are returned at the same time as the main contract tenders, the Department recommends a period up to ten weeks be inserted.</td>
</tr>
<tr>
<td>(c2)</td>
<td>Agreement NSC/W should be executed either as a simple contract or as a deed; the option chosen should be the same as that for the execution of the main contract. Delete as applicable to the nominated sub-contract. See paragraph 8.40.</td>
</tr>
<tr>
<td>(d)</td>
<td>Delete “drawings”, “specification”, etc as applicable to the nominated sub-contract. Insert or attach list of numbered tender documents to be issued with NSC/T Part 1.</td>
</tr>
</tbody>
</table>
Part 1 – Invitation to Tender

Invitation to tender to a Sub-Contractor prior to being nominated by the Architect/the Contract Administrator under JCT 98 35-6

[a] To

YOU ARE INVITED TO TENDER

[a] a VAT-exclusive Sub-Contract Sum

[b] a VAT-exclusive Tender Sum

for the following Sub-Contract Works (insert brief description)

particulars of which are referred to below

BY COMPLETING NSC/T PART 2 (Tender by a Sub-Contractor) and returning that Part to

[c]

not later than 19

Your tender must be in accordance with all the information set out in this NSC/T Part 1 (including item 17 - notional) except where changes are specifically provided for in NSC/T Part 2.

On item 3 of the Submissions in NSC/T Part 2 page 8 you are to insert a period not less than after which your Tender on NSC/T Part 2 is withdrawn.

Before you can be nominated you must enter into the Standard Form of Employer/Nominated Sub-Contractor Agreement (Agreement NSC/W)

*before* hand / as a deed

This is enclosed herewith and must be returned

*duly signed by you / entered into by you as a deed with your completed NSC/T Part 2.

If your Tender on NSC/T Part 2 is approved by the Employer a copy of the Agreement NSC/W

*duly signed by the Employer / entered into by the Employer as a deed will be returned to you by the Architect/the Contract Administrator.

Particulars of the Sub-Contract Works:

[d] These numbered tender documents together with amendments thereto and/or any other document which the Architect/the Contract Administrator has approved will be numbered and called the ‘Numbered Documents’ (see the Articles of Nominated Sub-Contract Agreement (Agreement NSC/A), Fifth recital, article 11 and the Annexures to Agreement NSC/A).

*drawings / specification / bill of quantities / schedule of rates (Planning Supervisor’s health and safety plan / Principal Contractor’s Health and Safety Plan IV and to the extent available) (to be listed here and enclosed)

Signed

Name

Date 19

*delete as applicable
(e) If the main contract has not been executed at the time of inviting sub-contract tenders, insert an adequate description to identify the main contract works to be carried out and location of the project.

Names and addresses of:

Insert details relating to the main contract.

(f1) If the main contractor is not known, insert: "Not known at date of invitation to tender."
Part 1 – Invitation to Tender

[Main Contract Works and location:]  [Job reference:]

Names and addresses of:
Employer:  [Tel No:]

*Architect / Contract Administrator:  [Tel No:]
*Planning Supervisor:
  *is / is to be the Architect / the Contract Administrator
  *is / is to be:  [Tel No:]

Consulting Structural / Services Engineer:  [Tel No:]

Quantity Surveyor:  [Tel No:]

Main Contractor (if known):  [Tel No:]

Principal Contractor:
  *is / is to be the Main Contractor

*delete as applicable
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Delete versions of Standard Form of Building Contract, 1998 Edition, not applicable to the project. Insert numbers of JCT amendments incorporated in the form of main contract. Delete “With” or “Without” Sectional Completion Supplement as applicable to the project.</td>
</tr>
<tr>
<td>2</td>
<td>Delete as applicable to the project. Note: A master programme should be provided by the contractor (see paragraph 3.45) therefore normally delete “deleted”.</td>
</tr>
<tr>
<td>3(g)</td>
<td>Normally insert “Details of the amendments to the main contract are given in the Preliminary element of the main contract bills of quantities (or specification/schedules of work) which is annexed hereto numbered *” (insert reference as applicable). If the preliminaries element of the main contract is not available, it will be necessary to prepare a numbered document setting out the amendments (see paragraphs 8.17 to 8.19).</td>
</tr>
<tr>
<td>4</td>
<td>Delete as applicable to the project.</td>
</tr>
<tr>
<td>5</td>
<td>Delete as applicable to the project. Insert name and address where the documents and drawings may be inspected – normally the architect/the contract administrator’s. The Department recommends that main contract drawings showing the site and general scope of the main contract works should be issued to tenderers as numbered tender documents.</td>
</tr>
</tbody>
</table>
Part 1 – Invitation to Tender

**MAIN CONTRACT INFORMATION**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>
| 1 | **Form of Main Contract:** Standard Form of Building Contract, 1998 edition  
   |   | *Local Authorities / Private version  
   |   | WITH / WITH APPROXIMATE / WITHOUT Quantities  
   |   | Incorporating Amendments  
   |   | *With / Without Sectional Completion Supplement  
| 2 | **Main Contract:** alternative provisions not referred to in the Main Contract Appendix (see item 6 page 5)  
   |   | **Architect / Contract Administrator:**  
   |   | *Article 3A / Article 3B  
   |   | **Quantity Surveyor:**  
   |   | WITHOUT quantities versions only, master programme: clause 5.1  
   |   | *Article 4A / Article 4B  
   |   | deleted / not deleted  
| 3 | **Any changes from printed Standard Form of Main Contract identified above:**  
   |   | **Warranties:** The Enabling Clause 19A “Warranty by Contractor – purchaser or tenant”  
   |   | *Included / not included  
   |   | maximum number of warranties required by Employer:  
   |   | **Main Contractor Warranty MCWa/P&T:** assignability  
   |   | *Number of times assignment permitted:  
   |   | *Assignment not permitted  
| 4 | **Execution of Main Contract:** *is / is to be *under hand / as a deed  
| 5 | **Inspection of Main Contract:**  
   |   | the unpriced *Bills of Quantities / Bills of Approximate Quantities / Specification / Schedules of Work (which set out the general conditions and preliminaries of the Main Contract) and the Contract Drawings may be inspected at:
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>6(h)</td>
<td>It is essential that the instructions given for this item are complied with.</td>
</tr>
<tr>
<td>7(i)</td>
<td>Normally insert “Details are given in the Preliminaries element of the main contract bills of quantities (or Specification/Schedules of Work) which is annexed hereto numbered *” (insert reference as appropriate). If the preliminaries element of the main contract is not available, all obligations and restrictions should be given under each item or a numbered document prepared containing the information (see paragraphs 8.17 to 8.19).</td>
</tr>
<tr>
<td>7(j)</td>
<td>When sub-contract tenders are invited after the main contract has been executed, details of any further obligations or restrictions imposed by the employer in a variation instruction or otherwise must be given.</td>
</tr>
<tr>
<td>8</td>
<td>See paragraph 8.45.</td>
</tr>
<tr>
<td>10</td>
<td>Normally insert &quot;Not applicable&quot;. However, if the original date for completion stated in the main contract appendix has been altered, the new completion date must be given.</td>
</tr>
</tbody>
</table>
Main Contract Appendix and entries therein

A copy of the COMPLETED APPENDIX TO THE MAIN CONTRACT MUST BE ATTACHED TO THIS INVITATION. If the Main Contract has not been entered into at the date of this invitation then a copy of the Appendix to the Main Contract completed so far as practicable must be attached to this invitation. Whichever completed Appendix has been attached to this invitation, a copy of the completed Appendix to the Main Contract must be sent to the Sub-Contractor with the copy of the Instruction on Nomination from JCT 98 35-6 nominating the Sub-Contractor. If the copy of that completed Appendix differs from the Appendix attached to this invitation, the provisions of the Appendix sent with the copy of the Instruction on Nomination from JCT 98 35-6 are the provisions that will apply.

Obligations or restrictions which are or will be imposed by the Employer not covered by Main Contract Conditions (e.g. those in Preliminaries of the Contract Bills or Specification or Schedule of Works or in a Variation instruction):

Order of Works: Employer's requirements affecting the order of the Main Contract Works (if any):

Type and location of access:

New Completion Date where this has been altered from the original Date for Completion stated in the Main Contract Appendix attached.

Other relevant information (if any) relating to the Main Contract:
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>12(j)</td>
<td>Delete “unamended”. After “subject to the attached schedule of modifications” insert “numbered *” (insert reference as appropriate). This document should contain the statement given in paragraph 8.22. Execution: where the main contract is executed as a deed, the sub-contract shall be executed as a deed, to be consistent. Therefore, normally delete the second sentence, “where however under hand” see paragraph 3.156.</td>
</tr>
<tr>
<td>13(i)</td>
<td>Normally delete “unless otherwise specifically stated here”.</td>
</tr>
<tr>
<td>14(m)</td>
<td>Having regard to the actual or anticipated dates for possession and completion of the main contract, insert estimated month of the earliest and of the latest starting date appropriate to the sub-contract works.</td>
</tr>
<tr>
<td>15(n)</td>
<td>Only complete this item if the identity of the contractor is known. The status of the employer, the contractor and sub-contractor for the purpose of the Construction Industry Scheme is incorporated in the Articles of Nominated Sub-Contract paragraph 3.153.</td>
</tr>
</tbody>
</table>
Appendix 7

Part 1 – Invitation to Tender

SUB-CONTRACT INFORMATION

12 Sub-Contract:

Under clause 35.7 of the Main Contract the Main Contractor is required, on receipt of the Instruction (Nomination NSC/N) of the Architect the Contract Administrator, forthwith to complete in agreement with you NSC/T Part 3 (Particular Conditions), have NSC/T Part 3 signed by him or on his behalf and by you or on your behalf and execute the Articles of Nominated Sub-Contract Agreement (Agreement NSC/A) which prescribe (article 1-3) that the conditions of the Sub-Contract shall be those given in the standard Conditions of Nominated Sub-Contract (Conditions NSC/C), 1998 Edition:

*unamended.

*subject to the attached schedule of modifications.

Retention:

The Retention Percentage to be the same as in the Main Contract: see attached Main Contract Appendix and entries therein, reference clause 204-1-1. If see the final sentence in item 6 and item 13.

Advance payment:

Clause 4.1-2 *apply (does not apply

If applicable:

the advance payment is:

£ / % of the Sub-Contract Sum

and will be reimbursed to the Employer in the following amount(s) and at the following time(s):

An advance payment bond from a surety approved by the Employer

*on the terms agreed between the British Bankers’ Association and the JCT

*on the terms annexed hereto

*will be / will not be required.

Adjudication:

The nominating body for an Adjudicator under the Sub-Contract, unless otherwise agreed by the Contractor and the Sub-Contractor, is to be the same body as selected for the Main Contract: see attached Main Contract Appendix and the entry therein reference to clause 41A-2.

Arbitration/ legal proceedings:

The option for arbitration or legal proceedings, unless otherwise agreed by the Contractor and the Sub-Contractor, is to be the same as the option selected for the Main Contract: see attached Main Contract Appendix and the entry therein reference to articles 7A and 7B and clauses 41B and 41C.

Execution:

Under hand or as a deed in the same manner as the Main Contract: see item 4. Where however the Main Contract has been executed as a deed the Main Contractor may elect to have the sub-contract executed under hand.

*delete as applicable
### Part 1 – Invitation to Tender

**SUB-CONTRACT INFORMATION continued**

<table>
<thead>
<tr>
<th>Item</th>
<th>Sub-Contract Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Main Contract Appendix and entries therein. These entries will, where relevant, apply to the Sub-Contract unless otherwise specifically stated here.</td>
</tr>
</tbody>
</table>

---

**Note:** see the final sentence in item 6 on the Appendix that will apply.

<table>
<thead>
<tr>
<th>Item</th>
<th>Sub-Contract Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>An indication as to the earliest starting date and the latest starting date for the Sub-Contract Works to be carried out on site: to be (earliest) and (latest) Period required by the Architect/the Contract Administrator to approve drawings after receipt by the Architect/the Contract Administrator:</td>
</tr>
</tbody>
</table>

---

<table>
<thead>
<tr>
<th>Item</th>
<th>Sub-Contract Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Income and Corporation Taxes Act 1988 – Statutory tax deduction scheme</td>
</tr>
<tr>
<td></td>
<td>The Contractor <em>is</em> / is not entitled to be paid by the Employer without the statutory deduction referred to in the above Act or such other deduction as may be in force.</td>
</tr>
</tbody>
</table>

---

*delete as applicable*
THIS PAGE INTENTIONALLY LEFT BLANK
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>16(p),(q)</td>
<td>List here or on an attached sheet (a numbered document), the type of “other items of attendance” which the contractor will provide free of charge to the sub-contractor: this information must correspond with the appropriate provisions included in the main contract bills of quantities (or specification/schedules of work) after each prime cost sum (see paragraphs 8.56 to 8.58).</td>
</tr>
</tbody>
</table>
### Part 1 – Invitation to Tender

#### SUB-CONTRACT INFORMATION continued

<table>
<thead>
<tr>
<th>16</th>
<th>Attendance items</th>
<th>Conditions NSC/C – clauses 3-15-1 and 3-16</th>
</tr>
</thead>
<tbody>
<tr>
<td>General attendance:</td>
<td>Conditions NSC/C define ‘general attendance’ in clause 3-15-1 as follows: “General attendance (including, where the Joint Fire Code applies, attendance in respect of the requirements of the Joint Fire Code as stated in NSC/T Part 1, item 16b) shall be provided by the Contractor free of charge to the Sub-Contractor and shall be deemed to include only use of the Contractor’s temporary roads, pavings and paths, standing scaffolding, standing power operated hoisting plant, the provision of temporary lighting and water supplies, clearing away rubbish, provision of space for the Sub-Contractor’s own offices and for the storage of his plant and materials and the use of messrooms, sanitary accommodation and welfare facilities.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The items of attendance as necessary in respect of the requirements of the Joint Fire Code, if applicable, are:</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>hand bells, whistles, alarms, manually operated sounders;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>security guards;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>fire signage e.g. location of fire access routes and escape routes and positions of dry riser inlets and fire extinguishers;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>fire doors and firestopping to lift shafts, service ducts and voids;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>water supplies for fire fighting;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>portable fire extinguishers;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>maintenance and inspection of fire fighting equipment;</td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>the services of an appropriate number of Fire Marshals where the Works are a Large Project.</td>
<td></td>
</tr>
<tr>
<td>Temporary Buildings will be located within the building under construction or within six metres thereof in respect of which the Contractor will connect the fire detection system of the Temporary Buildings to the Central Station.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In addition to the requirements for general attendance by the Contractor, Conditions NSC/C state in clause 3-18: “The Contractor shall provide, free of charge to the Sub-Contractor, the other items of attendance detailed in NSC/T Part 1 amended, if applicable, as detailed in NSC/T Part 2.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other items which the Contractor shall provide free of charge to the Sub-Contractor:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

*delete if not required*
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>17</td>
<td>The provisions for fluctuations included in Sub-Contract Conditions NSC/C are discussed in paragraphs 8.59 to 8.64. Sub-contract tenders for important portions of the works are normally invited and received at the same time as the tenders for the main contract. The Department recommends that when inviting sub-contract tenders for important portions of the Works, the architect/the contract administrator should specify the type of fluctuation provision that will apply. rule 3 Normally delete the two conditions which are not to apply and the option for the sub-contractor to choose the type of fluctuation. If Clause 4A or Clause 4B applies Fuels: delete “excluded“ (see paragraph 3.199). Base Date: normally insert the same base date as the main contract. Percentage addition: Clause 4A – Insert NIL Clause 4B – insert same percentage as the main contract. Government policy requires that a maximum of 15% be inserted (see paragraph 3.204).</td>
</tr>
<tr>
<td></td>
<td>If Clause 4C applies: Insert date of JCT Sub-Contract/Works Formula Rules applicable.</td>
</tr>
<tr>
<td></td>
<td>(u) Non-adjustable element: insert 10% Base Date: normally insert the same base date as the main contract (see paragraph 3.212).</td>
</tr>
<tr>
<td></td>
<td>rule 3 To operate the formula rules a priced schedule allocating every part of the sub-contract works to a work category must be prepared and included in the sub-contract documents. A blank schedule may be provided with the invitation to tender for the sub-contractor to price, or a priced schedule may be submitted by the sub-contractor attached to his tender NSC/T Part 2. Delete the alternative not required regarding the provision of the schedule.</td>
</tr>
<tr>
<td></td>
<td>(t) Fuels: delete “excluded“ (see paragraph 3.199). Base Date: normally insert the same base date as the main contract. Percentage addition: Clause 4A – Insert NIL Clause 4B – insert same percentage as the main contract. Government policy requires that a maximum of 15% be inserted (see paragraph 3.204).</td>
</tr>
<tr>
<td></td>
<td>rule 3 Base month: normally insert the same base month as the main contract.</td>
</tr>
<tr>
<td></td>
<td>rule 8 Delete options for dealing with “Fix-only” work not selected.</td>
</tr>
</tbody>
</table>
Part 1 – Invitation to Tender

SUB-CONTRACT INFORMATION continued

17 Fluctuations

[r] The clause of Conditions NSC/C which shall apply is:
   * clause 4A – Contribution, levy and tax fluctuations
   * clause 4B – Labour and materials cost and tax fluctuations
   * clause 4C – Formula adjustment
   * that chosen from clauses 4A, 4B and 4C by the Sub-Contractor and stated by him in NSC/T Part 2, page 3.

[s] The clause stated above (or, where the fourth alternative applies, that chosen by the Sub-Contractor) shall be operated in accordance with the relevant items below together with those in NSC/T Part 2, pages 3 and 4.

Clause 4A: Contributions, levy and tax fluctuations

[t] Fuels included / excluded

4A-2-1 Base Date:

4A-6-1 Percentage addition to fluctuation payments or allowances: %

Clause 4B: Labour and materials cost and tax fluctuations

[r] Fuels included / excluded

4B-3-1 Base Date:

4B-7 Percentage addition to fluctuation payments or allowances: %

Clause 4C: Formula adjustment

4C-1 JCT Sub-Contract/Works Contract Formula Rules are those dated

[u] 4C-3-3 and -3.4 Non-Adjustable Element: % (not to exceed 10%)

Base Date:

Formula Rules

rule 3 Definition of Balance of Adjustable Work – any measured work not allocated to a Work Category

*as in the Schedule included in the numbered tender documents.

*as in the Schedule completed by the Sub-Contractor and attached to NSC/T Part 2: see NSC/T Part 2, page 4.

rule 3 Base Month: (where no Month is stated, the Base Month will be the calendar month prior to that in which NSC/T Part 2 is due to be returned)

[v] If not completed by the Architect/Contract Administrator, to be completed by the Sub-Contractor; see NSC/T Part 2, page 4.

rule 8 Method of dealing with 'Fix-only' work:

*rule 8(ii) / rule 8(iii) / rule 8(iii)

*delete as applicable
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>rule 11a or 11b</td>
<td>Delete the alternative not required regarding the provision of the schedule as formula rule 3 page 8.</td>
</tr>
<tr>
<td>rule 55a (v)</td>
<td>The Department recommends that the weightings of labour and materials be completed by the architect/the contract administrator.</td>
</tr>
<tr>
<td>rule 55a (v),(w)</td>
<td>The separate material index for sprinkler installations should apply when a sprinkler installation is not part of a general heating, ventilating and air-conditioning sub-contract.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>rule 61a (v)</td>
<td>Normally delete “upon completion of manufacture of all fabricated components”. However, in exceptional circumstances NHS bodies may at their own discretion delete the alternative of “upon delivery to site of all fabricated components” provided they ensure that the provisions of clause 30.3 (off-site materials or goods) of the main contract have been complied with.</td>
</tr>
</tbody>
</table>

To ensure compatibility between the main contract and the nominated sub-contract, the provision for listing items should be consistent (see paragraphs 3.135 to 3.141).
## Part 1 – Invitation to Tender

### SUB-CONTRACT INFORMATION continued

### Clause 4C continued

<table>
<thead>
<tr>
<th>Rule 11a or 11b</th>
<th>Work Categories applicable to the Sub-Contract Works and classification of items as referred to in rule 11a or rule 11b</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>*as in the Schedule included in the numbered tender documents.</td>
</tr>
<tr>
<td></td>
<td>*as in the Schedule completed by the Sub-Contractor and attached to NSC/T Part 2: see NSC/T Part 2, page 4.</td>
</tr>
</tbody>
</table>

### Rule 43

<table>
<thead>
<tr>
<th>Weightings of labour and materials for electrical installations or heating, ventilating and air conditioning installations or sprinkler installations:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour</td>
</tr>
<tr>
<td>----------------------------------</td>
</tr>
<tr>
<td>[v] Electrical</td>
</tr>
<tr>
<td>[w] Heating, ventilating and air-conditioning</td>
</tr>
<tr>
<td>[v] Sprinkler</td>
</tr>
</tbody>
</table>

### Rule 55a

| The separate materials index for sprinkler installations will not apply.         |

### Rule 61a

<table>
<thead>
<tr>
<th>Fire installations. Adjustment shall be effected</th>
</tr>
</thead>
<tbody>
<tr>
<td>*upon completion of manufacture of all fabricated components.</td>
</tr>
<tr>
<td>*upon delivery to site of all fabricated components.</td>
</tr>
</tbody>
</table>

### Listed Items

| The materials or goods or items pre-fabricated for inclusion in the Sub Contract Works and to which clause 4.15.4.4 and clause 4.17.1.3 will apply are set down below: |

A bond in respect of payment for off-site goods and materials from a surety approved by the Employer:

*on the terms agreed between the British Bankers’ Association and the JCT

*on the terms annexed hereto

*will be/will not be required.

*delete as applicable
Appendix 8

NSC/T Part 2: Tender by a Sub-Contractor

The completion and return of tender by a sub-contractor NSC/T Part 2

1. This document is completed and signed by each potential sub-contractor and returned to the employer or the architect/the contract administrator as instructed together with the copy of the Standard Form of Employer/Nominated Sub-Contractor Agreement NSCAW executed by the sub-contractor as a simple contract or as a deed (Step 3).

2. The tenders are examined and evaluated by the architect/the contract administrator and the tender of the successful sub-contractor is signed by the employer (or the architect/the contract administrator on his behalf) to signify his approval (Step 4).
Part 2 – Tender by a Sub-Contractor

Note: When issuing the instruction under JCT 98 35-6 on Nomination NSC/N nominating the Sub-Contractor, the Architect/the Contract Administrator must satisfy himself that there are no discrepancies between the completed NSC/T Part 1 and the completed NSC/T Part 2, both of which must accompany his Nomination Instruction on Nomination NSC/N.

The identification term in column 1 is used in NSC/T Part 2 for the document whose full title is given in column 2.

<table>
<thead>
<tr>
<th>Identification term</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSC/T</td>
<td>The Standard Form of Nominated Sub-Contract Tender, 1998 Edition, which comprises:</td>
</tr>
<tr>
<td>- Part 1</td>
<td>Part 1: The Architect/the Contract Administrator’s invitation to Tender to a Sub-Contractor.</td>
</tr>
<tr>
<td>- Part 2</td>
<td>Part 2: Tender by a Sub-Contractor.</td>
</tr>
<tr>
<td>- Part 3</td>
<td>Part 3: Particular Conditions: to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
<tr>
<td>Nomination NSC/N</td>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
</tbody>
</table>
Part 2 – Tender by a Sub-Contractor

To the Employer and Main Contractor

[a] Main Contract Works and location:

[b] Job reference:

[c] Sub-Contract Works:

In response to the INVITATION IN NSC/T PART 1

We

of (address)

Tel. No:

having duly noted the information therein contained or referred to now, upon and subject to the Stipulations on page 8, OFFER for approval by or on behalf of the Employer and acceptance by the Contractor:

to carry out and complete, as a Nominated Sub-Contractor, as part of the Main Contract Works referred to in NSC/T Part 1, the Sub-Contract Works identified in the numbered tender documents listed in NSC/T Part 1 and in accordance with all the entries we have made in this Tender (subject to agreement on items 1 to 3 with the Main Contractor when we agree the items set out in NSC/T Part 3) and

*in the attached further documents; and

to complete in agreement with the Main Contractor NSC/T Part 3 (Particular Conditions), to have NSC/T Part 3 signed by us or on our behalf and to execute Agreement NSC/A (Articles of Nominated Sub-Contract Agreement) with the Main Contractor forthwith after receipt of a copy of the Nomination Instruction (Nomination NSC/N) issued to the Main Contractor under clause 35-6 of the Main Contract Conditions,

for the VAT-exclusive Sub-Contract Sum/VAT-exclusive Tender Sum (whichever is required by the invitation to tender, NSC/T Part 1, page 2) of

(words)

£

*delete if not applicable
Part 2 – Tender by a Sub-Contractor

The following SHALL BE APPLICABLE TO THE SUB-CONTRACT:

(b) The schedule of rates or prices for measured work (Conditions NSC/C clause 4-5 or clause 4-12) attached; and

either

* the daywork percentages set out below

or

(b) * the schedule of daywork prices (Conditions NSC/C clause 4-5 or clause 4-12) and the method by which they are to be adjusted attached; and

the fluctuations provisions set out hereafter; and

the attendance items in NSC/T Part 1 (subject to the changes if any, set out in NSC/T Part 2, page 5) to be provided by the Contractor free of charge to us.

The daywork percentages (Conditions NSC/C clause 4-5 or clause 4-13.3) are:

(c) Definition

\[\begin{array}{lll}
\text{Labour %} & \text{Materials %} & \text{Plant %} \\
\hline
\text{RICS/BEC (now CC)} & & \\
\text{RICS/ECA} & & \\
\text{RICS/ECA (Scotland)} & & \\
\text{RICS/HVCA} & & \\
\end{array}\]

†The wage fixing bodies whose labour rates will be applicable when charging for daywork labour.

Fluctuations

The clause of Conditions NSC/C which is to apply is that stated in NSC/T Part 1, item 17, unless that item states that the applicable clause shall be chosen by the Sub-Contractor from clauses 4A, 4B or 4C; in which case the clause we have chosen to apply shall be:

* clause 4A – Contribution, levy and tax fluctuations
* clause 4B – Labour and materials cost and tax fluctuations
* clause 4C – Formula adjustment

and the applicable clause shall be operated in accordance with the relevant items in NSC/T Part 1, item 17, together with those set out below.

Clause 4A:

the list of materials, goods, electricity and fuels (where fuels are to be included; see NSC/T Part 1, item 17) is set out in the Schedule attached.

Clause 4B:

the basic transport charges list and the list of basic prices of materials, goods, electricity and fuels (where fuels are to be included; see NSC/T Part 1, item 17) are set out in the Schedule attached.

Clause 4C:

4C-4

Fluctuations – articles manufactured outside the United Kingdom.

The list of market prices of such articles which the Sub-Contractor is required by the Sub-Contract Documents to purchase and import (see JCT Sub-Contract Works Contract Formula Rules, rule 4(j)) is set out in the Schedule attached.

*delete as applicable
**Part 2 – Tender by a Sub-Contractor**

**Clause 4C continued**

**Formula Rules**

- **rule 3** Definition of Balance of Adjustable Work. Where not set out in a Schedule included in the numbered tender documents, any measured work not allocated to a Work Category is as set out in the Schedule attached.

- **rule 8** Method of dealing with 'Fix-only' work:
  
  *rule 8(i) / rule 8(ii) / rule 8(iii)*

- **rule 11a or 11b** Work Categories applicable to the Sub-Contract Works. Where not set out in the Schedule included in the numbered tender documents, the Work Categories applicable to the Sub-Contract Work and the classification of items as referred to in rule 11a or rule 11b together with the portion of the Sub-Contract Sum/Tender Sum attributable to each item are set out in the Schedule attached.

- **rule 43** Weightings of labour and materials – electrical installations or heating, ventilating and air conditioning installations or sprinkler installations:

<table>
<thead>
<tr>
<th>Labour</th>
<th>Materials</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- **rule 65a** The separate materials index for sprinkler installations:
  
  *will / will not apply.

- **rule 61a** Lift installations. Adjustment shall be effected:
  
  *upon completion of manufacture of all fabricated components.

  *upon delivery to site of all fabricated components.

- **rule 64** Structural steelwork installations:
  
  (i) Average price per tonne of steel delivered to fabricator's works
  
  £

  (ii) Average price per tonne for erection of steelwork
  
  £

- **rule 70a** Catering equipment installations:
  
  apportionment of the value of each item between
  
  (i) materials and shop fabrication
  (ii) supply of factor items
  (iii) site installations

  is as set out in the list attached.
Part 2 – Tender by a Sub-Contractor

Attendance items

General attendance:

Conditions NSC/C – clauses 3-15-1 and 3-16

[g] The attendances listed relate to the following paragraphs in the Joint Fire Code: 6.3(a), 7.1, 7.4, 7.5, 8.1(b), 8.2, 10.2 and 10.8.

[g] Conditions NSC/C define ‘general attendance’ in clause 3-15-1 as follows: “General attendance (including, where the Joint Fire Code applies, attendance in respect of the requirements of the Joint Fire Code as stated in NSC/T Part 1, Item 16) shall be provided by the Contractor free of charge to the Sub-Contractor and shall be deemed to include only use of the Contractor’s temporary roads, pavings and paths, standing scaffolding, standing power operated hoisting plant, the provision of temporary lighting and water supplies, clearing away rubbish, provision of space for the Sub-Contractor’s own offices and for the storage of his plant and materials and the use of messrooms, sanitary accommodation and welfare facilities.”

[g] The items of attendance as necessary in respect of the requirements of the Joint Fire Code, if applicable, are:
- hand bells, whistles, buzzers, manually operated sounders;
- security guards;
- fire signage e.g. location of fire access routes and escape routes and positions of dry riser inlets and fire extinguishers;
- fire doors and fire stopping to lift shafts, service ducts and voids;
- water supplies for fire fighting;
- portable fire extinguishers;
- maintenance and inspection of fire fighting equipment;
- the services of an appropriate number of Fire Marshals where the Works are a Large Project.

[h] Other items of attendance:

[Apologies, but the text for [h] is not clear or legible. Assumption: It likely discusses additional specific attendance requirements not covered in [g].]

Changes, if any, from the other items of attendance set out in NSC/T Part 1, Item 16 and/or any further attendances which the Contractor shall provide free of charge to us (Conditions NSC/C clause 3-16):
Part 2 – Tender by a Sub-Contractor

Items 1 to 5 are to be completed by the Sub-Contractor. Items 1, 2 and 3 will be superseded after the Main Contractor and the Sub-Contractor have by agreement completed items 1 to 4 and 6 in NSC/T Part 3 “Particular Conditions” following receipt by the Main Contractor of Nomination NSC/N issued by the Architect/the Contract Administrator pursuant to JCT 98 3B-6 nominating the sub-contractor. When NSC/T Part 2 is annexed to the Articles of Nominated Sub-Contract Agreement (Agreement NSCA) items 1, 2 and 3 in NSC/T Part 2 must be deleted and the deletions initialed by or on behalf of the Contractor and the Sub-Contractor.

1 (i) Period required by the Architect/the Contract Administrator to approve drawings after receipt will be that set out in NSC/T Part 1, item 14.

(ii) The earliest starting date and the latest starting date for the Sub-Contract Works to be carried out on site:

<table>
<thead>
<tr>
<th>to be</th>
<th>(earliest)</th>
</tr>
</thead>
<tbody>
<tr>
<td>and</td>
<td>(latest)</td>
</tr>
</tbody>
</table>

(iii) Periods required for:

(i) submission for approval of all necessary Sub-Contractor’s drawings etc. (co-ordination, installation, shop or builders’ work or other as appropriate) weeks

(ii) the execution of the Sub-Contract Works

off-site (if any) prior to commencement on site weeks

on site weeks

from expiry of period required for notice to commence work on site which is weeks

(iv) Further details:

2 Conditions NSC/C clause 6.5.2

Insurance cover for any one occurrence or series of occurrences arising out of one event £

[k] See NSC/T Part 3, item 3, side notes [i] and [j].

3 [k] Conditions NSC/C clause 5A/5B

Value added tax – alternative VAT provisions clause 5A/5B to apply

clause 5A.5 *to apply / not to apply

clause 5B.5 *to apply / not to apply

*delete as applicable
Part 2 – Tender by a Sub-Contractor

4 Any other matters (e.g. special conditions or agreements on employment of labour, limitation on working hours) to be set out here or on an attached sheet.

5 Income and Corporation Taxes Act 1968 — Statutory tax deduction scheme

We *are/*are not the user of a current sub-contractor’s tax certificate.

The evidence to be produced by us to the Contractor for the verification of our tax certificate whose

starting date is 19

expiry date is 19

will be

6 A priced Activity Schedule is attached (see clause 1.4 and 4.17.1 of NSC/C)

*delete as applicable
Part 2 – Tender by a Sub-Contractor

Stipulations

1 Only when this Tender is signed by or on behalf of the Employer as ‘approved’ and the Architect/the Contract Administrator has returned to us a copy of the Agreement NSC/W signed by or on behalf of the Employer or entered into as a deed by the Employer (as applicable) do we agree to be bound by that Agreement NSC/W as signed by or on behalf of ourselves or entered into as a deed by ourselves.

2 We reserve the right to withdraw this Tender if

(a) after the identity of the Main Contractor has been notified to us in writing by the Employer or by the Architect/the Contract Administrator on his behalf, we have given to the Employer a notice in writing pursuant to clause 1.2 of the Agreement NSC/W;

(b) or

(c) after the Nomination Instruction on Nomination NSC/N has been issued by the Architect/the Contract Administrator, we are for any reasons stated in writing to the Main Contractor unable to agree with the Main Contractor the items of NSC/T Part 3 which are required to be completed by the Main Contractor in agreement with us and to have NSC/T Part 3 signed by us or on our behalf within ... days/weeks of the date of our signature on page 2 or such other later date as may be notified in writing by us to the Architect/the Contract Administrator.

3 Without prejudice to the reservations in 2 above this tender is withdrawn if the Nomination Instruction on Nomination NSC/N is not issued by the Architect/the Contract Administrator (with a copy to ourselves) pursuant to clause 3.6 of the Main Contract Conditions

4 We agree that on any withdrawal under 2 or 3 above we shall receive no monies from the Employer except for any amounts that may be due under Agreement NSC/W.

Signed by or on behalf of the Sub-Contractor

Date 19

Approved by or on behalf of the Employer

Date 19

Note on attachments to NSC/T Part 2

Page 2
where applicable, any further documents

Page 3
where applicable:
- schedule of rates and prices for measured work
- schedule of daywork prices
- schedule listing materials, goods, electricity and fuels (if to be included)

if clause 4A is applicable

- schedule listing basic transport charges and basic prices of materials, goods, electricity and fuels (if fuels are to be included)
if clause 4B is applicable

- list of market prices of articles manufactured outside the U.K.

if clause 4C is applicable

- list of measured work not allocated to a Work Category etc.
- rule 3: where not in NSC/T Part 1, Schedule of measured work not allocated to a Work Category etc.
- rule 11a or 11b: where not in NSC/T Part 1, Schedule of applicable Work Categories etc.
- rule 70a. Catering equipment installations: where applicable, a list of the apportionment of value of each item as required

Page 4

*delete as applicable
Appendix 9

NSC/T Part 3: Particular Conditions

The Particular Conditions NSC/T Part 3

Immediately following the nomination of a sub-contractor by the architect/the contract administrator (Step 4), the contractor completes and agrees with the sub-contractor the matters set out in this document. Upon agreement the contract is signed by the contractor and the sub-contractor (Steps 5 and 6).
**Part 3 – Particular Conditions**

Note: NSC/T Part 3 must be completed by the Contractor and the Sub-Contractor forthwith after receipt by the Contractor of the instruction of the Architect/the Contract Administrator on Nomination NSC/N nominating the Sub-Contractor under JCT 98 35-6.

Upon its completion the Contractor and the Sub-Contractor must sign NSC/T Part 3 on page 4.

The agreed provisions of NSC/T Part 3 items 1, 2 and 4 supersede the entries in items 1, 2 and 3 on pages 6 and 7 of NSC/T Part 2 which entries must be deleted and the deletions initialed by or on behalf of the Contractor and the Sub-Contractor.

<table>
<thead>
<tr>
<th>Identification term</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSC/T</td>
<td>The Standard Form of Nominated Sub-Contract Tender, 1998 Edition, which comprises:</td>
</tr>
<tr>
<td>Part 2</td>
<td>Part 2: Tender by a Sub-Contractor.</td>
</tr>
<tr>
<td>Part 3</td>
<td>Part 3: Particular Conditions: to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
<tr>
<td>Nomination NSC/N</td>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
</tbody>
</table>
Part 3 – Particular Conditions

Items to be completed by the Contractor and the Sub-Contractor

[a] Main Contract Works and location:

[b] The Sub-Contractor’s works in NSC/T Part 2, Items 3 to 4, should be considered when agreeing the entries in NSC/T Part 3.

[c] Conditions NSC/C state in clause 2.1: The Sub-Contractor shall carry out and complete the Sub-Contract Works in accordance with the agreed programme details in NSC/T Part 3, Item 1, and reasonably in accordance with the progress of the Works but subject to receipt of the notice to commence work on site as detailed in NSC/T Part 3, Item 1, and to the operation of clauses 2.2 to 2.7 (extension of Sub-Contract time).

[d] The period of notice must take account of any period stated for the execution of the Sub-Contract Works off-site prior to commencement on site.

[e] Sub-Contract Works:

1. (1) Period required by the Architect and/or the Contractor Administrator to approve drawings after receipt will be that set out in NSC/T Part 1, Item 14.

2. (2) The earliest starting date and the latest starting date for the Sub-Contract Works to be carried out on site:

   are: (earliest)

   and: (latest)

3. Periods required for:
   (i) Submission for approval of all necessary Sub-Contractor’s drawings etc. (co-ordination, installation, shop or builders work or other as appropriate): weeks

   (ii) the execution of the Sub-Contract Works off-site (if any):

      prior to commencement on site: weeks

      on site: weeks

      from expiry of period required for notice to commence

      work on site which is weeks

4. Further details:
Part 3 – Particular Conditions

Items to be completed by the Contractor and the Sub-Contractor continued

1 continued

(a) (5) Other arrangements:

state whether they are additional to those in items (3) and (4) or whether they supersede the details at items (3) and (4).

2 Conditions NSC/C clause 6.5.2

Insurance cover for any one occurrence or series of occurrences arising out of one event

£

3 Conditions NSC/C clause 5A.5E

(f) Value added tax – alternative VAT

clause *5A / 5B to apply

g) provisions

clause 5A.5 *to apply / not to apply

clause 5B.5 *to apply / not to apply

4 (h) Any other matters to be set out here or on an attached sheet.

*delete as applicable
Part 3 – Particular Conditions

Items to be completed by the Contractor and the Sub-Contractor continued

5 [i] Any changes or additions to the information given in NSC/T Part 1:
the Principal Contractor’s Health and Safety Plan if not previously provided;
item 7: obligations or restrictions imposed by the Employer;
item 8: order of Works: Employer’s requirements;
item 9: type and location of access,
as confirmed in Nomination NSC/N issued by the Architect/the Contract Administrator

6 Conditions NSC/C
Section 9

Settlement of disputes – adjudication, arbitration, legal proceedings

Adjudication – nominator of Adjudicator

President or a Vice-President or Chairman or a Vice-Chairman
Royal Institute of British Architects
The Royal Institution of Chartered Surveyors
Construction Confederation
National Specialist Contractors Council Limited
(if no nominator is selected the nominator shall be the President or a Vice-President of The Royal Institution of Chartered Surveyors)

Arbitration – appointor of Arbitrator

President or a Vice-President
Royal Institute of British Architects
The Royal Institution of Chartered Surveyors
Chartered Institute of Arbitrators
(if no appointor is selected the appointor shall be the President or a Vice-President of The Royal Institution of Chartered Surveyors)

Signed by or on behalf of the Contractor

Date 19

Signed by or on behalf of the Sub-Contractor

Date 19

*delete all but one
Appendix 10

**NSC/A Articles of Nominated Sub-Contract Agreement**

Immediately following the signing of the Particular Conditions NSC/T Part 3 by the contractor and the subcontractor, the contractor completes the Articles of Nominated Sub-Contract Agreement NSC/A and the contractor and the sub-contractor execute this document as a simple contract or as a deed (Steps 5 and 6).
## Articles of Nominated Sub-Contract Agreement

with the Standard Conditions of Nominated Sub-Contract (Conditions NSC/C) incorporated by reference.


The identification term in column 1 is used in NSC/A for the document whose full title is given in column 2.

<table>
<thead>
<tr>
<th>Identification term</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSC/T</td>
<td>The Standard Form of Nominated Sub-Contract Tender, 1998 Edition which comprises:</td>
</tr>
<tr>
<td>- Part 2</td>
<td>Part 2: Tender by a Sub-Contractor.</td>
</tr>
<tr>
<td>- Part 3</td>
<td>Part 3: Particular Conditions: to be agreed by a Contractor and a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
<tr>
<td>Nomination NSC/N</td>
<td>The Standard Form of Nomination Instruction for a Sub-Contractor nominated under JCT 98 35-6.</td>
</tr>
</tbody>
</table>
Articles of Nominated Sub-Contract Agreement

For use where a Sub-Contractor has been nominated under clause 35.6 of the Standard Form of Building Contract, 1998 Edition

Notes on completion by the Contractor and the Nominated Sub-Contractor

[a] Main Contract Works and location:

[a] Sub-Contract Works:

Articles of Agreement

made the day of 19

between

of (or whose registered office is situated at)

(thereinafter called ‘the Contractor’) of the one part

and

of (or whose registered office is situated at)

thereinafter called ‘the Sub-Contractor’) of the other part
Whereas

First the Sub-Contractor in response to an invitation to tender set out in NSC/T Part 1 by the Employer and the Architect/the Contract Administrator named in that Part has submitted an offer set out in NSC/T Part 2 to supply and fix materials or goods or execute work (hereinafter called ‘the Sub-Contract Works’) referred to in NSC/T Part 1 and particulars of which were set out in the numbered tender documents enclosed therewith;

Second the Sub-Contract Works are to be executed as part of the works (hereinafter called ‘the Main Contract Works’) referred to in NSC/T Part 1 being carried out by the Contractor under a contract with the Employer named in NSC/T Part 1 and as described in that Part, items 1 to 11 (hereinafter called ‘the Main Contract’);

Third pursuant to clause 35.1 of the Main Contract Conditions the Architect/the Contract Administrator has selected the Sub-Contractor whose Tender on NSC/T Part 2 for carrying out the Sub-Contract Works has been approved by or on behalf of the Employer;

Fourth the Employer and the Sub-Contractor have entered into Agreement NSCW under hand as a deed;

Fifth under clause 35.6 of the Main Contract Conditions the Architect/the Contract Administrator has issued an instruction on Nomination NSC/NC with a copy thereof to the Sub-Contractor dated

nominating the Sub-Contractor to carry out the Sub-Contract Works and has included with that instruction:

NSC/T Part 1 completed by or on behalf of the Architect/the Contract Administrator;

a copy of the numbered tender documents enclosed with NSC/T Part 1 together with any additional documents and/or amendments thereto as have been approved by the Architect/the Contract Administrator, and the Principal Contractor’s Health and Safety Plan;

NSC/T Part 2 completed and signed by or on behalf of the Sub-Contractor and signed by or on behalf of the Employer as ‘approved’;

confirmation, where relevant, of any alteration to the information given in NSC/T Part 1 in respect of—

item 7: obligations or restrictions imposed by the Employer
item 8: order of Works; Employer’s requirements
item 9: type and location of access;

approval, where relevant, of changes to the ‘other items of attendance’ in NSC/T Part 1, item 16, made by the Sub Contractor in NSC/T Part 2;

and, with the copy of this Instruction sent to the Sub-Contractor, a copy of the completed Appendix for the Main Contract;

and such completed NSC/T Part 1 and Part 2 and the numbered tender documents referred to above (together with any additional documents and/or amendments thereto as have been approved by the Architect/the Contract Administrator, and the Principal Contractor’s Health and Safety Plan) hereinafter called ‘the Numbered Documents’ and the completed Appendix for the Main Contract are annexed hereto.

Sixth the Contractor and the Sub-Contractor have agreed NSC/T Part 3 which has been signed by or on behalf of each of them and annexed hereto;

Seventh the Sub-Contractor has submitted his offer on NSC/T Part 2 on the basis that he will conclude a Sub-Contract on Agreement NSC/A with the Contractor as referred to in clause 35.7-2 of the Main Contract Conditions forthwith after receipt by him of a copy of Nomination NSC/N issued under clause 35.6 of the Main Contract Conditions;

*delete as applicable
Eighth at the date of the Sub-Contract

(A) the Sub-Contractor *is/is not the user of a current sub-contractor's tax certificate under the provisions of the Income and Corporation Taxes Act 1988 (hereinafter called 'the Act') in one of the forms specified in Regulation 24 of the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993 and the Schedule thereto (hereinafter called 'the Regulations') or any amendment or re-enactment or re-making thereof. Where the words 'is not' are deleted, clause 5C and clause 5D of the Standard Conditions of Nominated Sub-Contract (Conditions NSC/C) shall apply to the Sub-Contract unless the Contractor operates the 'self-vouchering' system to which footnote [k] to clause 5C refers in which case appropriate contractual arrangements other than clause 5C must be agreed and clause 5C shall not apply.

Where the word 'is' is deleted, clause 5D shall apply to the Sub-Contract and clauses 5C.2 to 5C.8 shall not apply;

(B) the Main Contractor *is/is not the user of a current sub-contractor's tax certificate under the Act and the Regulations;

(C) the Employer under the Main Contract *is/is not a 'contractor' within the meaning of the Act and the Regulations;

Now it is hereby agreed as follows

Article 1: The Sub-Contract

1-1 This Sub-Contract consists of:
- these Articles of Agreement,
- the completed NSC/T Part 1, Part 2 and Part 3 annexed hereto,
- the Numbered Documents annexed hereto and
- subject to article 1-3, Conditions NSC/C clauses 1-1 to 9C inclusive and either clause 4A or clause 4B or clause 4C as specified in either NSC/T Part 1 or Part 2 annexed hereto.

1-2 (c) In the Conditions NSC/C
*Clause 2.15: NSC/C Sectional Completion Supplement applies.
*Clause 5C / clause 5D / self-vouchering applies.

1-3 (d) The Conditions NSC/C, 1998 Edition, incorporating Amendments numbered shall be applicable

*unamended.

*subject to the schedule of modifications attached to NSC/T Part 1 and referred to in item 12 thereof.

Article 2: The Sub-Contractor's obligations

The Sub-Contractor will upon and subject to the Sub-Contract carry out and complete the Sub-Contract Works.
Appendix 10

Agreement NSC/A

3-1 The VAT-exclusive Sub-Contract Sum is (words)
£

The Contractor will discharge to the Sub-Contractor that Sum or such other sum as shall become payable in accordance with the Sub-Contract.

3-2 The VAT-exclusive Tender Sum is (words)
£

The Contractor will discharge to the Sub-Contractor such sum or sums as shall become payable in accordance with the Sub-Contract ("the Ascertained Final Sub-Contract Sum").

Article 4: Dispute or difference – adjudication

If any dispute or difference arises under this Sub-Contract either Party may refer it to adjudication in accordance with clause 9A.

Article 5A: Dispute or difference – arbitration

Where the entry in NSC/T Part 3 stating that “Clause 9B (Arbitration) applies” has not been deleted then, subject to article 4, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Sub-Contract or in connection therewith, except in connection with the enforcement of any decision of an Adjudicator appointed to determine a dispute or difference arising thereunder, shall arise between the Parties either during the progress or after the completion or abandonment of the Sub-Contract Works or after the determination or the employment of the Sub-Contractor, except under clause 5C or 5D (statutory payment schemes) to the extent provided in clause 5C-8 or 5D-6, it shall be referred to arbitration in accordance with clause 9B.

Article 5B: Dispute or difference – legal proceedings

Where the entry in NSC/T Part 3, item 6, stating that “Clause 9B (Arbitration) applies” has been deleted then, subject to article 4, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Sub-Contract or in connection therewith shall arise between the Parties either during the progress or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor it shall be determined by legal proceedings.
Appendix 10

Notes

[A1] For Agreement executed under hand and NOT as a deed.

[A2] For Agreement executed as a deed under the law of England and Wales by a company or other body corporate, insert the name of the party mentioned and identified on page 2 and then use either [A3] and [A4] or [A5]. If the party is an individual see note [A6].

[A3] For use if the party is using its common seal, which should be affixed under the party’s name.

[A4] For use of the party’s officers authorized to affix its common seal.

[A5] For use if the party is a company registered under the Companies Acts which is not using a common seal; insert the names of the two officers by whom the company is acting who MUST be either a director and the company secretary or two directors, and insert their signatures with ‘Director’ or ‘Secretary’ as appropriate. This method of execution is NOT valid for local authorities or certain other bodies incorporated by Act of Parliament or by charter if exempted under s.718(2) of the Companies Act 1985.

[A6] If executed as a deed by an individual: insert the name at [A2], delete the words at [A3], substitute ‘whose signature is here subscribed’ and insert the individual’s signature. The individual MUST sign in the presence of a witness who attests the signature. Insert at [A4] the signature and name of the witness. Sealing by an individual is not required.

Other attestation clauses are required under the law of Scotland.

---

AS WITNESS THE HANDS OF THE PARTIES HERETO

Signed by or on behalf of the Contractor

in the presence of:

Signed by or on behalf of the Sub-contractor

in the presence of:

---

EXECUTED AS A DEED BY THE CONTRACTOR

hereinafter mentioned namely

by affixing hereto its common seal

in the presence of:

*OR* acting by a director and its secretary* / two directors* whose signatures are here subscribed namely

[Signature] \[DIRECTOR\] \[Signature] \[SECRETARY*/DIRECTOR*

---

AND AS A DEED BY THE SUB-CONTRACTOR

hereinafter mentioned namely

by affixing hereto its common seal

in the presence of:

*OR* acting by a director and its secretary* / two directors* whose signatures are here subscribed namely

[Signature] \[DIRECTOR\] \[Signature] \[SECRETARY*/DIRECTOR*

*Delete as appropriate*
Annexures to the
Articles of Nominated Sub-Contract Agreement

See Fifth and Sixth recitals

- NSC/T Part 1 completed by or on behalf of the Architect/the Contract Administrator;

- the NUMBERED DOCUMENTS (that is, the tender documents numbered by the Architect/the Contract Administrator and enclosed with NSC/T Part 1 as sent to the Contractor pursuant to clause 35-6-1 of the Main Contract Conditions together with any amendments or additions thereto as have been approved by the Architect/the Contract Administrator);

- the completed Appendix for the Main Contract;

- NSC/T Part 2 completed and signed by the Sub-Contractor and signed by or on behalf of the Employer as 'approved'; items 1, 2 and 3 must be deleted, and the deletion initialled by the Contractor and the Sub-Contractor; if the Sub-Contract Sum or Tender Sum stated on NSC/T Part 2 differs from that inserted in article 3, amend NSC/T Part 2 to conform to article 3;

- NSC/T Part 3 signed by or on behalf of the Contractor and the Sub-Contractor.
Appendix 11

The completion of the Employer/
Nominated Sub-Contractor Agreement
NSC/W

1. This document should be completed as follows:
   a. page 1: completed by the architect/the contract administrator (for each potential sub-contractor (Step 2) except for entering the date which is entered by the employer (Step 4);
   b. page 2: typed amendment slip inserted by the architect/the contract administrator for each potential sub-contractor (Step 2). (See paragraph 8.44.);
   c. pages 2 and 7: Each tenderer initials the amendment slip on page 2 and completes page 7 as a simple contract or as a deed (Step 3);
   d. pages 1, 2 and 7: The employer dates the agreement of the successful sub-contractor on page 1, initials the amendment slip on page 2 and completes page 7 either as a simple contract or as a deed (Step 4).
Appendix 11

JCT Standard Form of Employer/Nominated Sub-Contractor Agreement


[a] Insert the same details as in NSC/T Part 1, pages 2 and 3.

[a] Main Contract Works ('Works') and location:

[a] Job reference:

[a] Sub-Contract Works:

This Agreement

made the day of 19

between

of (or whose registered office is situated at)

(herinafter called 'the Employer')

and

of (or whose registered office is situated at)

(herinafter called 'the Sub-Contractor')

© The Joint Contracts Tribunal Limited 1998
Commentary

A typed amendment slip with additional clause 2.1.4 must be glued in the margin of page 2 next to clause 2.1 by the Architect/Contract Administrator (Step 2) and initialled by the sub-contractor (Step 3) and the Employer (Step 4).

Additional clause 2.1.4

“.4 the carrying out of the Sub-Contract Works in a proper and workmanlike manner”
Whereas

First the Sub-Contractor has submitted a tender on Tender NSC/T Part 2 (hereinafter called ‘the Tender’) on the terms and conditions in that Tender and in the Invitation to Tender NSC/T Part 1 to carry out works (as set out in the numbered tender documents enclosed therewith and referred to above and hereinafter called ‘the Sub-Contract Works’) as part of the Main Contract Works referred to above to be or being carried out on the terms and conditions relating thereto referred to in the Tender NSC/T Part 1 (hereinafter called ‘the Main Contract’); and the Tender has been signed as ‘approved’ by or on behalf of the Employer;

Second the Employer has appointed

to be the Architect/the Contract Administrator for the purposes of the Main Contract and this Agreement (hereinafter called ‘the Architect/the Contract Administrator’ which expression as used in this Agreement shall include his successors validly appointed under the Main Contract or otherwise if appointed before the Main Contract is operative);

Third the Architect/the Contract Administrator on behalf of the Employer intends, after this Agreement has been executed and, if a Main Contract has not been entered into, after a Main Contract has been so entered into, to nominate the Sub-Contractor to carry out and complete the Sub-Contract Works on the terms and conditions of the Tender and the Invitation to tender NSC/T Part 1;

Fourth nothing contained in this Agreement nor anything contained in the Tender or in the Invitation to Tender NSC/T Part 1 is intended to render the Architect/the Contract Administrator in any way liable to the Sub-Contractor in relation to matters in the said Agreement, Tender or Invitation to Tender.

Now it is hereby agreed

1.1 The Sub-Contractor shall, after receipt of a copy of the Nomination Instruction (Nomination NSC/A) issued to the Main Contractor under clause 35-6 of the Main Contract Conditions, enter into complete agreement with the Main Contractor the Particular Conditions (NSC/T Part 3) and sign the completed NSC/T Part 3 or have it signed on his behalf and execute with the Main Contractor the Articles of Nominated Sub-Contract Agreement (Agreement NSC/A) unless, for good reasons stated in writing to the Main Contractor, the Sub-Contractor is unable to comply with this clause 1.1.

1.2 If the identity of the Main Contractor has not been notified in writing to the Sub-Contractor by the Employer or by the Architect/the Contract Administrator on his behalf before or on the date the Sub-Contractor signs this Agreement or enters into this Agreement as a deed then, not later than 7 days after receipt by the Sub-Contractor of a written notification by the Employer or by the Architect/the Contract Administrator on his behalf of the identity of the person who becomes the Main Contractor, the Sub-Contractor may by notice in writing to the Employer state that:

1 this Agreement shall cease to have effect except in respect of the warranty in clause 2.1 hereof and any amounts due under clause 2.2-2 hereof; and

2 the OFFER on Tender NSC/T Part 2 is withdrawn notwithstanding any approval of that Tender by signature on page 8 thereof by or on behalf of the Employer.

1.3 If for any reason no Sub-Contract is entered into between a Main Contractor and the Sub-Contractor, this Agreement shall cease to have effect except in respect of the warranty in clause 2.1 hereof and any amounts due under clause 2.2-2 hereof.

2.1 The Sub-Contractor warrants that insofar as the Sub-Contract Works have been or will be designed by him he will comply with regulation 13 of the Construction (Design and Management) Regulations 1994 or any amendment or re-making thereof and, without prejudice to such compliance, warrants that he has exercised and will exercise all reasonable skill and care in

1 the design of the Sub-Contract Works insofar as the Sub-Contract Works have been or will be designed by the Sub-Contractor; and
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2-1 2. the selection of the kinds of materials and goods for the Sub-Contract Works as far as such kinds of materials and goods have been or will be selected by the Sub-Contractor; and

3. the satisfaction of any performance specification or requirements as far as such performance specification or requirement is included or referred to in the description of the Sub-Contract Works included in or annexed to the numbered tender documents enclosed with NSC/T Part 1.

Before effect is given to any proposed design referred to in clause 2-1.1, to any proposed selection referred to in clause 2-1.2 or to any proposed satisfaction referred to in clause 2-1.3, the Employer shall refer such design, selection or proposed satisfaction to the Planning Supervisor referred to in the Invitation to Tender NSC/T Part 1 or to any new appointee as the Planning Supervisor made by the Employer; and the Sub-Contractor shall make such amendments, if any, to the proposed design, the proposed selection or the proposed satisfaction as may be necessary to take account of any comments of the Planning Supervisor. The warranty given under clause 2-1 shall be construed as being in respect of the design, selection or satisfaction after the Sub-Contractor has taken account of any comments of the Planning Supervisor.

Nothing in clause 2-1 shall be construed so as to affect the obligations of the Sub-Contractor under the Sub-Contract entered into by the execution by the Main Contractor and the Sub-Contractor of Agreement NSC/W in regard to the supply under that Sub-Contract of workmanship, materials and goods.

The Employer shall ensure that the Planning Supervisor carries out all the duties of a planning supervisor under the aforesaid Regulations.

2-2 1. If, after the date of this Agreement and before the date of issue by the Architect/Contract Administrator of the instruction on Nomination NSC/W under clause 35-6 of the Main Contract Conditions, the Architect/Contract Administrator instructs in writing that the Sub-Contractor should proceed with

1. the designing of;
2. the purchase under a contract of sale of materials or goods for, or
3. the fabrication of components for the Sub-Contract Works, the Sub-Contractor shall forthwith comply with the instruction and the Employer shall make payment or reimbursement for such compliance in accordance with clauses 2-2.2 to 2-2.4.

2. Unless 8.18(1) of the Housing Grants, Construction and Regeneration Act 1998 applies (i.e. payment or reimbursement pursuant to clause 2-2.1) shall be in accordance with the following provision:

1. payment shall be at 4-weekly intervals calculated from the date of the first instruction of the Architect/Contract Administrator under clause 2-2.1;

2. unless otherwise agreed, the Sub-Contractor shall, not later than 7 days after each 4-weekly period, invoice the Employer with copies to the Architect and Quantity Surveyor for the amount of any expense reasonably and properly incurred by the Sub-Contractor in carrying out work in the designing of the Sub-Contract Works; for any component properly fabricated by the Sub-Contractor; and for reimbursement of the Sub-Contractor for any amount properly due and paid by the Sub-Contractor under a contract for materials and goods properly purchased by the Sub-Contractor for the Sub-Contract Works. The invoice shall state the basis on which the invoiced amount has been calculated. The payment of the invoice shall become due 14 days after the date of the invoice and the final date for payment thereof shall be 14 days after the date on which such payment became due.

3. Not later than 5 days after the date on which the payment became due the Employer shall give a written notice to the Sub-Contractor which shall, in respect of the invoiced amount, specify the amount of the payment proposed to be made, to what the amount of the payment relates and the basis on which the amount is calculated; and not later than 5 days before the final date for payment of the invoice the Employer may notify the Sub-Contractor of any amount proposed to be withheld and/or deducted, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground.

Footnote

1d. Section 109(1) of the Act provides:

"(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless:

(a) it is specified in the contract that the duration of the work is to be less than 46 days, or

(b) it is agreed between the parties that the duration of the work is estimated to be less than 46 days."
Appendix 11

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2.2.4 If no notice pursuant to clause 2.2.2.3 is given the Employer shall pay the amount due under the invoice.

2.5 Upon payment in accordance with clause 2.2.2:

- the Employer may use the work of the Sub Contractor in the designing of the Sub Contract Works for the purpose of the Sub Contract Works and/or the Works but not further or otherwise; and

- the component materials and goods shall become the property of the Employer.

2A Where S.109(1) of the Housing Grants, Construction and Regeneration Act 1996 applies, the Employer:

1. shall pay the Sub-Contractor the amount of any expense reasonably and properly incurred by the Sub-Contractor in carrying out work in the designing of the Sub Contract Works, and upon such payment the Employer may use that work for the purpose of the Sub Contract Works and/or the Works but not further or otherwise; and/or

2. shall pay the Sub-Contractor for any component properly fabricated and shall reimburse the Sub-Contractor for any amount properly due and paid by the Sub-Contractor under a contract of sale for materials or goods properly purchased by the Sub-Contractor for the Sub Contract Works, and upon such payment or reimbursement the component materials and goods shall become the property of the Employer.

3. No payment or reimbursement referred to in clause 2.2.2.1 and/or 2.2.2.2 shall be made after the date of issue of the instruction of the Architect/the Contract Administrator on Nomination NSC/N nominating the Sub-Contractor except

1. in respect of any design work properly carried out and/or materials or goods properly ordered under a contract of sale or components properly fabricated in compliance with an instruction under clause 2.2.1 but which are not used for Sub-Contract Works by reason of some written decision against such use given by the Architect/the Contract Administrator before the date of issue of the instruction of the Architect/the Contract Administrator on Nomination NSC/N nominating the Sub-Contractor; and/or

2. where pursuant to clauses 35.3 to 35.9 of the Main Contract Conditions the nomination of the Sub-Contractor does not result in a Sub-Contract being entered into between a Main Contractor and the Sub-Contractor and no payments in respect of the Sub-Contractor are directed by the Architect/the Contract Administrator under clause 35.13.1 of the Main Contract Conditions.

4. Where

any payment and/or reimbursement has been made by the Employer under clause 2.2.2; and

the nomination, pursuant to clauses 35.3 to 35.9 of the Main Contract Conditions, of the Sub-Contractor results in a Sub-Contract being entered into between a Main Contractor and the Sub-contractor the Numbered Documents for which Sub-Contract incorporate the design, materials or goods or components to which clause 2.2.1 refers

the Sub-Contractor shall provide the Employer with a written statement, in duplicate, of the amount so paid or reimbursed and to be credited to the Main Contractor and the Sub-Contractor shall allow to such Main Contractor credit for such payment or reimbursement in the payment of the amount due in respect of the Sub-Contract Works.

3.1 The Sub-Contractor shall not be liable under clause 3.2 or 3.3 until the Architect/the Contract Administrator has issued his instruction on Nomination NSC/N nominating the Sub-Contractor which results in a Sub-Contract being entered into between a Main Contractor and the Sub-Contractor nor in respect of any revised period of time for delay in carrying out or completing the Sub Contract Works which the Sub-Contractor has been granted under clauses 2.2 to 2.7 of Conditions NSC/C.
Appendix 11

Supply of information etc. by the Sub-Contractor — delay in that supply

3-2 -1 The Sub-Contractor shall, subject to clause 3-2-2, supply the Architect/the Contract Administrator with information, drawings and details in accordance with any programme agreed between them, or at such time as the Architect/the Contract Administrator may reasonably require for the purposes of complying with his own obligations under clauses 5-4-1 and 5-4-2 of the Main Contract Conditions to provide information, drawings and details.

-2 The Architect/The Contract Administrator shall give the Sub-Contractor all the necessary details and information which the Sub-Contractor may need in order to comply with the programme or to satisfy the requirement of the Architect/the Contract Administrator. Any failure or delay by the Architect/the Contract Administrator to give such details and information shall not be construed as a default of the Sub-Contractor under clause 3-2-1.

-3 The Sub-Contractor shall be liable to the Employer to the extent that any delay in complying, or any failure to comply, with clause 3-2-1 as a result of a default on his part contributes to a valid claim by the Contractor by reason of the Relevant Event in clause 25-4-6-1 or clause 25-4-6-2 of the Main Contract Conditions for an extension of time and/or to any valid claim by the Main Contractor for direct loss and/or expense in respect of the “matter” in clause 26-2-1-1 or clause 28-2-1-2 of the Main Contract Conditions.

Default in performance by Sub-Contractor

3-3 -1 The Sub-Contractor shall so perform his obligations under the Sub-Contract that the Architect/the Contract Administrator will not be required of any default by the Sub-Contractor be under a duty to consider the issue of an instruction to determine the employment of the Sub-Contractor under clause 26-2-1-7 of the Main Contract Conditions provided that any suspension by the Sub-Contractor of further execution of the Sub-Contract Works under clause 4-2-9 of Conditions NS/C shall not be regarded as a “default by the Sub-Contractor” as referred to in clause 3-3-2.

-2 The Sub-Contractor shall so perform the Sub-Contract that the Main Contractor will not become entitled to an extension of time for completion of the Main Contract Works by reason of the Relevant Event in clause 25-4-7 of the Main Contract Conditions.

Architect’s direction on value of Sub-Contract Work in respect Certificates — information to Sub-Contractor

4 The Architect/The Contract Administrator shall operate the provisions of (a) clause 35-13-1 of the Main Contract Conditions.

Employer’s duty — final payment for Sub-Contract Works

5-1 The Architect/The Contract Administrator shall operate the provisions in (e) clauses 35-17 to 35-19 of the Main Contract Conditions.

Final payment to Sub-Contractor — Sub-Contractor’s obligations

5-2 After final payment by the Main Contractor under clause 35-17 of the Main Contract Conditions the Sub-Contractor shall rectify at his own cost or (or if he fails to rectify, shall be liable to the Employer for the costs referred to in clause 35-18 of the Main Contract Conditions) any omission, fault or defect in the Sub-Contract Works which the Sub-Contractor is bound to rectify under Conditions NS/C after written notification thereof by the Architect/the Contract Administrator at any time before the issue of the Final Certificate under clause 30-8 of the Main Contract Conditions.

Obligations of Sub-Contractor after issue of Final Certificate

5-3 After the issue of the Final Certificate under the Main Contract Conditions the Sub-Contractor shall in addition to such other responsibilities, if any, as he has under this Agreement, have the like responsibility to the Main Contractor and to the Employer for the Sub-Contract Works as the Main Contractor has to the Employer under the terms of the Main Contract relating to the obligations of the Contractor after the issue of the Final Certificate.

Architect’s instructions — duty to make a further nomination — liability of Sub-Contractor

6 Where the Architect/the Contract Administrator has been under a duty under clause 35-24 of the Main Contract Conditions, except as a result of the operation of clause 35-24-3, to issue an instruction to the Main Contractor making a further nomination in respect of the Sub-Contract Works, the Sub-Contractor shall indemnify the Employer against any direct loss/or expense resulting from the exercise by the Architect/the Contract Administrator of that duty.

Footnotes

[a]: Note: Clause 35-13-1 requires that the Architect/the Contract Administrator, upon directing the Main Contractor as to the amount included in any Interim Certificates against the value of the Nominated Sub-Contract Works issued under clause 30 of the Main Contract Conditions, shall forthwith inform the Sub-Contractor in writing of that amount.
[b]: Note: Clause 29-17 deals with final payment by the Employer for Sub-Contract Works prior to the issue of the Final Certificate under the Main Contract Conditions.
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7.1 The Architect/The Contract Administrator and the Employer shall operate the provisions in regard to the payment of the Sub-Contractor in clause 35-13 of the Main Contract Conditions.

7.2 If, after paying any amount to the Sub-Contractor under clause 35-13-5.3 of the Main Contract Conditions, the Employer produces reasonable proof that there was in existence at the time of such payment a petition or resolution to which clause 35-13-5.3 of the Main Contract Conditions refers, the Sub-Contractor shall repay on demand such amount.

8 Where (f) clause 1-7 of Conditions NSC/C applies, the Sub-Contractor shall forthwith supply to the Main Contractor details of any restriction, limitation or exclusion to which that clause refers as soon as such details are known to the Sub-Contractor.

9 Where clause 19-1.2 of the Main Contract applies 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, the Employer may at any time after Practical Completion of the Works assign to any such transferee or lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation) to enforce any of the terms of this Agreement made for the benefit of the Employer hereunder. The assignee shall be estopped from disputing any enforceable agreements reached between the Employer and the Sub-Contractor and which arise out of and relate to this Agreement (whether or not they are or appear to be a derogation from the rights assigned) and made prior to the date of any assignment.

10 If any conflict appears between the terms of the Tender and this Agreement, the terms of this Agreement shall prevail.

11.1 If any dispute or difference arises under this Agreement either Party may refer it to adjudication in accordance with clause 11A and to arbitration or legal proceedings in accordance with clause 11B or clause 11C respectively: provided that a dispute or difference in connection with the enforcement of any decision of an Adjudicator appointed pursuant to clause 11A shall be dealt with in legal proceedings pursuant to clause 11A-7.3.

11.2 Whatever the nationality, residence or domicile of the Employer, the Main Contractor, the Sub-Contractor, any sub-contractor or supplier or the Adjudicator or the Arbitrator and whenever the Main Contract Works or the Sub-Contract Works or any part thereof or situated the law of England shall be the law applicable to this Agreement.

11A ADJUDICATION

11A-1 Clause 11A applies where either Party refers any dispute or difference arising under this Agreement to adjudication.

11A-2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated as the Adjudicator by the person named in the Appendix to the Main Contract (the nominator). [g] Provided that

1. no Adjudicator shall be agreed or nominated under clause 11A-2.2 or clause 11A-3 who will not execute the Standard Agreement for the appointment of an Adjudicator issued by the JCT (the 'JCT Adjudication Agreement') (h) with the Parties, [i] and

2. where either Party has given notice of his intention to refer a dispute to adjudication then

- any agreement by the Parties on the appointment of an Adjudicator must be reached with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer (see clause 11A-4.1); Of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the notice of intention to refer; and will only nominate adjudicators who will enter into the 'JCT Adjudication Agreement'.

(f) The JCT Adjudication Agreement is available from the retailers of JCT forms.

Footnotes

[g] Note: Clause 1.1 deals with specified supplies and restrictions etc. in the contracts of sale for such supplies.

[i] The nominators named in the Appendix to the Main Contract have agreed with the JCT that they will comply with the requirements of clause 11A on the nomination of an adjudicator including the requirements in clause 11A.2.2 for the nomination to be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer; and will only nominate adjudicators who will enter into the 'JCT Adjudication Agreement'.

A version of this Agreement is also available for use if the Parties have named an Adjudicator in their contract.
Appendix 11

11A.2 continued

any application to the nominator must be made with the object of securing
the appointment of, and the referral of the dispute or difference to, the Adjudicator
within 7 days of the date of the notice of intention to refer.

Upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by
the Parties from the nominator of the name of the nominated Adjudicator the Parties shall
thereupon execute with the Adjudicator the JCT Adjudication Agreement.

11A.3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus
unable to adjudicate on a dispute or difference referred to him, then either the Parties
may agree upon an individual to replace the Adjudicator or either Party may apply to the
nominator for the nomination of an adjudicator to adjudicate that dispute or difference;
and the Parties shall execute the JCT Adjudication Agreement with the agreed or
nominated Adjudicator.

Dispute or difference referred to Adjudicator - notice of intention to refer

11A.4.1 When a Party requires a dispute or difference to be referred to adjudication then that
Party shall give notice to the other Party of his intention to refer the dispute or
difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed
or appointed within 7 days of the notice then the Party giving the notice shall refer
the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice.
If an Adjudicator is not agreed or appointed within 7 days of the notice the referral
shall be made immediately on such agreement or appointment. The said Party shall
include with that referral particulars of the dispute or difference together with a
summary of the contentsions on which he relies, a statement of the relief or remedy
which is sought and any material he wishes the Adjudicator to consider. The referral
and its accompanying documentation shall be copied simultaneously to the other
Party.

-2 The referral by a Party with its accompanying documentation to the Adjudicator and
the copies thereof to be provided to the other Party shall be given by actual delivery
or by FAX or by special delivery or recorded delivery. If given by FAX then, for record
purposes, the referral and its accompanying documentation must forthwith be sent
by first class post or given by actual delivery. If sent by special delivery or recorded
delivery the referral and its accompanying documentation shall subject to proof to
the contrary, be deemed to have been received 48 hours after the date of posting
subject to the exclusion of Sundays and any Public Holiday.

Conduct of the Adjudication

11A.5.1 The Adjudicator shall immediately upon receipt of the referral and its accompanying
documentation confirm that receipt to the Parties.

-2 The Party not making the referral may, by the same means stated in clause 11A.4.2,
send to the Adjudicator within 7 days of the date of the referral with a copy to the
other Party, a written statement of the contentsions on which he relies and any
material he wishes the Adjudicator to consider.

-3 The Adjudicator shall within 28 days of his receipt of the referral and its
accompanying documentation under clause 11A.4.1 and acting as an Adjudicator for
the purposes of S.108 of the Housing Grants, Construction and Regeneration Act 1996
and not as an expert or an arbitrator reach his decision and forthwith send that
decision in writing to the Parties. Provided that the Party who has made the referral
may consent to allowing the Adjudicator to extend the period of 28 days by up to 14
days; and that by agreement between the Parties after the referral has been made a
longer period than 28 days may be notified jointly by the Parties to the Adjudicator
within which to reach his decision.

-4 The Adjudicator shall not be obliged to give reasons for his decision.

-5 In reaching his decision the Adjudicator shall act impartially and set his own
procedure; and at his absolute discretion may take the initiative in ascertaining the
facts and the law as he considers necessary in respect of the referral which may
include the following:

-1 using his own knowledge and/or experience;

-2 opening up, reviewing and revising any certificate, opinion, decision,
requirement or notice issued, given or made under this Agreement as if no such
certificate, opinion, decision, requirement or notice had been issued, given or
made;
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11A-5 -5 -3 requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up;

-4 requiring the Parties to carry out tests or additional tests or to open up work or further open up work;

-5 visiting the site of the Works or any workshop where work is being or has been prepared for the Works;

-6 obtaining such information as he considers necessary from any employee or representative of the Parties provided that before obtaining information from an employee of a Party he has given prior notice to that Party;

-7 obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved;

-8 having regard to any term of the Agreement relating to the payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid.

-5 Any failure by either Party to enter into the JCT Adjudication Agreement or to comply with any requirement of the Adjudicator under clause 11A-5 or with any provision or requirement under clause 11A shall not invalidate the decision of the Adjudicator.

-7 The Parties shall meet their own costs of the Adjudication except that the Adjudicator may direct as to who should pay the cost of any test or opening up if required pursuant to clause 11A-5-4.

Adjudicator’s fee and reasonable expenses – payment

11A-6 -1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator’s fee and reasonable expenses in equal proportions.

-2 The Parties shall jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the Adjudication.

Effect of Adjudicator’s decision

11A-7 -1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given. [i]

-2 The Parties shall, without prejudice to their other rights under the Agreement, comply with the decisions of the Adjudicator; and the Employer and the Sub-Contractor shall ensure that the decisions of the Adjudicator are given effect.

-3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 11A-7-1.

Immunity

11A-8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator.

11B ARBITRATION

Clause 11B applies where clause 41B of the Main Contract Conditions (Arbitration) applies or will apply. A reference in clause 11B to a Rule or Rules is a reference to the JCT 1996 edition of the Construction Industry Model Arbitration Rules (CIMAR) current at the Base Date as defined in the Main Contract.

11B-1 -1 Where either Party requires a dispute or difference to be referred to arbitration then that Party shall serve on the other Party a notice of arbitration to such effect in accordance with Rule 2.1 which states:

Footnote

[i] The arbitration or legal proceedings are not an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by an Adjudicator.
Appendix 11

11B.1 continued

"Arbitral proceedings are begun in respect of a dispute when one party serves on the other a written notice of arbitration identifying the dispute and requiring him to agree to the appointment of an arbitrator;"

and an arbitrator shall be an individual agreed by the parties or appointed by the person named in the Appendix to the Main Contract in accordance with Rule 2.3 which states:

"If the parties fail to agree on the name of an arbitrator within 14 days (or any agreed extension) after:
(i) the notice of arbitration is served, or
(ii) a previously appointed arbitrator ceases to hold office for any reason, either party may apply for the appointment of an arbitrator to the person so empowered."

By Rule 2.5:

"the arbitrator's appointment takes effect upon his agreement to act or his appointment under Rule 2.3, whether or not his terms have been accepted."

- 2 Where two or more related arbitral proceedings in respect of the Works fall under separate arbitration agreements, Rules 2.6, 2.7 and 2.9 shall apply thereto.

- 3 After an arbitrator has been appointed other Party may give a further notice of arbitration to the other Party and to the Arbitrator referring any other dispute which falls under article 7A of the Main Contract Conditions to be decided in the arbitral proceedings and Rule 3.3 shall apply thereto.

11B.2 Subject to the provisions of clause 1A and clause 30.9 of the Main Contract Conditions the Arbitrator shall, without prejudice to the generality of his powers, have power to rectify this Agreement so that it accurately reflects the true agreement made by the Parties, to direct such procedure and/or valuations as may in his opinion be desirable in order to determine the rights of the Parties to ascertain and award any sum which ought to have been paid and to determine all matters in dispute which shall be submitted to him.

11B.3 Subject to clause 11B.4 the award of such Arbitrator shall be final and binding on the Parties.

11B.4 The Parties hereby agree pursuant to S.45(2)(a) and S.69(2)(a) of the Arbitration Act 1996 that either Party may (upon notice to the other Party and to the Arbitrator):

- 1 apply to the courts to determine any question of law arising in the course of the reference; and

- 2 appeal to the courts on any question of law arising out of an award made in an arbitration under the Arbitration Agreement.

11B.5 The provisions of the Arbitration Act 1996 or any amendment thereof shall apply to any arbitration under this Agreement wherever the same, or any part of it, shall be conducted.

11B.6 The arbitration shall be conducted in accordance with the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR) at the Base Date, as defined in the Main Contract. Provided that if any amendments to the Rules so current at the date of this Agreement have been issued by the JCT after that date the Parties may, by a joint notice in writing to the Arbitrator, state that they wish the arbitration to be conducted in accordance with the Rules as so amended.

11C LEGAL PROCEEDINGS

Where article 5B of Agreement NSC/A applies, any dispute or difference shall be determined by legal proceedings pursuant to article 5B.
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Agreement NSC/W

Notes

[A1] For Agreement executed under hand and NOT as a deed.

[A1] AS WITNESS THE HANDS OF THE PARTIES HERETO

Signed by or on behalf of the Employer

in the presence of:

Signed by or on behalf of the Sub-Contractor

in the presence of:

---

[A2] For Agreement executed as a deed under the law of England and Wales by a company or other body corporate: insert the name of the party mentioned and identified on page 2 and then use either (A3) and (A4), or (A5).

If the party is an individual see note (A6).

[A3] For use if the party is using its common seal, which should be affixed under the party's name.

[A4] For use of the party's officers authorised to affix its common seal.

[A5] For use if the party is a company registered under the Companies Acts which is not using a common seal: insert the names of the two officers by whom the company is acting who MUST be either a director and the company secretary or two directors, and insert their signatures with "Director" or "Secretary" as appropriate. This method of execution is NOT valid for local authorities or certain other bodies incorporated by Act of Parliament or by charter if exempted under s.74B(2) of the Companies Act 1985.

[A2] EXECUTED AS A DEED BY THE EMPLOYER

hereinbefore mentioned namely

*by affixing hereeto its common seal

in the presence of:

*OR

acting by a director and its secretary* / two directors* whose signatures are here subscribed

namely

[Signature] ___________________ DIRECTOR

and

[Signature] ___________________ SECRETARY*/DIRECTOR*

[A2] AND AS A DEED BY THE SUB-CONTRACTOR

hereinbefore mentioned namely

*by affixing hereeto its common seal

in the presence of:

*OR

acting by a director and its secretary* / two directors* whose signatures are here subscribed

namely

[Signature] ___________________ DIRECTOR

and

[Signature] ___________________ SECRETARY*/DIRECTOR*

[A6] If executed as a deed by an Individual: insert the name at [A2], delete the words at [A3], substitute 'whose signature is here subscribed' and insert the individual's signature. The individual MUST sign in the presence of a witness who attests the signature. Insert at [A4] the signature and name of the witness. Sealing by an individual is not required.

[Signature] ___________________ DIRECTOR

and

[Signature] ___________________ SECRETARY*/DIRECTOR*

*Delete as appropriate
Appendix 12

Nomination NSC/N The Standard Form of Nomination Instruction

The completion of nomination instruction NSC/N

This document is completed by the architect/the contract administrator and sent to the contractor with a copy to the nominated sub-contractor (Step 4).
The Standard Form of Nomination Instruction
for a Sub-Contractor nominated under clause 35-6 of the Standard Form of Building Contract, 1998 Edition

Notes on completion

From (Architect/Contract Administrator)

Address:

Job reference:

To (Main Contractor):

Main Contract Works and location:

Sub-Contract Works:

Sub-Contractor hereby nominated:

Tel. No:

The Sub-Contractor named above is hereby NOMINATED under clause 35-6 to supply and fix or to execute the Sub-Contract Works identified above for the

*Delete as applicable

*VAT-exclusive Sub-Contract Sum of £

*VAT-exclusive Tender Sum of £

and you must forthwith proceed as stated on page 2.
Commentary

The Department recommends that the following paragraph (see paragraph 8.33) is inserted by the architect/ the contract administrator in the space at the bottom of this page:

"I must be informed forthwith, if in agreeing the matters referred to in the Particular Conditions NSC/T Part 3 and/or in the Articles of Nominated Sub-Contract Agreement NSC/A, the Sub-Contractor requires any alteration of his tender or of any other matter affecting the progress and/or the price of the Works and the Sub-Contract Works."
There are enclosed:
- the completed invitation to Tender to the Sub-Contractor (NSC/T Part 1);
- the numbered tender documents enclosed with the Invitation to Tender (b) together with any additional documents and/or amendments thereto as have been approved by me;
- the Tender by the Sub-Contractor (NSC/T Part 2) completed and signed by or on behalf of the Sub-Contractor and signed by or on behalf of the Employer as 'approved';
- a copy of the completed Agreement NSC/W between the Employer and the Sub-Contractor;
- any confirmation of alterations to the information given in NSC/T Part 1 in respect of item 7: obligations or restrictions imposed by the Employer item 8: order of Works: Employer's requirements item 9: type and location of access; and
- the Principal Contractor's Health and Safety Plan if not previously provided.

Any changes to the 'other items of attendance' given in any Invitation to Tender (NSC/T Part 1, item 16) which are set out on page 5 of the Tender by the Sub-Contractor on NSC/T Part 2 are APPROVED.

A copy of this Nomination Instruction, together with a copy of the completed Appendix for the Main Contract, has been sent to the Sub-Contractor.

In accordance with clause 35.7, you must forthwith upon receipt of this Instruction complete, in agreement with the Sub-Contractor, NSC/T Part 3 (Particular Conditions); and have that completed NSC/T Part 3 signed by you or on your behalf and by or on behalf of the Sub-Contractor;

execute the Articles of Nominated Sub-Contract Agreement (Agreement NSC/A) to which the completed NSC/T Parts 1, 2 and 3 and the (c) Numbered Documents shall be annexed;

and send to me a copy of the completed Agreement NSC/A and of the agreed and signed NSC/T Part 3 but not the other Annexures to NSC/A.

Unless you have within 7 working days from receipt of this Instruction given me written notice of reasonable objection under clause 35.5-1 then –

If, having used your best endeavours, you have not, within 10 working days from receipt of this Instruction, complied with clause 35.7 and sent to me a copy of the completed Agreement NSC/A and of the agreed and signed NSC/T Part 3 you must, in accordance with clause 35.8, give me a written notice of the reasons for such non-compliance. Within a reasonable time after receipt of such notice I will inform you of my decision pursuant to clause 35.9.

Signed: Architect/Contract Administrator

Date: 19
Appendix 13

Completion of the documents relating to nominated suppliers

The documents included in appendices 14 and 15 have been reproduced with the permission of the copyright holder, The Joint Contracts Tribunal Ltd 1998.

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Name of document</th>
<th>Identification term</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>JCT Standard Form of Tender by Nominated Supplier</td>
<td>Tender TNS/1 (SFBC)</td>
</tr>
<tr>
<td>15</td>
<td>Schedule 3: Warranty Agreement by a Nominated Supplier</td>
<td>Warranty TNS/2 (SFBC)</td>
</tr>
</tbody>
</table>
Appendix 14

Tender TNS/1 (SFBC) JCT Standard Form of Tender by Nominated Supplier

Attention is drawn to the notes relating to the completion of the contract which should be observed.
JCT Standard Form of Tender by Nominated Supplier

For use in connection with the Standard Form of Building Contract (SFBC) issued by the Joint Contracts Tribunal, 1980 edition, incorporating Amendments 1 to 9

Job Title: ____________________________
(name and brief location of Works)

Employer: ____________________________

Main Contractor: ____________________________
(if known)

Tender for: ____________________________
(abbreviated description)

Name of Tenderer: ____________________________

To be returned to: ____________________________

Lump sum price: ____________________________
(words)

and/or Schedule of rates (attached)
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.2(c)</td>
<td>The architect/the contract administrator should ascertain that any sale conditions attached to a tender do not incorporate any provisions which purport to override or modify the main contract conditions (Step 4).</td>
</tr>
<tr>
<td>2(d)</td>
<td>The Department recommends that the period that the tender is open for acceptance should be inserted by the architect/the contract administrator and be sufficient to enable the due process of nomination to take place (Step 4) and the contract of sale concluded (Step 6).</td>
</tr>
<tr>
<td>3(e)</td>
<td>The reference to the warranty agreement should not normally be deleted (see paragraph 3.176).</td>
</tr>
</tbody>
</table>
We confirm that we will be under a contract with the Main Contractor:

1. to supply the materials or goods described or referred to in Schedule 1 for the price and/or at the rate set out above; and

2. in accordance with the other terms set out in that Schedule, as a Nominated Supplier in accordance with the terms of SFBC clause 36.3 to 36.5 (as set out in Schedule 2) and our conditions of sale in so far as they do not conflict with the terms of SFBC clause 36.3 to 36.5 provided:

3. the Architect, the Contract Administrator has issued the relevant nomination instruction (a copy of which has been sent to us by the Architect, the Contract Administrator); and

4. agreement on delivery between us and the Main Contractor has been reached as recorded in Schedule 1 Part 6 (see SFBC clause 36.4.3) and

5. we have thereafter received an order from the Main Contractor accepting this tender.

We agree that this Tender shall be open for acceptance by an order from the Main Contractor within

(d) of the date of this Tender. Provided that where the Main Contractor has not been named above we reserve the right to withdraw this Tender within 14 days of having been notified, by or on behalf of the Employer named above, of the name of the Main Contractor.

Subject to our right to withdraw this Tender as set out in paragraph 2 we hereby declare that we accept the Warranty Agreement in the terms set out in Schedule 3 hereof on condition that no provision in that Warranty Agreement shall be effective unless and until

a copy to us of the instruction nominating us, the order of the Main Contract accepting this Tender, and a copy of the Warranty Agreement signed by the Employer have been received by us.

For and on behalf of

[Signature]

Address

Signature

Date
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1A, 2A 4, 5 and 8 on page 4</td>
<td>The Department recommends that the specification for the materials and goods to be supplied by the nominated supplier should include as an appendix, a copy of the preliminaries element of the main contract bills of quantities/specification/schedules of work giving details of amendments to the main contract, obligations or restrictions imposed by the employer, order of works, access and other relevant information.</td>
</tr>
</tbody>
</table>
### Schedule 1

1. Description, quantity and quality of material or goods:
   
   **1A**

   **1B**

   **1C**

   *Note: 1A to be completed by or on behalf of the Architect; the Contract Administrator setting out his requirements. If the supplier is unable to comply with 1A he is to state in 1B what modifications he proposes, and the Architect; the Contract Administrator is to state in 1C, such modifications are acceptable.*

2. Access to Works:
   
   **2A**

   **2B**

   *Note: 2A to be completed by or on behalf of the Architect; the Contract Administrator. The supplier in 2B either confirms that the access in 2A is acceptable or states what modifications etc. to the access he requires or if 2A has not been completed, completes 2B.*

3. Provisions, if any, for returnable packings:

4. Date for Completion of Main Contract (or anticipated Date for Completion if Main Contract not let):

   *Note: To be completed by or on behalf of the Architect; the Contract Administrator.*

5. Defects Liability Period of the Main Contract **months**.

   *Note: To be completed by or on behalf of the Architect; the Contract Administrator.*
<table>
<thead>
<tr>
<th>Item</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>6A</td>
<td>Complete, having regard to the actual or anticipated dates for possession and completion of the main contract.</td>
</tr>
<tr>
<td>7A</td>
<td>See paragraph 8.73. Paragraphs 8.59 and 8.61 equally apply to materials and goods supplied by a nominated supplier.</td>
</tr>
<tr>
<td>8</td>
<td>See commentary to Page 3 of TNS/1 Insert rate of liquidated and ascertained damages.</td>
</tr>
<tr>
<td>9</td>
<td>Normally the contract of sale with the contractor should be executed as a deed – paragraph 3.166 equally applies to materials and goods supplied by a nominated supplier.</td>
</tr>
</tbody>
</table>
6A Anticipated commencement and completion dates for the nominated supply after the necessary approval of drawings (subject to SFBC clause 36:4:3, which provides that delivery shall be commenced, carried out and completed in accordance with a delivery programme to be agreed between the Contractor and supplier including, to the extent agreed, the grounds set out in clause 36:4:3 on which that programme may be varied or if no such programme is agreed in accordance with the reasonable directions of the Contractor):

6B Supplier’s proposed delivery programme to comply with 6A:

1. Supplier’s proposed delivery programme to comply with 6A:

2. If 6B 1 not completed, delivery shall be commenced, carried out and completed in accordance with the reasonable directions of the Contractor.

6C Delivery programme as agreed between the supplier and the Contractor, if different from 6B 1:

Note: 6A to be completed by or on behalf of the Architect/the Contract Administrator. The supplier to complete 6B 1 to take account of 6A; but the completion of 6B 1 to subject to the terms of 6C which may need to be used when the Contractor and supplier are signing item 6.

7. Provisions, if any, for fluctuations in price or rates:

7A

7B

7C

Note: 7A to be completed by or on behalf of the Architect/the Contract Administrator. If the supplier is unable to comply with 7A he is to state in 7B what modifications to the provisions in 7A he requires, and the Architect/the Contract Administrator is to state in 7C if such modifications are acceptable.

8. SFBC clause 25 (Extension of time) applies to the Main Contract without modification except as stated below:

The liquidated and ascertained damages (SFBC clause 24:2:1 and Appendix entry) under the Main Contract are at the rate of:

£_________ per_________.

Note: To be completed by or on behalf of the Architect/the Contract Administrator.

9. Contract of sale with Contractor to be executed under hand as a deed.

Note: Alternative not to be used to be deleted by the supplier subject to agreement on the method of execution of the sale contract with the Main Contractor.
Schedule 2

JCT Standard Form of Building Contract

Clauses 36.3 to 36.5 provide as follows:

36.3 Ascertainment of costs to be set against prime cost sum

-1. For the purposes of clause 36.6.2 the amounts ‘properly chargeable to the Employer in accordance with the nomination instruction of the Architect; the Contract Administrator’ shall include the total amount paid or payable in respect of the materials or goods less any discount other than the discount referred to in clause 36.4.4, properly so chargeable to the Employer and shall include where applicable:

-1.1 any tax (other than any value added tax which is treated, or is capable of being treated, as input tax (as referred to in the Finance Act 1972) by the Contractor) or duty not otherwise recoverable under this Contract by whomsoever payable which is payable under or by virtue of any Act of Parliament on the import, purchase, sale, appropriation, processing, alteration, adapting for sale or use of the materials or goods to be supplied; and

-1.2 the net cost of appropriate packing, carriage and delivery after allowing for any credit for return of any packing to the supplier; and

-1.3 the amount of any price adjustment properly paid or payable to, or allowed or allowable by the supplier less any discount other than a cash discount for payment in full within 30 days of the end of the month during which delivery is made.

2. Where in the opinion of the Architect; the Contract Administrator the Contractor properly incurs expense, which would not be reimbursed under clause 36.3.1 or otherwise under this Contract, in obtaining the materials or goods from the Nominated Supplier such expense shall be added to the Contract Sum.

Sale contract provisions – Architect’s; Contract Administrator’s right to nominate supplier

36.4 Sale where the Architect; the Contract Administrator and the Contractor shall otherwise agree, the Architect; the Contract Administrator shall only nominate as a supplier a person who will enter into a contract of sale with the Contractor which provides, inter alia:

-1. that the materials or goods to be supplied shall be of the quality and standard specified provided that where and to the extent that approval of the quality of materials or of the standards of workmanship is a matter for the opinion of the Architect; the Contract Administrator, such quality and standards shall be to the reasonable satisfaction of the Architect; the Contract Administrator;

-2. that the Nominated Supplier shall make good by replacement or otherwise any defects in the materials or goods supplied which appear up to and including the last day of the Defects Liability Period under this Contract and shall bear any expenses reasonably incurred by the Contractor as a direct consequence of such defects provided that:

-2.1 where the materials or goods have been used or fixed such defects are not such that reasonable examination by the Contractor ought to have revealed them before using or fixing;

-2.2 such defects are due solely to defective workmanship or material in the materials or goods supplied and shall not have been caused by improper storage by the Contractor or by misuse or by any act or neglect of either the Contractor, the Architect; the Contract Administrator or the Employer or by any person or persons for whom they may be responsible or by any other person for whom the Nominated Supplier is not responsible:

3. that delivery of the materials or goods supplied shall be commenced, carried out and completed in accordance with a delivery programme to be agreed between the Contractor and the Nominated Supplier including, to the extent agreed, the relevant grounds on which that programme may be varied:

- force majeure; or
- civil commotion, local combination of workmen, strike or lock-out; or
- any instruction of the Architect; the Contract Administrator under clause 13.2 (Variations) or clause 13.3 (Additional sums); or
- failure of the Architect; the Contract Administrator to supply to the Nominated Supplier within due time any necessary information for which he has specifically applied or refusing on a date which was neither unreasonable nor unduly remote from nor unreasonably close to the date on which it was necessary for him to receive the same or
- exceptionally adverse weather conditions

or, if such programme is agreed, delivery shall be commenced, carried out and completed in accordance with the reasonable directions of the Contractor:

4. that the Nominated Supplier shall allow the Contractor a discount for cash of 5 per cent on all payments if the Contractor makes payment in full within 30 days of the end of the month during which delivery is made;

5. that the Nominated Supplier shall not be obliged to make any delivery of materials or goods (except any which may have been paid for in full less only any discount for cash) after the determination (for any reason) of the Contractor’s employment under this Contract;

6. that full discharge by the Contractor in respect of payments for materials or goods supplied by the Nominated Supplier shall be effected within 30 days of the end of the month during which delivery is made less only a discount for cash of 5 per cent if so paid:

7. that the ownership of materials or goods shall pass to the Contractor upon delivery by the Nominated Supplier to or to the order of the Contractor, whether or not payment has been made in full;
Appendix 14

- if in any dispute or difference between the Contractor and the Nominated Supplier which is referred to arbitration the Contractor and the Nominated Supplier agree and consent pursuant to Sections 1(3)(a) and 2(1)(b) of the Arbitration Act 1979 that either the Contractor or the Nominated Supplier

- may appeal to the High Court on any question of law arising out of an award made in the arbitration and

- may apply to the High Court to determine any question of law arising in the course of the arbitration;

and that the Contractor and the Nominated Supplier agree that the High Court should have jurisdiction to determine any such questions of law;

- if in any dispute or difference between the Contractor and the Nominated Supplier raises issues which are substantially the same as or are connected with issues raised in a related dispute between the Employer and the Contractor under this contract then, where clauses 41·2·1 and 41·2·2 apply, such dispute or difference shall be referred to the Arbitrator to be appointed pursuant to clause 41; that the Arbitrator shall have power to make such directions and all necessary orders in the same way as if the procedure of the High Court as to joining one or more defendants or joining co-defendants or third parties was available to the parties; that the agreement and consent referred to in clause 36·4·8·1 on appeals or applications to the High Court on any question of law shall apply to any question of law arising out of the awards of such arbitrator in respect of all related disputes referred to him or arising in the course of the reference of all the related disputes referred to him; and that in any case, subject to the agreement referred to in clause 36·4·8·1, the award of such Arbitrator shall be final and binding on the parties.

- if no provision in the contract of sale shall override, modify or affect in any way whatsoever the provisions in the contract of sale which are included therein to give effect to clauses 36·4·1 to 36·4·9 inclusive.

Contract of sale—restriction, limitation or exclusion of liability

1 Subject to clauses 36·5·2 and 36·5·3, where the said contract of sale between the Contractor and the Nominated Supplier in any way restricts, limits or excludes the liability of the Nominated Supplier to the Contractor in respect of materials or goods supplied or to be supplied, and the Architect, the Contract Administrator has specifically approved in writing the said restrictions, limitations or exclusions, the liability of the Contractor to the Employer in respect of the said materials or goods shall be restricted, limited or excluded to the same extent.

2 The Contractor shall not be obliged to enter into a contract with the Nominated Supplier until the Architect, the Contract Administrator has specifically approved in writing the said restrictions, limitations or exclusions.

3 Nothing in clause 36·5 shall be construed as enabling the Architect, the Contract Administrator to nominate a supplier otherwise than in accordance with the provisions stated in clause 36·4.

* The Architect, the Contract Administrator should state whether in the Appendix to the SFBC the words 'clauses 41·2·1 and 41·2·2' have been deleted; if so then clause 36·4·8·2 will not apply to the Nominated Supplier.
Appendix 15

Warranty Agreement TNS/2 (SFBC)

Schedule 3: Warranty Agreement by a Nominated Supplier

The attestation on page 9 of the following forms should be amended as the specimen clauses given in Appendix 4, substituting “Supplier” for “Contractor”. Normally the warranty should be executed as a deed. The employer should date the document when completing his attestation.
Schedule 3: Warranty Agreement by a Nominated Supplier

To the Employer: ____________________________

named in our Tender dated ____________________

For ____________________________
(abbreviated description of goods/materials)

To be supplied to: ____________________________
(job title)

Subject to the conditions stated in the above mentioned Tender (that no provision in this Warranty Agreement shall take effect unless and until the Instrument nominating us, the order of the Main Contractor accepting the Tender and a copy of this Warranty Agreement signed by the Employer have been received by us) WE WARRANT in consideration of our being nominated in respect of the supply of the goods and/or materials to be supplied by us as a Nominated Supplier under the Standard Form of Building Contract referred to in the Tender and in accordance with the description, quantity and quality of the materials or goods and with the other terms and details set out in the Tender ("the supply") that:

1-1 We have exercised and will exercise all reasonable skill and care in:

1-1-1 the design of the supply insofar as the supply has been or will be designed by us; and

1-1-2 the selection of materials and goods for the supply insofar as such supply has been or will be selected by us; and

1-1-3 the satisfaction of any performance specification or requirement insofar as such performance specification or requirement is included or referred to in the Tender as part of the description of the supply.

1-2 We will:

1-2-1 save insofar as we are delayed by:

1-2-1-1 force majeure; or

1-2-1-2 civil commotion, local combination of workmen, strike or lock-out; or

1-2-1-3 any instruction of the Architect/the Contract Administrator under SFBC clause 13.2 (Variations) or clause 13.3 (provisional sums); or
1.2 continued

-4 failure of the Architect, the Contract Administrator to supply to us within due time any necessary information for which we have specifically applied in writing on a date which was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for us to receive the same so supply the Architect, the Contract Administrator with such information as the Architect, the Contract Administrator may reasonably require; and

-2 so supply the Contractor with such information as the Contractor may reasonably require in accordance with the arrangements in our contract of sale with the Contractor; and

-3 so commence and complete delivery of the supply in accordance with the arrangements in our contract of sale with the Contractor

that the Contractor shall not become entitled to an extension of time under SFBC clauses 25.4.6 or 25.4.7 of the Main Contract Conditions nor become entitled to be paid for direct loss and/or expense ascertained under SFBC clause 26.1 for the reasons referred to in clause 26.2.1 of the Main Contract Conditions; and we will indemnify you to the extent but not further or otherwise that the Architect, the Contract Administrator is obliged to give an extension of time so that the Employer is unable to recover damages under the Main Contract for delays in completion, and/or pay an amount in respect of direct loss and/or expense as aforesaid because of any failure by us under clause 1.2.1 or 1.2.2 hereof.

2 We have noted the amount of the liquidated and ascertained damages under the Main Contract, as stated in TNS/1 Schedule 1, item 8.

3 Nothing in the Tender is intended to or shall exclude or limit our liability for breach of the warranties set out above.

4.1 In case any dispute or difference shall arise between the Employer or the Architect, the Contract Administrator on his behalf and ourselves as to the construction of this Agreement or as to any matter or thing of whatsoever nature arising out of this Agreement or in connection therewith then such dispute or difference shall be and is hereby referred to arbitration. When we or the Employer require such dispute or difference to be referred to arbitration, we or the Employer shall given written notice to the other to such effect and such dispute or difference shall be referred to the arbitration and final decision of a person to be agreed between the parties as the Arbitrator, or, upon failure to agree within 14 days after the date of the aforesaid written notice, of a person to be appointed as the Arbitrator on the request of either of us or the Employer by the person named in the Appendix to the Standard Form of Building Contract referred to in the Tender.

4.2.1 Provided that if the dispute or difference to be referred to arbitration under this Agreement raises issues which are substantially the same as or connected with the issues raised in a related dispute between the Employer and the Contractor under the Main Contract or between a Nominated Sub-Contractor and the Contractor under Sub-Contract NSC/4 or NSC/4S or between the Employer and any other Nominated Supplier, and if the related dispute has also been referred for determination to an Arbitrator, the Employer and ourselves hereby agree that the dispute or difference under this Agreement shall be referred to the Arbitrator appointed to determine the related dispute; and the JCT Arbitration Rules applicable to the related dispute shall apply to the dispute under this Agreement; and such Arbitrator shall have power to make such directions and all necessary awards in the same way as if the procedure of the High Court as to joining one or more of the defendants or joining co-defendants or third parties was available to the parties and to him; and the agreement of consent referred to in paragraph 4.6 on appeals or applications to the High Court on any question of law shall apply to any question of law arising out of the awards of such Arbitrator in respect of all related disputes referred to him or arising in the course of the reference of all the related disputes referred to him.

2 Save that the Employer or ourselves may require the dispute or difference under this Agreement to be referred to a different Arbitrator (to be appointed under this Agreement) if either of us reasonably considers that the Arbitrator appointed to determine the related dispute is not properly qualified to determine the dispute or difference under this Agreement.

3 Paragraphs 4.2.1 and 4.2.2 hereof shall apply unless in the Appendix to the Standard Form of Building Contract referred to in the Tender the words 'clause 41.2.1 and 41.2.2 apply' have been deleted.
4.3 Such reference shall not be opened until after Practical Completion or alleged Practical Completion of the Main Contract Works or termination or alleged termination of the Contractor’s employment under the Main Contract or abandonment of the Main Contract Works, unless with the written consent of the Employer or the Architect/the Contract Administrator on his behalf and ourselves.

4.4 Subject to paragraph 4.5 the award of such Arbitrator shall be final and binding on the parties.

4.5 The parties hereby agree and consent pursuant to Sections 1(3) and 2(1)(b) of the Arbitration Act, 1979, that either party

1. may appeal to the High Court on any question of law arising out of an award made in any arbitration under this Arbitration Agreement; and

2. may apply to the High Court to determine any question of law arising in the course of the reference;

and the parties agree that the High Court should have jurisdiction to determine any such question of law.

4.6 Whatever the nationality, residence or domicile of ourselves or the Employer, the Contractor, any sub-contractor or supplier or the Arbitrator, and wherever the Works or any part thereof are situated, the law of England shall be the proper law of this Warranty and in particular (but not so as to derogate from the generality of the foregoing), the provisions of the Arbitration Acts 1996 (notwithstanding anything in S.34 thereof) to 1979 shall apply to any arbitration under this Contract wherever the same, or any part of it, shall be conducted. [*]

4.7 If before his final award the Arbitrator dies or otherwise ceases to act as the Arbitrator, the Employer and ourselves shall forthwith appoint another Arbitrator, or, upon failure so to appoint within 14 days of any such death or cessation, then either the Employer or ourselves may request the person named in the Appendix to the Standard Form of Building Contract referred to in the Tender to appoint such further Arbitrator. Provided that no such further Arbitrator shall be entitled to disregard any direction of the previous Arbitrator made to vary or revise any award of the previous Arbitrator except to the extent that the previous Arbitrator had power so to do under the JCT Arbitration Rules and/or with the agreement of the parties and/or by the operation of law.

4.8 The arbitration shall be conducted in accordance with the JCT Arbitration Rules’ current at the date of the Tender. Provided that if any amendments to the Rules so current have been issued by the Joint Contracts Tribunal after the aforesaid date the Employer and Supplier may, by a joint notice in writing to the Arbitrator, state that they wish the arbitration to be conducted in accordance with the JCT Arbitration Rules as so amended. [†]

[††] Signature of or on behalf of the Supplier:

[††] Signature of or on behalf of the Employer:

[*] Where the parties do not wish the proper law of the Warranty to be the law of England appropriate amendments to paragraph 4.7 should be made. Where the Works are situated in Scotland then the forms issued by the Scottish Building Contract Committee which contain Scots proper law and arbitration provisions are the appropriate documents. It should be noted that the provisions of the Arbitration Acts 1960 to 1979 do not apply to arbitrations conducted in Scotland.

[†] The JCT Arbitration Rules contain stricter time limits than those prescribed by some arbitration rules or those frequently observed in practice. The parties should note that a failure by a party or the agent of a party to comply with the time limits incorporated in these Rules may have adverse consequences.

[†††] The Warranty Agreement is to be executed as a deed advice should be sought on the correct method of execution.
Appendix 16

The use of bonds and guarantees in NHS contracts

Introduction

1. A bond is a legally enforceable financial guarantee given by a third party (the guarantor) to a purchaser (the client) to guarantee the obligations of a supplier of goods, works or services (the contractor) under a contract. The guarantor agrees to pay the client a sum of money if the Contractor defaults on its obligations. The purpose of requiring a bond is to help the client meet the extra expenses to remedy the default and/or complete the contract.

Scope of guidance

2. This guidance covers some of the practical considerations when using bonds, the issue of calling ‘on demand’, and deals with five types of bond or guarantee:
   a. unconditional on-demand bonds;
   b. performance bonds;
   c. parent company guarantees;
   d. advance payment bonds;
   e. retention bonds.

3. NHS bodies are strongly advised to seek appropriate professional and legal advice on the use, choice, and drafting of bonds for a particular contract.

Practical considerations

4. Bonds are generally provided by the financial market, either by a bank or a surety company. The Contractor and the guarantor will seek to establish the terms and conditions under which the bond can be called. NHS bodies for their part should want to know that the guarantor issuing the bond is a sound, reliable and responsible corporate body and be satisfied that if there is need to call the bond for payment the guarantor will comply promptly.

5. There are at present no standard forms of bond for use and the wording of commercial bonds can vary depending on which organisation is providing the bond, who is involved in drawing it up and what the bond is expected to deliver. There is often intense negotiation over the precise wording of bonds and legal advisers should always be involved.

6. Generally, the additional cost of a bond is relatively small in comparison with the price of the contract. This will depend to some extent on the terms and conditions the client requires (whether the bond is on-default, or more onerous, on-demand) and the degree of risk the guarantor attached to the ability of the contractor to give a counter indemnity and to repay any sum that is called.

7. The size of the bond is very important, because this impacts on a contractor’s bonding capacity. To require a large value bond has the same effect as an equivalent number of smaller bonds. Generally, contractors will be unwilling to use up their bonding line on large bonds for smaller projects and this can restrict competition.

8. In most cases, on-demand bonds are provided by banks who may regard them as open credit notes and may require provisions to be made from borrowing facilities against contingent liabilities. This can affect the contractor’s financial resources and its ability to compete for and undertake other work. A requirement for an on-demand bond may therefore deter firms who would otherwise have tendered for the contract and/or inhibit their ability to tender in the future.

9. In raising a bond or a line of bonding credit from a bank or a surety company, the Contractor may undergo independent professional financial vetting. Whilst the extent or the cover which the market is willing to provide may give some indication of the contractor’s financial standing and prospects, the procedures applied vary greatly and will not always involve a detailed check of performance or record.

10. A guiding principle of procurement best practice is that normally a contract should not be placed with a contractor if there are reasonable doubts about the contractor’s ability to meet the terms and conditions of the contract satisfactorily. Such doubts may arise in relation to the adequacy of the contractor’s management and technical resources to deliver on time and to the required quality standard, or where information available suggests the contractor may have inadequate financial resources with consequent risk to Exchequer funds.

11. Note: bonds are not always necessary and are no substitute for considered judgements about the risks of a particular contract and the capabilities and financial resources of the available contractors. A decision to
require a bond must be part of an overall approach to risk management and should take account of available measures to reduce the risk of default, including a proper prequalification of tenderers. NHS bodies will need to exercise careful judgement in assessing the costs and benefits of using bonds, many of which may not be easily quantifiable.

Unconditional on-demand bonds

12. The terms and conditions of a bond determine the circumstances and mechanism by which the bond can be called. An unconditional on-demand bond allows the client to call the bond at any time. Unconditional on-demand bonds are only provided by banks and are in effect certified cheques.

13. Because they are not linked to the performance of the contractor, unconditional on-demand bonds can be called by the client at any time and without having to show any cause or justification. The findings of the courts have been consistent that there is no implied requirement for the calling to be fair or reasonable. Unconditional on-demand bonds can, therefore, be used unfairly, usually as a threat to persuade the contractor to do something it would not otherwise do, or which it is not contracted to do.

14. Note: unconditional on-demand bonds are essentially unfair and should not be used in NHS procurement.

Performance bonds

15. A performance bond is usually provided at contract award, for an agreement percentage of the total contract value (normally about 10 percent). Normally, the value does not reduce, but performance bonds should have an expiry date (not necessarily a calendar date – it can be linked to an event so that time slippage is automatically taken into account). If the value of the contract increases, or the duration of the contract extends, then the value of the bond needs to be amended accordingly.

16. Note: a performance bond will not of itself ensure that contracts are carried out efficiently and to time, but it will be one of a number of commercial pressures on the contractor to perform well. A performance bond can provide some compensation if the contractor defaults on its obligations.

17. There are two basic forms of performance bond: the ‘conditional on-default bond’ and the much more onerous ‘conditional on-demand bond’.

Conditional on-default performance bonds

18. Usually these can be called only following a serious breach by the contractor of the agreed terms and conditions of the contract (which will include becoming bankrupt and would normally allow the client terminate the contract).

19. Conditional on-default performance bonds are fairly common within UK industry and are mainly provided by surety companies. They have been criticised because they are often written in outdated and obscure language. This has meant that when calls have been made, guarantors have sometimes looked to the wording of the bond for reasons not to pay.

20. Note: properly expressed conditional on-default performance bonds provide a third party guarantee that the contractor will not default from a contract it has freely entered into. They should be required where there are identifiable risks of default by the contractor, subject to value for money considerations. NHS bodies should seek legal advice that the wording clearly expresses the true transaction and not assume that “traditional” wording will be appropriate. They must be prepared to pursue this with the guarantor.

Conditional on-demand performance bonds

21. These are bonds which although ‘on-demand’ should include within their terms and conditions:

- a mechanism for calling (so that the bond may be called only if certain procedures have been followed, requiring senior personnel within the client’s organisation to approve the calling);
- a requirement for the client to identify the reason for calling (which reason may be questioned and contested);
- a cooling off period (during which the contractor may remedy the default).

22. There is a place for the use of conditional on-demand performance bonds where the cost or other consequences of default by the contractor are very high and provided it is properly called the guaranteed sum will be paid without risk of dispute. Such bonds retain some features of an unconditional on-demand bond. They can be called at the sole discretion of the client, but only if the agreed conditions for calling are met. This should prevent the client from acting in an arbitrary or unreasonable way and protect the contractor from the bond being called without the due and proper consideration of responsible people in the client’s organisation. A cooling off period should allow the contractor time to investigate and remedy the default.
23. **Note:** NHS bodies should be aware of the burden that on-demand bonds can place on a contractor. Conditional on-demand performance bonds should be used sparingly on high risk and/or high value projects where the costs and/or other consequences of default by the contractor are high and only after careful consideration, including appropriate professional and legal advice.

**Parent company guarantees**

24. This form of guarantee is given by a parent company (or holding company) to guarantee the proper performance of a contract by one of its subsidiaries (the contractor), and can only be given where the contractor is owned by a parent company or is the subsidiary of a larger group. Such a guarantee is free of cost to the client, but may give less certainty of redress than a bond because it is not supplied by an independent third party. However, whilst accepting less independence, parent company guarantees for the proper performance of the contract can be more advantageous than bonds. Rather than receiving a fixed amount in compensation, the parent company is obliged to complete the contract (see 6.3 below). Costs for completion are borne by the parent company – and these costs may be significantly more than compensation provided for in a bond. In addition, further recompense can be sought for time delays in completion through the normal clauses incorporated in the contract.

25. The conditions of a parent company guarantee will usually give the parent company the opportunity to remedy any default within a period of notice before the guarantee of completion of the project itself or the employment of another contractor to complete the project.

26. Where problems arise under the contract, this form of guarantee should discourage the parent company from putting the contractor into liquidation solely to avoid losses in completing the project or in paying damages for late or non-completion. Provided that the parent company is financially sound and the guarantee is properly worded, the performance and the completion of the contract can be safeguarded, but the way in which the project is completed if the contractor defaults can, to some extent, be at the discretion of the parent company.

27. Because the financial strength of the parent company may be linked to that of the contractor, a parent company guarantee will be acceptable only if the parent company (or holding company) is financially strong and its financial resources are largely independent of those of the contractor.

28. **Note:** NHS bodies should be aware when vetting contractors that a parent company guarantee is only as good as the parent company (or holding company) itself.

If the financial position of the holding company is inadequate, then the guarantee should be given by the ultimate parent company, if this is justified by its own financial standing.

**Advance payment bonds**

29. The Treasury has issued guidance explaining why advance payments should be avoided (see DAO letter 8/93, dated 2 June 1993 – extract attached) and has informed the Public Accounts Committee that “any advance payment made under a contract should be secured by a bank guarantee”.

30. Where the advance payment reduces with time as, for example, stage payments are made against goods and/or services delivered under the contract, then the value of the guarantee should reduce to reflect the outstanding amount of the advance payment.

31. Normal practice is to require a conditional reducing on-demand advance payment bond issued by a bank so that provided it is properly called, the guaranteed sum will be paid without risk of dispute.

32. **Note:** advance payments should be avoided wherever possible. In all cases where they cannot, they must be independently secured by a conditional on-demand advance payment bond issued by a bank. NHS bodies should take legal advice that the wording expresses the true intention of the transaction.

**Retention bonds**

33. These bonds are still rare in the UK but their use is likely to increase. They are provided so that contractors (and their sub-contractors) may be paid without the client deducting retention money. As work is completed, the contractor is paid fully under the terms of the contract. Normal practice is to provide conditional retention bonds issued by a surety company that increases in value as payments are made in accordance with the contract. The client is protected against default at the end of the defects liability or guaranteed maintenance period up to the amount of the bond.

34. Most forms of contract require withholding a percentage from payments made during the course of the contract to accumulate a fund that is available to the client if the contractor fails to rectify defects in accordance with the contract (typically 3.0 to 5.0 per cent of the value of the contractor’s work up to certified completion, reducing 1.5 to 2.5 per cent up to final acceptance). Usually, the first moiety of retained money is released to the contractor on certified practical completion and the second on final acceptance that the contractor has fulfilled its contracted obligations. The cost of that
anticipated loss of cash flow is reflected in a contractor’s tender pricing. Retention bonds give contractors better and more certain cash flow through full payment at all stages (without the deducting of retention money).

35. The use of retention bonds transfers financing cost from the contractor to the client (who is required to pay in full earlier) and will pass cash flow benefits to the contractor. Their use will only result in a lower cost to the client if contractors are prepared to reduce their tender prices accordingly. The option to offer a retention bond should be included in the tender documents at stage.

36. Note: the conditions of a retention bond should relieve the client from failure by the Contractor to rectify defects in accordance with the contract up to the value of the bond. NHS bodies will need to consider the balance of costs and benefits in deciding whether to require and/or accept retention bonds. When used they should be conditional on-demand, issued by a surety company. NHS bodies should take legal advice that the wording expresses the true intention of the transaction.

EXTRACT FROM DAO LETTER 8/93; dated 2 June 1993 “Advance payments”

Definitions

1. The term advance payment is used to describe payments made to contractors before the customer has received equivalent value in return. An advance payment provides a contractor with working capital, to enable the commitments under the terms of a contract to be fulfilled.

2. The term interim payment is used to describe payments which are made at prescribed stages or intervals during the progress of a project. They are normally linked to work done and/or physical progress satisfactorily achieved, as defined in the contract.

3. Subject to the Government’s policy that when payments have become due they should be made promptly, payment is as a general rule made in arrears after the specified goods or services have been satisfactorily provided, unless the contract provides for interim payments (see paragraphs 14 to 19 below). However, suppliers sometimes seek advance payments, usually in return for a price discount.

4. An advance payment will lead to higher Exchequer financing costs. Requests for advance payments should be rejected in any cases where the extra financing cost falling on the Exchequer exceeds the value of the discount. Even if the discount offered by a contractor appears to be greater than the extra Exchequer cost of paying in advance, it is not Government policy to act as a source of loan finance for contracts in competition with the market and advance payments should be resisted.

5. EC public procurement rules demand a level playing field in the letting of public contract above a stipulated financial threshold. If an advance payment is to be offered for a particular requirement, this should be made known at the time tender documents are issued to all potential suppliers. It would not be acceptable for an advance payment to be offered to the successful contractor to secure a further price advantage.

6. Although advance payments are the normal practice in certain types of procurement, such as international contracts for capital works and contracts for the design, manufacture and supply of heavy capital equipment, these are areas in which most central Government departments are not normally involved.

7. Advance payment by government departments should therefore be very much the exception. In any cases where departments feel that such payment may be desirable, they should carry out a financial appraisal to establish whether there is a value for money case. For advance payments, the appropriate cost of Government lending is the National Loan Fund rate plus 2 per cent (see Annex G, paragraph 12 (iv) of the Treasury’s guide ‘Economic Appraisal in Central Government – A Technical Guide for Government Departments’ (the Green Book)). NLF rates are available from the Treasury’s Monetary Group.

8. If they wish to proceed, departments should ensure that they seek the approval of the Treasury, unless they have the appropriate delegated authority to do so. Advance payments should never be used for the purpose of avoiding an underspend in a particular financial year by making a payment before the liability to pay has matured.

9. Where, exceptionally, an advance payment is made departments should ensure that adequate steps are taken to protect the taxpayers’ money. The intended purpose of the advance payment should be stipulated clearly in the contract. Unless adequate guarantees are obtained, the department may receive nothing in the event of the contractor going into liquidation or otherwise failing to meet its contractual obligations. The Treasury has informed the Public Accounts Committee, in the Government’s reply to the Committee’s 13th report, 1990-91, (A New Ship for St Helena) that it “considers that any advance payment made under contract should be secured under an adequate bank guarantee (and that in such cases the contract should require that the advance payment is not itself used as security for the bank guarantee)”. 

10. Departments should act accordingly, typically by requiring a bond or financial guarantee issued by a
reputable bank for the value of the advance, and payable in the event of the contractor’s non-performance. Departments should note that the cost of such a guarantee is bound to be reflected in the overall contract price, thus eroding some of the price advantage that may appear to make the advance payment attractive. Departments should consult their legal advisers about the terms of any guarantee, to ensure that their interests are protected fully and the undertakings given to the Public Accounts Committee are fulfilled.

11. Some service and maintenance contracts typically require payments at the point the contract commences. Payment made under such contracts are not subject to the advance payment rules set out in paragraphs 3.10 above, provided the service is already operationally available and can be called on from the date of payment. Consideration should be given to whether the guarantee arrangements at paragraph 11 may be appropriate and, wherever possible, departments should seek alternative arrangements (for example quarterly payments in arrears) for these types of contract.

12. The above guidance does not apply in relation to grants or grants in aid to NDPBs and other institutions, such as local authorities; to the prefunding of other public sector bodies in relation to functions which they carry out on behalf of departments; or to inter-department transactions. The arrangements for the timing and phasing of such payments should be set out in the financial memorandum or any other documentation between the department and the body concerned (see Government Accounting paragraph 21.2.6(c)). The guidance is also not intended to preclude departments from exercising sensible discretion on payment in advance for minor services such as training courses, attendance at conferences, etc. But such payments should not be made in advance of need.

13. Special considerations may apply in joint venture cases covered by the guidance for departments issued by the Treasury on 16 March 1993. Further guidance on the timing of payment in such cases will be issued by the Treasury in due course. In the meantime, the Treasury should be consulted by departments if a joint venture would appear to involve an advance payment as defined in paragraph 1 above.

**Interim payments**

14. Interim payments are commonly used for capital projects. They reduce the financing burden on the contractor of having to borrow commercially to provide working capital and should, therefore, result in reduced contract prices. On the other hand, a requirement for contractors to use some of their own funds, or to borrow commercially, can act as a spur to timely and efficient completion. If payments to a contractor are made during the early stages of a contract or for any reason become unrelated to physical progress (for example a large payment in respect of materials brought on site) the incentive to complete the contract on time will be significantly reduced.

15. Where it is decided, in the light of these considerations, that interim payments would provide value for money, adequate contractual conditions should be drawn up to protect the Department’s position. Payments of this sort should be framed within the contract as ‘a payment on account towards the total price’ rather than a final payment for part of the work done, as this will ensure that they are subject to review and are recoverable, if necessary. Interim payments should be related to value already received and wherever possible be linked firmly to physical performance. Payment on the basis of elapsed time should be avoided as it encourages the contractor to let completion slip. If progress slips departments should not seek to avoid an underspend in a particular financial year by making interim payments before the relevant physical performance has been achieved.

16. Departments should seek to ensure in contract conditions that ownership of the assets (goods, intellectual property, etc.) covered by each interim payment is transferred to the department when payment is made. They also ensure that the arrangements do not detract from or obviate the obligations on the contractor under the Government’s prompt payment policy, for paying his own suppliers and contractors promptly.

17. Departments should also consider whether contract performance should be covered by a performance bond in the form of a guarantee (issued by a bank or surety company), which can be ‘called’ if the contractor’s performance under the contract is not satisfactory. Departments should consult their legal advisers about the terms of any guarantee, to ensure that their interests are protected fully. The need for a guarantee should be considered on the merits of the case taking account of the risks involved from a breach of contract (for example the extra costs likely to be incurred to complete the project satisfactorily), together with the costs of the guarantee (which the contractor will pass on to the customer).

18. It is the responsibility of project managers to ensure that expenditure on a project is fully matched wherever possible by physical performance. A comparison of the rate of actual expenditure with the forecast rate of expenditure is not relevant to the appraisal of project manager’s performance.

19. A number of departments have already adopted these principles and have achieved significant benefits. Their application has meant that payments are not made before they are justified; and has resulted in more realistic estimates of cost and time and a greater likelihood of completion within budget and on time.
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Given below are details of other documents in the Concode series which are either published by The Stationery Office or in preparation. Information is correct at the time of publication of this document.

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  Amendment no 1, 1995

Guide to contract strategies for construction projects in the NHS, 1995

Guide to the requirements of European Community Public Procurement Directives, 1995  
  Amendment no 1, 1995  
  Amendment no 2, 1996  
  Amendment no 3, 1997


Guide to the JCT Agreement for minor building works, 1994  
  Amendment no 1, 1994  
  Amendment no 2, 1997

  Amendment no 1, 1997

  Amendment no 1, 1997

  Amendment no 1, 1996

Guide to building, engineering and grounds maintenance contracts for the NHS estate, 1996

Guide to the new Engineering and Construction Contract, 1997

  Vol 1: Scheme particulars, conditions of appointment, provision for fees and expenses, specimen certificates, definitions, memorandum of agreement, 1995  
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