

The JCT Major Project Form

2003 Edition

Introduction:

The Joint Contracts Tribunal launched in June 2003 another standard form of contract in response to a demand by commercial, sophisticated clients who sought a simpler contract which would avoid the perceived necessity for either creating bespoke contracts or radical redrafting any one of the current available standard forms.

The response has been to produce the Major Project Form ('MPF'), which is considerably shorter than any its contemporary contracts for example it is 80 percent smaller than the With Contractor's Design contract.

Accordingly, and as stated in the JCT Guidance Notes published alongside the MPF, they have produced a much shorter contract as they expect the MPF users to have a thorough understanding of both the building and general contractual procedures. However, with any commercial contract, the corollary of producing a shorter and simpler contract is inevitably the greater need for interpretation of its terms, which could easily lead to disagreements and eventually disputes.

Perhaps in recognition as already stated the JCT have also published a 24 page set of Guidance Notes with the MPF, which in itself appear slightly contradictory to the aim of producing the MPF as a shorter and simpler contract which should be sufficiently self explanatory.

Similar to other forms of contract the MPF is moving towards a greater reliance on the Contractor who assumes more risks and obligations. Clearly for the MPF to be successful the responsibilities and obligations of the parties need to be accurately identifiable and particularly at what stage do these responsibilities and obligations pass between the parties.

The stated aim of the MPF is having defined the Requirements, the Employer should then permit the Contractor to undertake the Project without the Contractor being reliant upon the Employer for anything more than access to the site, the review of Design Documents and payment. In particular, there is no requirement for the Employer to issue any further information to the Contractor, as design information beyond that contained in the Requirements will be produced by the Contractor.

Overall the MPF is a radical departure for the JCT and incorporates many of the usual commercial realities. Employers should find the Contract refreshing and favourable, perhaps with the exception of the lack of the Contractor's responsibility for the Requirements. Equally, Contractors should have little to fear from the Contract with the majority already conversant with risks and obligations contained within it.

Key Features:

Attestation Provision	The contract is to be executed as a deed and therefore provides a limitation period of 12 years.
Clause 1	The Contractor is responsible for completing the Project in accordance with the Contract, which is defined in clause 29 as: 'The Contract Conditions, the Appendix, the Third party Rights Schedule, the Requirements, the Proposals and the Pricing Document.'
Design	The key document is the Employer's Requirements, which needs to be sufficiently detailed to set out what it expects the Contractor to design and clause 5.1 expressly excludes the Contractor's responsibility for the contents of the Requirements or the adequacy of the design contained therein. Clearly, failure to adequately define the design parameters could result in dispute.
Design Standards	<p>The Contractor provides a standard duty of using reasonable skill and care with clause 5.3 expressly excluding any 'fit for purpose' provision.</p> <p>The JCT in recognition of those Employers requiring a 'fit for purpose' obligation set out in the Guidance Notes page 7 a slightly watered down alternative, which requires the Contractor to warrant that the Project will be 'suitable for the purpose stated in the Requirements.'</p>
Design procedure	Clause 6 expects any Design Documents, which are widely defined to be prepared and submitted to the Employer, who has 14 days to approval and comment.
Discrepancies	Only discrepancies within the Requirements and changes in the Statutory Requirements post the Base Date will give rise to a Change. Other discrepancies between or contained within the documents will not give rise to a Change.
Possession and Completion	<p>The Contractor does not have exclusive possession of the Site, which suggests that the Employer may undertake works at the same time with the proviso that the Contractor has sufficient access to areas of the Site to complete his works. Limitations must be set out in the Requirements.</p> <p>The Employer with consent may also take over any part or parts of the Project prior to Practical Completion, which unlike other JCT Contracts clause 39 provides a definition for Practical Completion.</p>

Time	<p>To preserve the liquidated damages provision the MPF also provides the usual suspects for extending the Contract period with the exception of exceptional weather conditions, industrial disputes, and the inability to obtain labour and/or materials and delays in statutory approvals, which are all excluded and will therefore be at the risk of the Contractor.</p> <p>The MPF adopts the following principles for making an extension of time:</p> <ul style="list-style-type: none"> • The Employer should implement any agreement reached regarding Changes, acceleration or costs savings. • Regard must be given to any failure by the Contractor of clause 9.3 i.e. using reasonable endeavours to prevent or reduce delay to the works. • A fair and reasonable adjustment should be given regardless of any concurrent culpable delay.
Acceleration and Bonus	<p>The Contract expressly provides for acceleration by agreement. The Employer is also liable to paying the Contractor an optional agreed bonus payment if the Project is Practically Completed before the date of Completion Date.</p>
Pre-Appointed Consultants and Specialists	<p>If adopted by the Employer he can name consultants in the Appendix which will be novated to the Contractor on a Model Form which must be contained in the Requirements.</p> <p>The Contract clause 18.4 provides that the Contractor will accept responsibility to the Employer for services previously performed by the consultant and clause 18.6 prevents the Contractor (without permission) altering the terms of the Consultants engagement.</p> <p>The Guidance Notes also identifies a potential problem for the Contractor if the 'fit for purpose' obligation has been adopted by the Employer, this could readily be incompatible to the majority of Consultant Appointments and will immediately put the Contractor's obligations at odds to its Consultants.</p> <p>Another potential pitfall for the Contractor is If the Contractor fails to agree terms with the Named Specialist and subsequently fails to appoint them. Clause 18.5 has some very serious repercussions since it the Employer will <u>not</u> be liable to pay the Contractor in respect to these works.</p>

Cost Savings	The Contractor is 'encouraged' to suggest amendments to the Requirements and/or Proposals and will directly benefit by a novel cost saving scheme.
Variations Changes	<p>– The Contractor shall comply with all written instructions issued by the Employer with the limitation to any of the terms of the Contract. For example, (clause 13) acceleration and (clause 19) costs savings and value improvements.</p> <p>The valuation of any Change shall preferably be agreed before any instruction is issued or they will be determined on the basis of a fair valuation that takes into account all consequences of the Change including any loss and/or expense, which may be incurred.</p>
Valuation	Valuations will be made monthly, however the Pricing Document provides for a range of payment options based upon, interim payments, stage payments, scheduled payments or indeed any other method the parties wish to make.
Third Party Rights	<p>This is a major innovation albeit it remains optional. It provides for the Contractor to effectively warrant their obligations under the Contract to other defined third parties, which relies on the relatively untried Contracts (Rights of Third Parties) Act 1999.</p> <p>The MPF sets out the rights available to these beneficiaries in the Third Party Rights Schedule, which carry many of the usual conditions contained in standard collateral warranties.</p> <p>The Contract excludes the Subcontractors and Consultants. Notwithstanding that the Subcontractor warranty may be addressed later in the year with the publication of the Subcontract terms.</p>
Insurance	The Contract does not provide for specific insurance and the MPF expects the parties to arrange bespoke arrangements. A separate option is also provided for Professional Indemnity Insurance.
Disputes	Clause 35 deals with the resolution of disputes and offers mediation by agreement, statutory adjudication under the Scheme and finally any difference or dispute being decided through litigation. The Contract does not provide an option for arbitration.

What's missing

Some of the common conditions which are missing from this form include:

1. Nominated Subcontractors
2. Payment for materials either on or off site
3. It fails to provide for any fluctuations
4. No retention
5. No oral mechanism for variations
6. No priority of documents provision
7. No specific insurance requirements
8. No lengthy provisions for VAT, Inland Revenue etc
9. No Insurance provisions

The Contract Documentation:

The MPF consists of 6 distinct documents including a set of Guidance Notes; with the latter confirming they are not a definitive guide to the terms of Contract or its interpretation.

1 The Conditions

The Contract is executed as a deed and consists of 8 main sections and 39 individual clauses. Clause 39 provides a useful definitions clause for terms used throughout all the contract documents.

2 The Appendix

The Appendix is similar to other JCT formats and contains all the relevant and necessary details required by the Contract terms.

3 The Third Party Rights Schedule

This is a considerable (optional) step in adopting the provisions under the Contracts (Rights for Third Parties) Act 1999, but remains limited to the Main Contractor providing a warranty to funders, purchasers and/or tenants. In relation to the Subcontract the JCT are currently preparing the Subcontract form, which should deal with this particular discrepancy and is expected to be published later this year.

Consultants will presumably still be expected to provide collateral warranties and if they are involved with the preparation of the Requirements particularly as the Contractor is expressly excluded for any responsibility in their creation.

4 The Pricing Document

Provides information for determining the manner in which the Contractor is to receive payments in respect of the Contract Sum and includes the contract sum analysis and pricing information.

This information will need to be prepared in the knowledge that it will also govern the valuation of any Changes.

5 The Requirements

These are the Employer's Requirements and what the Contractor will have to meet to discharge its obligations under the Contract.

6 The Proposals

These are the Contractor's Proposals which confirm how they intend to meet the Requirements.

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