

2018-02-12

## The RIAI Standard Form of Contract 2017 Version:An Overview

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### Recommended Citation

Cunningham, T. (2017) . *The RIAI standard form of Contract 2017:an overview*. Dublin Institute of Technology.

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# **The RIAI Standard Form of Contract - 2017 Version - An Overview**

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## **Introduction**

The Royal Institution of Architects of Ireland (RIAI) ‘Yellow’ and ‘Blue’ Standard Forms of Building Contract have been recently amended and published as the 2017 edition. The revisions have largely been prompted by the recent enactment and commencement of the Construction Contracts Act (2013) in July 2016 and the Building Control (Amendment) Regulations 2014 (commonly referred to as BCAR). The amendments are designed to align the Contracts with current legislation and to accommodate recent developments in practice since the publication of the 2012 editions.

The Contracts have been completely reformatted and now present a much improved and modern appearance which is certainly easier to read and use. The main changes to the Contracts are:

- The Articles of Agreement incorporate a new fifth article regarding notice requirements, particularly regarding payment claims notices, under the Construction Contracts Act (2013).
- Clause 1 - ‘Definitions’ contains an additional definition of the “Works” in response to changes in the Building Control regulatory environment,
- Clause 35 - Payments and Certificates, has been amended to align with the provisions of the Construction Contracts Act (2013).
- Clause 38, - Dispute Resolution, has been retitled ‘Avoiding and Resolving Disputes’ and has been redrafted.
- The text has been modified throughout in order to express gender neutral wording
- The Appendix to the Contract now requires the Architect’s e-mail address for the service of payment claims notices.

The RIAI (2017) *Practice Note* published in association with the new Contracts reports that ‘*current advanced work on a complete overhaul and modernisation of these two*

*forms* [the Yellow' and 'Blue' forms] is in progress. The Practice Note states that the amendments to the 2012 edition '*have been kept as simple as possible*'. The Note informs us that a review of the RIAI Conciliation Guidelines and Procedures, originally published in 2016 is also planned for review in the light of the Mediation Bill (2017) which is currently under review in the Oireachtas.

## **Standard Forms of Contract**

*'Buildings cost money – lots of it'* (Kirkham, 2014). Construction is complex and intense in nature and is frequently carried out over a long period of time. In addition the priorities of clients, designers and contractors often differ and, occasionally, are conflicting. The possibility of disputes arising in these circumstances is high.

Although contracts can be made by word of mouth or by conduct, it is difficult to prove what has been said or done unless some form of record has been kept. In order to succeed in an action in contract, the burden of proof rests on the claimant to show, that on the balance of probabilities, his or her case is valid. It is very important therefore, that a record of the bargain struck by the parties, the details of the work, and the rights and obligations of the parties are clearly expressed in writing. Failure to do so often leads to disputes.

It is possible, but usually impractical and/or uneconomic to develop a separate contract to suit each individual project. A number of standard forms have now been published by various stakeholders within the Industry. Clamp, Cox and Lupton (2007 p. 17) state that '*the increasing range and scale of work, has led [in the UK] to a proliferation of alternative forms of building contract, both standard and purpose drafted*'. In Ireland the situation, however, is less complicated and the choice of contract depends primarily on whether the project is in the private sector or in the public sector. Private sector building construction projects in Ireland are typically carried out under one of the RIAI Standard Forms of Building Contract.

The contract fixes the agreement between the parties. Standard forms of contract are specifically designed to suit the construction process and they provide a pragmatic approach to dealing with common construction issues. The terms of the contract lay down how risks are allocated between the parties and the principles by which conflicting interests of the parties are settled. The conditions of contract are based on long experience of the construction process and '*incorporate the wisdom of*

*generations*' (O'Connell as foreword in Keane, 2001). For example, variations are specifically allowed so that work does not have to be 100% pre-defined. The various forms are, nevertheless, organic and are updated from time to time to reflect changes in legislation and developments in industry practice and administration.

An important feature of standard forms is that they are commonly agreed between the bodies representing client interests, the construction industry, and the professions. This results in what is perceived to be a balanced allocation of risks between the parties to the building contract. It is possible, however, for individual clauses to be deleted but this practice should be kept to a minimum, as the form would no longer be standard and its benefits would be reduced.

A survey carried out in the UK for *The Latham Report* (1994) found that the main strengths of using standard contractual arrangements were that they were well known/established and that they are perceived to be fair. Using standard forms allows all parties to become familiar with the documents and become aware of their rights and obligations under the contract; this provides greater clarity in the event of disputes. The above survey also identified the main weaknesses of standard forms as encouraging conflict/litigation, being insufficiently clear, and creating a high level of mistrust.

## **The RIAI Standard Form of Contract**

The RIAI currently publish four Forms of Contract for use in private sector building contracts. These are:

- Articles of Agreement With Quantities (the 'Yellow' Form)
- Articles of Agreement Without Quantities (the 'Blue' Form)
- Articles of Agreement SF88, 1999 Edition (the 'Short Form' or Pink Form)
- RIAI Building Contract, August 2002 (the 'White' Form)

The 'Yellow' and 'Blue' Forms are the most widely used of these forms and are suitable for general use on commercial, industrial and residential sector projects. The 'Pink' Form is designed for less complex domestic projects where there are no nominated sub-contractors or suppliers. Kennedy (2015) recommends the 'Pink' Form's use where *'the architect is the only professional consultant working on the project'*; adding that *'it is often used for simple house extension projects.'* Use of the 'White' Form appears to be limited in practice, and it seems to be confined to house extensions and new houses.

Because of their limited application and use the ‘Pink’ and ‘White’ Forms are not considered further.

The two Contracts which have been republished by the RIAI in 2017 are commonly referred to as the ‘Blue Form’ and the ‘Yellow Form’. Apart from the colour of the paper on which the Contract is printed, the wording of the two Forms is almost identical. The fundamental distinction between the Forms lies in the identity of the contracting party who bears what is known as the ‘quantities risk’. This risk determines which party suffers the extra cost, or benefits from the reduced cost, in the event that the works have been incorrectly measured in the Contract Documents. The Employer bears this risk where quantities form part of the Contract (the ‘Yellow Form’). The Contractor bears the risk where quantities do not form part of the Contract (the ‘Blue Form’). The headline on the front cover of Contract identifies, in large, bold print, whether the Contract is ‘with’ or without quantities. So, the ‘Yellow Form’ states:

**This Form is applicable where Quantities form part of the Contract**

The corresponding wording on the front cover of the ‘Blue Form’ reads:

**This Form is applicable where Quantities DO NOT form part of the Contract**

The ‘*with quantities*’ ‘Yellow Form’ is suitable for substantial projects. Under this arrangement, the Contract Sum is deemed to be that set out in the Contractor’s priced Bill of Quantities. Errors in work descriptions or quantities contained in the Bill are corrected and treated as a Variation to the Contract. Such errors are, more often than not, at the Employer’s expense.

The ‘*without quantities*’, ‘Blue Form’ is suitable for smaller projects and the Contract Sum is based solely on the drawings and specifications alone. Under this arrangement, the Contractor bears the risk of incorrect quantities **even where a Bill of Quantities has been provided for tendering purposes**.

Formal guidance regarding the use of Bills of Quantities on private sector projects is provided in the Liaison Committee’s *Code of Practice for Tendering & Contractual Matters 2006*. This Code is endorsed by the construction professions and may be regarded as representing standard practice in this area. Practice Note 3 recommends that ‘*Bills of Quantities should always be issued as tender documents and the Form of*

*Contract where quantities form part of the Contract (Yellow Form) should always be used*. Practice Note 4 modifies this general principle somewhat. It states: *‘In the case of minor building works, tenders may be sought on drawings and specification basis and the Form of Contract where quantities do not form part of the Contract [Blue Form] should be used.’*

Opinions regarding what constitutes ‘minor’ works among employers, design and construction professionals are, no doubt, likely to differ. In this regard the Capital Works Management Framework which regulates public sector procurement process describes the PW-CF5 Form of Contract, which is prescribed for projects ranging in value from €500,000 to €5 million as its ‘Minor Works’ Form. **However**, this Form of Contract has **now become** a ‘with quantities’ arrangement and the Contractor’s priced Bill of Quantities takes precedence over the Works Requirements (drawings and specifications).

Professional judgement is called for in deciding whether to adopt the ‘Yellow’ or the ‘Blue’ Form and this decision should be taken in the light of the various factors affecting the project itself. In view of the almost identical wording of the two Contracts, this study is limited to a review of the ‘Yellow’ Form alone.

## **The RIAI ‘Yellow’ Form of Contract – 2017 Version**

The Forms are divided into two distinct sections: the Articles of Agreement and, the Conditions of Contract.

### **The Articles of Agreement**

The Articles of Agreement *‘is the basic contract’* (Keane, 2001). These state the formal agreement between the Employer and the Contractor to execute the work according to the Contract Documents for the Contract Sum. The Articles set out the essentials of the Contract: the Works; the Contract Sum; the Date of the Agreement, and the Contract Documents. They identify the Employer’s agents: the Architect and the Quantity Surveyor and set out arrangements for replacing them. The Works are typically described in very basic terms.

The Articles reflect whether quantities form part of the Contract or not. As noted above, the ‘Yellow Form’ is used where quantities form part of the Contract and in these instances the Contract Documents include a priced Bill of Quantities. Where quantities

do not form part of the Contract the 'Blue Form' is used, and these contracts are entered into on the basis of Drawings and Specifications.

Article One states the Contractor's duty, to build:

*“For the consideration hereinafter mentioned the Contractor will upon and subject to the Conditions annexed hereto execute and complete the Works shown upon the Contract Drawings and/or described in the Specification, and Conditions all of which together with this Agreement and Bill of Quantities are hereinafter referred to as the ‘Contract Documents’”.*

Article Two states the Employer's corresponding duty, to pay:

*“The Employer will pay the Contractor the sum (exclusive of Value Added Tax of ... (hereinafter referred to as the “Contract Sum”) or such other sum as shall become payable by operation of the said Conditions at the time and in the manner specified in the said Conditions”*

Articles Three and Four identify the Architect and the Quantity Surveyor. The Contractor is entitled to object to a re-nomination of the Architect or Quantity Surveyor, In the event of a dispute regarding the re-nomination of an Architect or Quantity Surveyor, an Arbitrator must be satisfied that there is a valid reason for the Contractor's objection before overturning the re-appointment. (Keane 2001).

A new Article Five has been incorporated which permits the service of the Contractor's payment claims notices required under Section 4 of the Construction Contracts Act (2013) by e-mail to the Architect rather than by registered post.

The parties may either sign or seal the Contract. The primary difference is that a signed (simple) contract binds the parties for six years after completion of the contract, whereas a sealed contract binds them for twelve years. The 2017 Contract now requires contracting companies to insert additional Company Registration Numbers and Addresses on the signing / sealing page.

## **The Conditions of Contract.**

The Conditions of Contract represent the terms under which the work is to be undertaken. They represent the detailed arrangements which regulate the relationship between the Employer, Architect, and Contractor and describe their powers, duties and

responsibilities. The Contract contains 38 Conditions between pages 5 and 38: the following is a précis of these provisions.

### ***1. Definitions***

The inclusion of a definitions clause is common practice in legislation and standard forms of contract. Clause 1 (a and b) defines the Designated Date for nominated sub-contracts and for the main contract respectively. The Designated Date provides a base date from which any increase in wage or material prices can be measured, Clause 1(b) adds that Saturdays, Sundays, Statutory Holidays, Good Friday and registered builders' holidays are not counted as working days. Clause 1(c) confirms that the Contract Sum excludes VAT which is to be added by the Contractor when invoicing the Employer. Clause 1(d) is new and clarifies that the Contractor is required to construct the works in accordance with current Building Control legislation and associated Codes of Practice relating to certifying compliance. Clause 1(e) clarifies that Saturdays, Sundays, and public holidays are disregarded for the purpose of calculating the various periods of notice set out in the Contract.

### ***2. Scope of Contract***

Clause 2 regulates how the Contract is controlled

The Contractor must complete the works in accordance with the Contract Documents to the satisfaction of the Architect and must also comply with Architect's Instructions regarding:

- modifying the design, quality or quantity of the works;
- correcting discrepancies between the Contract Documents;
- removing materials from site,
- opening up covered work,
- condemning work and having it redone,
- postponing work,
- dismissing people for incompetence or misconduct,
- remedying defects,
- any other proper matters relating to the Contract.



Architect's Instructions frequently have cost implications which give rise to variations and loss and expense claims from the Contractor. The cost implications arising from these are added to, or deducted from, the Contract Sum as the case might be. If the Contractor does not comply with an Instruction within five working days, the Employer can arrange for another contractor to carry out the Instruction and charge it to the Contractor.

### ***3. Drawings Specifications and Bill of Quantities.***

The Contract Sum for Works carried out under the 'Yellow Form' of Contract is based on the Contractor's priced Bill of Quantities.

Where a Bill of Quantities is a Contract Document it is deemed to have been prepared in accordance with the current Agreed Rules of Measurement (ARM4). Errors in Bills do not vitiate the contract but are rectified. The cost of unnecessary remeasurement can be charged to the Contractor.

Where a Bill is not a Contract Document the Contract Sum is based on the Drawings and Specification. In these cases the Contractor provides a Schedule of Rates or a priced Bill (if provided). This arrangement would normally be carried out under the 'Blue Form' of Contract.

The Contract Documents are retained by the Architect and copies are provided to the Contractor. The Contractor must keep a copy of the drawings and specification on site. The Contractor's rates are confidential and are not to be divulged to others. All documents the property of the Contractor, are to be returned to the Contractor on completion of the contract.

### ***4. Variations Arising from Legislative Enactments***

The Contract Sum is adjusted for increased or decreased costs due to legislation such as changes in VAT, duties, and orders regarding the cost of labour.

### ***5. Contractor to Provide Everything Necessary***

The Contractor must complete the job to the true intent and meaning of the Contract Documents. The Contractor must immediately report discrepancies among the Contract Documents to the Architect who shall decide the course to be followed.

## ***6. Local and Other Authorities' Fees***

The Contractor must pay all fees legally demandable by Local Authorities and Public Service Companies. Such fees typically arise from compliance with planning, building control, health and safety, environmental law etc. For example, the Contractor is often the party who pays the fee for the Commencement Notice required under the Building Regulations. Local Authority Fees are often covered by a provisional sum in the Bill of Quantities.

## ***7. Setting out of Works***

The Architect supplies the necessary setting out information to the Contractor who becomes responsible for accurately setting out the Works. Any errors in the actual setting out must be rectified by the Contractor at no extra cost.

## ***8. Materials and Workmanship to Conform to Description***

The materials and workmanship are to conform to the standards set out in the Contract Documents. **These are now to be the 'best' of their respective standards.** The Contractor may be asked to test work to prove such compliance. Testing fees are added to the Contract Sum unless the tests reveal non-compliant work.

## ***9. Work to be Opened up***

Opening up work is carried out at the expense of the party at fault. Urgent work is to be inspected promptly by the Architect.

## ***10. Site Manager / Foreman***

The Contractor must have a competent person in charge who is authorised to receive Architect's Instructions on behalf of the Contractor.

## ***11. Access to Architect to Works***

This Clause stipulates that the Architect and any person authorised by him have the right to access the works.

### ***12. Clerk of Works***

A Clerk of Works, paid for by the Employer, can be appointed, by notification, as an inspector at any stage during the Works. The Contractor can object on reasonable grounds to such appointment.

### ***13. Ascertainment of Prices for Variations***

Variations shall not vitiate the Contract. The Contractor must confirm oral instructions within five days and these are deemed to be given in writing unless dissented from by the Architect. Variations shall be valued without undue delay in accordance with the following rules:

- agreement,
- Bill rates if the varied work is similar in character and conditions,
- based on Bill rates if reasonable to do so in dissimilar conditions,
- fair valuation based on market rates if there are no appropriate Bill rates,
- daywork as tendered in the Bill **or** where no rates have been inserted calculated in accordance the Liaison Committee Schedule of Daywork Charges

### ***14. Omissions***

The Contractor may be compensated for loss in the event of extensive omissions. The Contractor is also entitled to 10% of the credit on the builders work element of the Contract Sum where there is a net omission in this section of the account.

### ***15. Assignment or Sub-Letting***

Written consent is required from the other party in order to assign the work. Written permission is required from the Architect for the Contractor to sub-let the work.

### ***16. Nominated Sub-Contractors***

This Clause covers work by firms selected by the Architect but employed by Contractor. The Contractor may make reasonable objections to such appointment or may reject the appointment of a Nominated Sub-contractor were it fails to indemnify the Contractor against the corresponding liabilities of the Contractor towards the Employer.

Clause 16(b) requires the Contractor to pay Nominated Sub-contractors within five working days of receiving payment from the Employer. It should be noted that this may constitute a pay-when-certified arrangement which is now unlawful under the terms of the Construction Contracts Act (2013).

Clause 16 (c) provides that The Employer can pay the Nominated Sub-contractor direct if the Contractor fails to pay the Nominated Sub-contractor.

Early final payment may be made to a Nominated Sub-contractor provided the Contractor is indemnified against latent defects subsequently emerging in Nominated Sub-contractor's Works. In this event, the Contract Retention Funds is reduced pro-rata.

Clause 16 (e) Clarifies that the Employer, in the absence of a Collateral Warranty, is in no way liable to Nominated Sub-contractors. The Sub-Clause also clarifies that the Contractor, subject to certain conditions, is not liable for the extra costs involved in employing another, replacement Sub-contractor to complete the Nominated Sub-contract Works where the original Nominated Sub-contractor has been justifiably dismissed.

### ***17. Nominated Suppliers***

Nominated Suppliers are firms selected by the Architect to supply specific materials or goods.

### ***18. Provisional Sums***

Provisional Sums are allowances for work that cannot be fully defined at the time of entering into the Contract. These works are valued on completion in accordance with the rules set out in Clause 13 above. Provisional Quantities, likewise, are approximate quantities of works which are measured in-situ on completion. Provisional Sums are spent in whole or part at the disposal of the Architect. If spent on Nominated Sub-contract work or on Nominated Suppliers they are treated as a P.C. Sum (next).

### ***19. Prime Cost Sums***

Prime Cost Sums are allowances for payments by the Contractor to Nominated Sub-contractors or Suppliers. Such payment and are net of commission and/or discounts.

The Architect directs the payment of P.C. Sums which are adjusted in the Final Account.

***20. Independent Contractors, Artists and Tradesmen.***

The Employer can employ direct contractors to carry out work not specified in the Contract. They are paid by the Employer who is required to indemnify the Contractor against liability and loss claims arising from their actions. The Contractor may object to such appointments.

***21A Liability, and Indemnity for Damage to Persons and to Property***

The Contractor is generally responsible for, and must indemnify the Employer against, negligence claims for injury to persons and damage to other persons' property arising out of the Works. The Employer, however remains responsible for the negligence of the Employer's independent contractors, during, and following partial possession and practical completion of the works.

Damage to property does not refer to the Works themselves.

***21b Insurance Against Damage to Persons and Property.***

The Contractor must carry Public Liability, Employers Liability and Motor Insurance to cover the indemnity given to the Employer in Clause 21A. These policies are to remain in place for 18 months following Practical Completion or until the issue of the Final Certificate whichever is the earlier. Further policies must be taken out if return visits are required after this date.

Alternatively, the Employer, instead of the Contractor, may arrange the Public Liability insurance. The Contractor must in this event, nevertheless, take out the Employer's Liability and Motor policies. There is no cover if the event causing the loss is not accidental, or is a permitted exclusion, or is not covered by the insurance policies.

***22 All Risks Insurance***

The Contractor must take out All Risks insurance (except for the exclusions permitted under Clause 23 below) for the full reinstatement value of the Works, including the percentage for professional fees & site clearance stated in the Appendix, and VAT if

applicable. The insurance is to remain in place until Practical Completion. Further insurance cover is required when rectifying defects during the Defects Liability Period. Clause 22 (b) (i) provides the Employer with the option of arranging the necessary All Risks Insurance.

The Contractor is to make good damage with 'due diligence'. The insurance compensation less the Amount for Professional Fees is paid into a joint names account. Payment for rectification of the damaged work is by instalment from this account on foot of Architect's Certificates which are not subject to retention. If the Contractor has arranged the insurance which fails to cover the full cost of the reinstatement then the Contractor will bear the shortfall and the Employer is not liable to pay the extra cost of the work not covered by insurance. If the Employer is responsible for All Risks insurance but the payment results in a shortfall in cover then he/she must make up the shortfall and pay this to the Contractor. If the reinstatement work is varied and there is a balance left, including interest, this is paid to the Employer.

### ***23 Insurance Policies***

The Contractor's insurance policies are to be provided by reputable insurance companies approved by the Employer. Similarly, where the Employer arranges the insurance cover required by the Contract, these insurers are to the approval of the Contractor. The All Risks policy is to be in Joint Names. The Contractor (and the Employer where applicable) must comply with the conditions of the particular insurance policies. The insurance policies are permitted to contain exclusions from cover for the particular risks set out in Clause 23(c), these are set out in the supplement to the Contract at pages 40 to 43.

The Contractor (or Employer where applicable) is to produce policies and premium receipts for inspection by the other party. If these are not produced, the other party may take out the insurance and recover the premium from the defaulting party.

### ***24 Damage due to Excluded Risks***

The Contractor is not liable for loss and/or damage arising from an excluded risk. Where substantial damage arises due to an excluded risk, either party may seek to terminate the Contract within 20 working days of the occurrence if it is just and equitable in the circumstances. If the parties cannot agree on whether termination is just

and equitable, then an Arbitrator may be appointed to decide the issue. If the parties decide to continue with the works, the Contractor shall make good the loss and or damage which will be reimbursed as a variation.

### ***25 Damage due to Design***

The Employer is responsible for loss and damage caused by the defective design provided by the design team and Nominated Sub-contractors and Nominated Suppliers. The Contractor is, however, responsible for damage due to his/her own, or domestic sub-contractor's defective design. The Contractor shall repair such defective work with due diligence and will be reimbursed where the Employer is responsible.

### ***26 Responsibility for Existing Structures.***

In alteration work and extension projects, the Employer is responsible for insuring the **existing structures and contents** against various stated risks (fire, storm, tempest, water damage, impact from various sources and damage due to riots etc. and malicious damage). The Contractor must nevertheless indemnify the Employer against damage to contents which are not the Employer's property. This indemnity is limited to the amount of the Minimum Sum for Public Liability Insurance entered in the Appendix.

The Employer must maintain adequate structure and contents insurance throughout the Contract period until the defects have been rectified (the issue of the Certificate of Making Good Defects). The Contractor is entitled to inspect such policies, and may, if the Employer has failed to do so, insure the existing structures and contents, and charge the Employer for the cost of the additional premiums.

The Employer is not entitled to recover consequential loss resulting from any of the perils noted in this Clause from the Contractor.

Additional works or variations requested after Practical Completion, The buildings which have been handed over are considered to be 'existing buildings' and these must be covered by the Employer's building and contents insurance policies.

### ***27 War Damage***

The Contractor is in no way responsible for such damage.

### ***28 Dates for Possession and Completion***

The Contractor is to be granted possession of the site (or section(s)) on or before the 'Date for Possession', or 'Dates for Phased Possession' stated in the Appendix and must 'regularly proceed' and complete the Works by the 'Date for Completion' unless this has been extended by the Architect. If the Date of Possession is deferred, then Contractor is entitled to compensation for losses arising due to 'dislocation of the Contractor's organisation.

### ***29 Damages for Non-Completion.***

If the Contractor fails to complete the Works on time, or within an extended period of time awarded by the Architect, the Architect may certify that the works should reasonably have been completed by that time, but have not been. The Employer may then apply the Liquidated and Ascertained Damages as stated in the Appendix for the period of delay for which the Contractor is responsible.

If a delay is caused by the Employer's acts or default, the Contractor must notify the Architect of the delay within five working days. In these instances the Architect shall extend the Contract period and the Contractor may be entitled to damages arising from such delays.

### ***30 Delay and Extension of Time***

The Contract period may be extended due to:

- force majeure;
- delayed possession;
- exceptionally inclement weather;
- events causing loss or damage covered by the insurance clauses;
- strike or civil commotion;
- Architect's Instructions;
- late instructions or information;
- unavoidable inability to secure labour or materials;
- delays by Employer's direct employees, and/or,



- other delays caused by the Employer.

The Contractor must immediately notify the Architect and use best endeavours to mitigate the delay. The Architect will take account of contributory negligence by the Contractor in assessing delays due to loss and damage covered by all risk insurance.

### ***31 Practical Completion and Defects Liability***

A 'Certificate of Practical Completion' is issued when the Architect is satisfied that the Works can be taken over and used by the Employer for their intended purpose and that any outstanding matters are trivial in nature and do not interfere with the operation of the building. The issue of the Certificate signals the commencement, on the following day, of the 'Defects Liability Period' (entered in the Appendix and usually one year). During this period, the Contractor must make good defective materials and workmanship. At the end of the Defects Liability Period, The Architect must, not later than 20 working days after the end of the Period, give the Contractor a final list of defects to be rectified.

**Note** under Clause 35 (Certificates and Payments below) half the retention fund is usually released on the issue of the Certificate of Practical Completion. The Employer also assumes responsibility for insuring the Works.

### ***32A Partial or Phased Possession***

The Contractor may consent to the Employer taking possession of part or phases of the works before overall Practical Completion of the Works. In such cases the Architect shall issue a 'Possession Certificate' at least three working days beforehand describing the 'Relevant Part' and certifying its 'Percentage' value of the [adjusted] Contract Sum.

Two days after the issue of the Possession Certificate, the Employer assumes responsibility for 'Relevant Part' and must fully insure it and its contents. The Contractor's liability for non-completion (Liquidated Damages) is reduced by the relevant 'Percentage' of the Contract Sum. The Architect must certify Practical Completion of the Relevant Part which triggers the commencement of its Defects Liability Period, and, ten days later, releases half the retention held on Relevant Part. The outstanding half of the retention is released at the end of the relevant Defects Liability Period **or** in conjunction with the issue of the Certificate of Making Good Defects for the Relevant Part, whichever is the later.

### ***32B Damage due to Use, Occupation or Possession by the Employer***

This ten line sentence seems to mean that the Contractor is not liable for damage to the premises and contents during the Defects Liability Period in excess of that covered by the All Risks insurance policy required under Clause 22 above. Where such damage occurs or is due to the Employer's use of the building, it qualifies as an excluded risk under Clause 24. This clause emphasises the importance for the Employer to maintain full building and contents insurance following handover of the building.

### ***33. Determination of Contract by Employer***

If the Contractor:

- suspends the work without reasonable cause or,
- fails to proceed diligently or,
- persistently refuses to carry out Instructions or,
- fails to build in accordance with the Contract Documents or,
- seriously breaches the Contract;

then, the Employer may, by notice, require the Contractor to cease the specified default within ten (10) working days. Should the Contractor continue the default, the Employer can, by notice, 'determine' the Contract 'thereupon' or within the following ten days. Such notice must be reasonable and would be invalid if the Employer is in serious breach of the Contract.

Following service of the notice, the Contractor is not allowed to remove materials or plant off the site, and the Employer becomes entitled to hold a lien on such materials goods and plant. The Employer must take possession of the site within a month in order to avail of this lien. Sub-contractors materials plant and materials are not subject to the lien unless their value has already been included in a Certificate.

If the Contractor becomes insolvent then the Employer can determine the Contract, by notice, with immediate effect.

The Employer may then:

- employ a completion contractor to complete the works and may use all site-facilities, materials, plant etc.

- require the Contractor to assign the benefit of sub-contracts and supply contracts to the completion contractor,
- notify the Contractor to remove items ‘as and when required’ from site. If the Contractor fails to remove the items, the Employer can sell them and set the proceeds off against extra costs arising from the determination,
- refuse to pay the original Contractor any more money until all expenses of the Employer have been met. The final account is calculated as: the money already paid to the Contractor **plus** the amount paid to the completion contractor, **less** the amount that *would* have been paid, on completion, to the Contractor. In the (vast) majority of cases this process results in a debt due to the Employer from the Contractor.

The Architect may secure the site as soon as the letter of notice of default or determination is sent and the Contractor. The Contractor is liable for the cost of such additional security for a period not exceeding one calendar month from determination.

#### ***34. Determination of Contract by Contractor***

The Contractor may threaten to suspend the Works, where the Employer fails to pay the Contractor by the date for honouring certificates (entered in the Appendix), by providing five working-days’ notice. In the event that the Contractor is still not paid at the end of the five days, the Contractor may suspend the works for a further ten days. If payment is still not received at the end of the ten day suspension period, the Contractor may determine its own employment (resign). If payment *is* made, then the period for completing the Contract is extended by two days for every day the works were suspended.

In addition, the Contractor may by notice, determine the Contract with immediate effect if the Employer becomes insolvent.

In the event the Contract is determined, the Contractor shall remove all materials and plant from site, and the Employer shall pay the:

- Contract value of the completed works,
- value of work in progress but not completed,
- cost of materials paid for, or for which the Contractor is legally bound to pay,

- reasonable costs of removal,
- losses suffered by the Contractor on account of the determination.

The Contractor also becomes entitled to hold a lien on unfixed materials which may previously have been paid for by the Employer.

### ***35. Certificates and Payments.***

Clause 35(a) seeks to afford the Contractor some comfort that the Employer has sufficient funds to finance the project. The default provision of this sub-clause (Clause 35 (a) (ii)) requires that the Employer provides a bank certificate confirming that there are adequate funds to meet the projected cash flow, and to guarantee the payment of Certificates presented by the Contractor during the course of the project. **Alternatively**, (Clause 35 (a) (i)) requires the Employer to arrange, from the outset of the Contract, a joint names 'Guarantee Account' into which the Employer deposits and maintains two month's average payment. The 'Guarantee Account' is used to pay the final Interim Certificate and the Final Certificate. Any surplus in the account (as is likely) accrues to Employer. If a deficit results, however, this must be paid to the Contractor. Payment from the Guarantee Account shall only be made on foot of an Architect's Certificate.

Clause 35 (b) has been modified in response to the introduction of the Construction Contracts Act (2013). The Contractor is now entitled to submit payment claims **starting within one calendar of month from the actual date of possession** and thereafter at the intervals stated in the Appendix (default one calendar month). The Contractor's detailed progress statement (typically constituting a 'Payment Claim Notice' under the Act) is to be verified and certified within of five working days, unless otherwise stated in the Appendix. The resulting Certificate is to be honoured by the Employer within seven working days of presentation by the Contractor, unless otherwise a different period is stated in the Appendix. **The Architect is now required to explain the basis of the calculation of any differences between the amount claimed by the Contractor and that certified by the Architect.**

Clause 35 (c) provides that interim payment shall be the gross valuation of the duly executed work and materials on site *less* retention; liquidated damages (where applicable) and previously certified sums. The value of duly executed work usually includes components such as preliminaries, variations and materials on site for

incorporation into the works provided they are properly protected and have not been prematurely brought onto site. **A paragraph affirming the Employer's ownership of unfixed materials and prohibiting their removal without the authority of the Architect has been removed from the Contract.**

Clause 35 (d) provides the Architect with the discretion to pay for materials *off site* before delivery to site. Discretion may be exercised where the eight stipulated conditions which protect the Employer's interests are rigidly adhered to. Note, this sub-clause retains a paragraph similar to the one omitted from Clause 35(c) affirming the Employer's ownership of unfixed materials which the Contractor has been paid for and prohibiting their removal without the authority of the Architect.

Sub-clauses 35 (e to g) set out various procedures for dealing with retention money which is set aside in order to rectify defective work. Retention is normally held as a percentage, entered in the Appendix, of the value of the executed work and materials. The amount of the retention held may be capped if a particular limit is stated in the Appendix.

The most common option for dealing with retention is set out in Sub-clause 35 f (2). This sub-clause provides that retention is held by the Employer during the construction phase of the project, and is held on trust for the Contractor. The Employer is not obliged to invest this money. One moiety (half) of the retention is released on Practical Completion of the Work. The other half of the retention is released on foot of the Final Certificate.

*Alternatively*, under sub-clause 35(g), the retention may be deposited in a 'Joint Account' with the interest accruing to the Contractor. As with Sub-clause 35 f (2). One half of the retention is released on Practical Completion of the Work. The other half of the retention is released on foot of the Final Certificate. This approach appears to be rarely used in practice.

In addition, sub-clause 35 (f) 1 sets out a further mechanism for dealing with the remaining retention held after the issue of the Certificate of Practical Completion. Under this arrangement the Contractor provides a retention bond which triggers the release of the remaining retention shall be released in full. The text of the Retention Bond, however, has been deferred until the next print run of the Contract but is available as a separate loose-leaf print.

The Final Account procedures are set out in Sub-clauses 35 (h) to (m):

The Contractor is required to submit, within three months of Practical Completion, all the necessary documentation to enable the Architect to calculate the Final Account (in practice the QS performs this function on substantial projects). Following the three-month deadline for the submission of the documentation, the measurement and valuation of the Works proceeds and must be completed within the 'Period of Final Measurement' stated in the Appendix. There is a provision, however, enabling the Architect to accept late information from the Contractor in exceptional circumstances, and to seek additional details from the Contractor regarding the Final Account. In both cases, the Architect may then extend the Period of Final Measurement.

The Final Certificate is scheduled (Sub-clause 35 (i)) to be issued within ten days after the *latest* of the following events:

- the end of the Defects Liability Period, **or**,
- the completion of making good of defects, **or**,
- the end of the Period of Final Measurement.

At this time, the Architect shall notify the Contractor and Employer of his/her intention to issue the Final Certificate. The Architect will then issue the Final Certificate unless a Notice of Arbitration is served within ten (or specified number of) working days.

The Final Certificate states:

- the previous payments certified and the amount of retention released at Practical Completion and,
- the adjusted Final Account amount,
- any balance due less any deductions authorised under the Contract Conditions.

Any balance due either to the Contractor or to the Employer is classed as a debt payable ten days following of issue of the Final Certificate.

The Final Certificate is conclusive that the Works have been completed in accordance with the Contract Documents and the accounts have been properly calculated unless there is:

- fraud, dishonesty, or fraudulent concealment relating to the works or any matter dealt with in the Final Certificate.
- undetectable (latent) defects which emerge at a later stage.

Apart from the Final Certificate, other certificates are not conclusive evidence that works, materials or goods are in accordance with the Contract.

Failure by the Architect to issue a Final Certificate within the default timetable (35 (i) above) will entitle the Contractor to charge AA interest on the balance due.

If the Employer fails to honour any Certificate within seven days of the time stipulated for payment, the Contractor is entitled to charge AA interest on the outstanding amount.

### ***36. Wage and Price Variations***

This clause requires a supplement, set out in pages 46 and 47 of this Contract, to clarify its meaning.

The prices in the Bill of Quantities are deemed to be set at the Designated Date entered in the Appendix. If wages and other emoluments, plant costs, and/or insurance costs vary during the course of the Contract, the extra costs can be recovered by the Contractor, or, may be recovered by the Employer in the unlikely event that prices fall.

The prices of materials and plant at the time of the tender are deemed to be market prices and the Contractor may be required to provide a list of basic prices, (this is usually included in the Bill of Quantities). If the price of any goods increases substantially, the Contractor shall notify the Architect in writing within a reasonable time of becoming aware of the increase.

Increased costs, including those of sub-contractors are reimbursed in interim progress applications. At Practical Completion all the relevant documentation must be submitted in a “detailed statement” within the following three-month period. Increased costs do not apply on works valued on the basis of dayworks, nor do they apply to rectifying defects.

### ***37. Collateral Agreements***

The purpose of this Clause is to enable the Employer to have a contractual link to nominated sub-contractors. The agreement is set out in a standard format and published by the RIAI. Where a collateral agreement is entered into with a nominated sub-

contractor, the conditions set out in this (the ‘Yellow Form’) are deemed to be amended and supplemented in all respects necessary to entitle the Employer vis-a-vis the Contractor to give effect to the terms of the collateral agreement.

### ***38. Avoiding and Resolving Disputes***

The purpose of this Clause is to provide a mechanism for resolving disputes. The clause has been retitled and simplified.

A dispute, which has not been resolved by negotiation *should* initially be referred to Conciliation in preference to statutory Adjudication or Arbitration.

A Conciliation may be initiated by either party by sending a written Request for Conciliation to the other party, describing an outline of the disputed issues and the solution sought. If the parties cannot agree on the appointment of a Conciliator, then they may request the President or Vice President of the RIAI to nominate a Conciliator.

Clause 38a refers to the *RIAI Conciliation Guidelines and Procedures* which may be regarded as the default mechanism governing conciliations commenced under this form of Contract.

The Conciliator will make a Recommendation which is e-mailed simultaneously to the disputing parties, followed up one day later, by recorded delivery post. If neither party rejects the Recommendation within 10 working days, the Recommendation will be deemed to be agreed and legally binding on the parties. If a party rejects the Recommendation, they must notify the other party, in writing, within the ten day deadline.

Alternatively, or if settlement is not reached through Conciliation the dispute may be referred to Arbitration. The procedure for commencing Arbitrations is similar to that for Conciliation with either party sending a written Notice of Arbitration to the other party, describing an outline of the issues and the solution sought. If the parties cannot agree on the appointment of an Arbitrator, then they may request the President (or Vice President) of the RIAI to nominate an appointee.



## The Appendix

The purpose of the Appendix is to gather together the various items which might vary from contract to contract, and thereby to simplify the task of reference. There are eighteen items in the RIAI form to be stated. Each item has a clause reference.

- 1 Designated Date
- 2 Architect's e-mail address for delivery of payment claims notices (New)
- 3 Percentage for Professional Fees (if not stated, 12.5%)
- 4 Cost of Site Clearance
- 5 Minimum sum for Employer's Liability Insurance (if not stated €13,000,000)
- 6 Minimum sum for Public Liability Insurance (if not stated €3,000,000)
- 7 Date for Possession (**Or dates for Phased Possession if specified**)
- 8 Date for Completion
- 9 Liquidated and Ascertained Damages
- 10 Defects Liability Period
- 11 Guarantee Account
- 12 Period of Interim Certificates (if not stated, **one calendar month**)
- 13 Time for Issue of Interim Certificates by the Architect (if not stated, 5 working days)
- 14 Percentage of Certified Value Retained (not to exceed 10%)
- 15 Limit of Retention Fund
- 16 Joint Account Retention Fund
- 17 Period of Final Measurement (if not stated, 6 months)
- 18 Period for Serving Notice of Arbitration (if not stated, 10 working days)

## Supplements

The Contract incorporates three supplements

- Permitted wordings of the exclusions in Clause 23I regarding the Contractor's insurance policies (Pages 40 to 43)

- Text for Retention Bond referred to in Clause 35(f)(i) (Pages 44 and 45) The text of the bond has been deferred until the next print run and is available as a loose-leaf from the RIAI.
- A supplement setting out the meaning of wordings in Clause 36 Wage and Price Variations. (Pages 46 and 47)

The Conciliation procedures referred to under Clause 38 are published as a separate document.

## References

Clamp, H. Cox, S. and Lupton S. (2007) *Which Contract? Choosing the Appropriate Building Contract* (4<sup>th</sup> Edition). London RIBA Publishing

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Kirkham, R. (2014) *Ferry and Brandon's Cost Planning of Buildings* (9<sup>th</sup> Edition). Chichester: Wiley Blackwell.

Latham, M. (1994) *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report*. London: HMSO.

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