Notes on a few of the interesting sub-clauses associated with the General Conditions of Contract for Building Works - Private Edition (with Quantities) 2005

by

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This set of notes is from my talk delivered to SCLHK on 25th May 2005 and serves as a brief background to the development of the General Conditions of Contract for Building Works – Private Edition 2005 (“GCC”) and highlights a few of the more interesting sub-clauses.

It has taken all of 10 years very hard work to get the GCC published. Denis Levett in particular has spent untold hours of his own time working through the 6 major drafts and literally dozens of sub-drafts under the pragmatic guidance of the Chairman, Mr LAM, ably assisted by the secretary to the Joint Contracts Committee (“JCC”) Mr. William Wang.

It is to replace the 1963 version, presumably with the blessing of the Provisional Construction Industry Coordination Board, which includes Real Estate Developers Association of HK.

It commenced life as a much localised version of JCT 80, including the modern day management requirements along with the basic risk allocation.

It would not be unfair to say that the first three or four drafts reflected the JCC’s “developercentric” nature, with the Contractor required to jump a number of “conditions precedent” hurdles to get any more time or money.

The first serious change to this came with the publishing of the Tang Report in January 2001. The JCC needed to respond to it as para 5.59 says

“…….. we recommend that the industry co-ordinating body……in consultation with concerned stakeholders, lead a review on the Standard Form of Building Contract, Private Edition with a view to achieving the same objectives” i.e. adopt those recommendations in the Tang Report and together with those made by Jessie B. Grove 111 for HKG’s civil engineering contract, in so far as they relate to a building contract.

The JCC then set about producing a document that would, as far as practical, express the rights and obligations as between Employer and Contractor in “neutral” and achievable terms. This resulted in nearly all “conditions precedent” being removed.

The third and fourth drafts were circulated to a wide range of interested parties in the building industry, their comments and suggestions received and each one answered by Denis Levett.

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This resulted in further rounds of consultation with members of the industry, including commissioning Mr. Anthony Houghton to give an opinion on two of the drafts.

Many of the suggestions received were adopted or adapted and are included in the published document and whilst this put back the publication by 2 years, it has resulted in a document that is better balanced and much easier to read and translate despite its complex nature.

I should make clear the connection between the JCC and Hong Kong Construction Association’s part in the development of the Contract.

The HKCA is not a member of the JCC. I was and still am a consultant to HKCA and worked with the JCC, looking after the interests of the contractors in my personal capacity.

Not being a member of the JCC, HKCA’s role was “advisory”, though it did influence the outcome through my attendance at the JCC meetings. I was only there by the kind invitation of the JCC and my attendance is not to be taken as ownership or endorsement of the Contract by HKCA.

We are now coming to the overview of the main initiatives in the Contract from the Contractor’s point of view.

The first issue to clear up is the matter of the Guidance Notes.

There are fairly detailed separate “Guidance Notes” produced for each of the three contractual “players” i.e. the Contractor, the Architect and the Surveyor. These “Guides” are the work of the drafter.

Why have Guidance Notes?

The “Guides” are produced -

1. To help users find their way around a totally new document.
2. To provide some directions to inter-related clauses.
3. To suggest possible meaning to some of the important undefined words and phrases.

The intention is to complete the exercise by also reviewing the Nominated Sub/Nominated Supply contracts and produce a combined users’ guide, in due course, which will, I hope, be placed on HKCA’s website fairly soon.

I am told that there is also an intention to set up a permanent version of the JCC to review the documents in use and advise on amendments to them, as well as developing further contract standard forms.

The legal status

The individual “Guides” are expressly stated as not being Contract documents – though they could be if included by means of a Special Condition of Contract. This is not recommended. The same will apply to the final combined guide.
General Overview

The agreed purpose (inter alia) was to produce a document that is

(1) as “neutral” as reasonably possible which reflects current practice and needs and which
(2) satisfies the recommendations of the Tang Report and consequently
(3) would be endorsed by the PCICB.

As noted, the existing standard contract form follows the 1963 British form and has remained unchanged (other than by copious and often confusing special conditions of contract) since first put into use in HK, getting on for nearly 40 years ago.

Bearing in mind that the new form is a set of General Conditions, it attempts to recognise and deal with the many changes that have happened in the building industry over the years.

It therefore goes into much more detail in describing the rights, obligations and duties of those involved and includes lengthy references to procedures and management requirements that are found in many other forms of contract.

This Contract is not for use in any kind of civil engineering works, hence there is no reference to “ground conditions”. If e.g. piling is to be included, it will have to be by a Special Condition of Contract.

There are now very few clauses that the contractors will find problematic. They boil down to the strict conditions precedent notice requirements for additional money (clause 28) and the potential problem for the parties getting a mediator appointed (clause 41). The latter is usefully mitigated by the right to go straight to early arbitration for a number of (but not all) important issues.

Both the Architect and the QS will have to work harder to meet their respective obligations as they have to respond to the contractually imposed deadlines, in order to protect the Employer’s position, and their own, if they don’t want to get sued.

Points for the Contractor to note.

There are several pages of Definitions, nearly 70 in all. There is little that is unusual. The most notable are –

“Contract” – which now includes the Specification. The Definition permits changes in risk to be “hidden” in documents other than the Conditions (except the Specification) though to be effective, any change to the Conditions must be flagged as being a Special Condition of Contract.

There is a schedule in clause 5 that sets out the order of importance of the Contract documents. Pre-contract letters, if expressly referred to and included, will be the second most important, after the Articles of Agreement and the Appendix, followed by Special Conditions (if any).

Discrepancies between the Contract documents must be pointed out to the A asap under clause 2.2 or risk loosing out under the new, and most welcome, clause 1.11(1) which requires everyone to act
“reasonably and expeditiously”. Everything must be read and understood in the light of this sub-clause. This is likely to have a major (if unpredictable) effect upon the arbitrator’s award.

For the Substantial Completion Certificate to be issued, the Works do not have to be 100% finished, so long as the Employer can make use of the building. Consequently, all the necessary inspections and tests must first have been passed.

A “Variation” is defined and is further described in clause 13.

“Direct loss and/or expense” is a separate calculation from a Variation and is the only matter where a written notice remains a condition precedent to payment. The “Definition” may restrict a claim for consequential damage.

Clause 1.9 requires that all communications must be in writing. (Some of the very important ones must be by special delivery in order to fix certain critical start dates.)

There are rather complicated rules dealing with the inevitable oral instructions in clause 4. Basically they must be confirmed in writing before the Contractor should comply with them.

Clause 2 sets out the Contractor’s basic obligations. Nothing unusual is included, but it does make clear that the Contractor’s skill and care includes having a level competence appropriate to the scope and nature of the Works. This one for those drawing up the tender list to ponder and it also impacts on the Architect’s power to instruct a Variation.

The Contractor can be given specific design and “design development” responsibilities and has the same level of skill and care as for the Architect i.e. reasonable skill and care (and not fit for the purpose unless expressly spelt out in the Contract).

The Works are at the risk of the Contractor until 14 days after Substantial Completion, when the Employer takes over. There could be a problem with a back-dated completion certificate but the insurance cover extends until the Defects Rectification Certificate is issued.

Under clause 3 the Contractor can be requires to provide a very detailed rolling programme and a method statement. They are not Contract documents. The Contractor may also have to provide detailed information on site staff. These requirements can be reduced for simple/smaller Works.

Clause 4 limits the Architect’s power to issue instructions to those specifically set out in the Contract (remembering that those powers can be anywhere other than in the Spec.).

Instructions can be issued at any time up to the issue of the Final Certificate, which will be long after the Works were completed. The only restriction is, no Variations after the issue of any DRC, which is likely to be at least 12 months after completion.

Any Variation issued after the Completion Date is not valued at or even based on the Contract rates. “Fair” rates are to be used, which I understand to mean the market rates current at the time the work was done, without adjustment for the Contractor’s level of overheads and profit.
The Contractor must comply with any Architect’s instruction, but can go to early arbitration over the Architect’s power to issue it.

If the Contractor does work under protest and then wins the arbitration, there is no basis of payment for the work done outside of the terms of the Contract. The arbitrator will not be able to help at the time, because a dispute over valuing work is not a matter for early arbitration.

If the Contractor does not “begin” to comply with the instruction within 7 days of its receipt, the A can get others to do the work”.

What constitutes “begin” is debatable. The Contractor will at least have to send some acknowledgement of the instruction as well as disputing it. If the Architect does get the work done by others, there will be a maintenance liability problem.

As noted, clause 5 deals with the Contract documents. It also requires the Contractor to deliver “as built drawings” and manuals within 60 days of the date of issue of the completion certificate.

Their delivery is not stated to be a condition precedent to the release of the first half of the Retention, and it cannot be argued that the failure to comply will “unreasonably interfere with the taking over of the Works”.

Before enforcing the terms of any warranty (other than NSC/NS direct warranties) against the Contractor, the Employer must exhaust all remedies in the warranty. The Contractor needs to check the wording of the warranty for the inclusion of any such protection.

Clause 6 underlines the fact that the Contractor must not break the law. If the Contractor thinks that the Architect’s design or instruction does not comply, the C needs to seek a Variation, and quickly, given clauses 1.11 and 4.3 (compliance with the Architect’s instructions).

Fees etc. not expressly included in the tender price via the BQ are reimbursable.

Clause 7 requires the Contractor to set out the Works in compliance with the information provided by the Architect and to remedy errors. Alternatively the Architect may accept the defect and deduct money, based on the loss of amenity, not the cost of putting it right.

Clause 8 is important. It refers to the standard of workmanship etc. the Contractor needs to achieve. If the Contractor does not (to the satisfaction of the Architect) reach the standard, the Architect can

(1) have the work redone by the Contractor, or
(2) accept the work, at a lower price (as if it were a Variation), or
(3) to avoid removing satisfactory work with the bad, issue a Variation to remedy it, but with no additional money.

Under clause 9, the Contractor will be reimbursed for royalties paid (except for plant used by the Contractor). A notice under clause 28 is not needed.

Clause 10 sets out the requirements for the Contractor’s site team. There is no power to reduce the Contract Sum for non-compliance.
Clause 11 requires the Contractor to allow the Architect reasonable access to places of manufacture.

Clause 12 deals with the Architect’s representatives, their duties and any delegated power. The Contractor has 7 days to object to an instruction from an AR. The Architect has a further 7 days to respond, failing which the AR’s instruction has no effect. The same rules do not apply to “the engineer”.

Clause 13 deals with the important issues of Variations, Provisional Quantities and Provisional Sums.

There are few limits placed on the Architect’s power to order a Variation, but cannot go so far as to “change the scope or nature” of the Works. (See clause 2.3 above.) Making an “economic” omission without paying loss of profit is (probably) ok. Omitting a few floors is not allowed. Using a cheaper material is.

The Contractor must not vary the Works without an order in writing.

There is nothing unusual about the rules of valuing a Variation, which is done by the QS, without a notice from the Contractor. Generally, the BQ rates apply, or provide the basis for work added or for unchanged work affected by a Variation. The principal exceptions, of work ordered after completion and as the result of an early arbitration, have already been mentioned.

The valuing of a Variation does not include anything for “loss and/or expense” or for any other cause that is to be reimbursed under any other clause. Some of these clauses do not require a specific clause 28 notice from the Contractor, including for a Variation, but most do.

With the permission of the Architect, daywork can be used for any work that cannot be measured and valued at or based on BQ rates. The Contractor needs to be alert to the need for prior agreement from the Architect. Unless the Contractor has included a specific % it is paid at cost plus 15%.

The QS must give the Contractor the opportunity to be present when taking measurements. If not, this may affect the arbitrator’s view of a dispute over the measurement of a Variation.

Clause 14 ties the Contract Sum to the “quality and quantity” set out in the BQ (and not as shown on the Drawings or as described in the Spec.) i.e. any change to an item description or quantity is reflected in a change to the Contract Sum.

The BQ must be measured in compliance with the SMM. Any divergence from it must be stated in the BQ. Any error in the quantities in the BQ shall be put right and treated as a Variation. This a duty placed on the QS. The Contractor does not have to give a formal notice ( though good sense say that the Contractor should alert the QS).

The QS is also obliged to consider the effect any correction(s) to BQ descriptions have on the tendered rates and if affected, make a valuation of the change(s) that is “fair to both parties”. Again, there is no guidance how “fair” is to be assessed by the QS. Note the different wording from where used in clause 13. – no mention of “both parties”.

Ideally, in this case, the “fair” valuation should reflect the rate(s) the Contractor would have used had the description(s) been correct in the BQ. The practical solution could be by using market rate(s),
current at the time of tender, adjusted (up or down) for the level of profit and overheads included by the Contractor.

As the corrections are merely bringing the BQ into line with the Drawings/Spec i.e. there is no change in the amount of work to be done according to the original design, there is no possibility of a “loss and/or expense” claim (or an EoT).

The Contract Sum is adjusted in accordance with clause 15.

Clause 16 is concerned with materials etc. stored adjacent the Site. They are at the risk of the Contractor and once delivered and they are not to be removed without the Architect’s approval.

Clause 17 deals with completion and defects.

The Definition of completion in clause 1.6 includes the passing of all tests referred to in the Contract, many of which are likely to be found in the Specification. If they are not clearly referred to in the BQ, the Contractor is entitled to more money. Clause 28 notice rules apply.

The Architect can instruct the Contractor to remedy defects at any time during the DLP, but within 14 days of the expiry of (each) DLP, the Architect is to send the Contractor a list of defects to be remedied, which the Contractor is to complete within a reasonable time. If the Contractor does not, the Architect can get others to do it at the Contractor’s expense.

The issue of the Defects Rectification Certificate for the whole of the Works realises the Contractor from all work related obligations other for warranties and latent defects.

Any DRC for a Section or Part does not seem to have the same effect. It seems probable that the Contractor can be instructed to do work of repair in such areas at any time up until the final DRC is issued.

Clause 18 describes the Employer’s right to take over a part of the Works early. If done, the DLP starts from the date of handover and the Retention and LD’s are proportionally adjusted. There are insurance implications with the Employer becoming responsible for the part taken over.

Clause 19 deals with assignments and sub-letting, which is permitted unless expressly prohibited and provided the Contractor does not loose control of what is happening on the Site.

The Contractor may be required to submit the sub-contracting arrangements to the Architect, who has the right (within reason) to object to any particular sub-contractor.

Clause 20 is a general indemnity against bodily injury and damage given by the Contractor to the Employer. Insurances do not affect this obligation.

Clauses 21 and 22 cover ECI, which is to be maintained until the issue of the DRC for the whole of the Works, and the 3rd party liability and CAR insurances. Any change to the standard risk allocation must be set out in the BQ or Specification. What happens if they are not, is not addressed.
In any case, the 3rd party and CAR insurances are to be on “the best terms available” in the insurance market at the time.

The insurance cover ceases 14 days after the date of Substantial Completion for the Section or Part. Significant back dating of the Completion Certificate is likely to expose the Employer.

In the event of damage to the Works, the Contractor must follow the procedures set out in clause 22 or risk not getting all the money. The money is released through the interim payment certificates i.e. the money is paid to the Employer.

There is a risk that the cover will not be enough to carry out the repair work, particularly if the Employer is taking out the insurances. The Contractor needs to check the Appendix at time of tender.

Clause 23 describes the commencement and completion of the Works (or any Section).

The Contractor is bound to “proceed regularly and diligently”, which is an implied condition precedent to getting an EoT.

Under clause 24, before the Employer can deduct LD’s, the Architect has to issue a certificate of non-completion, stating the date by which the Works should have been completed and that all EoT claims have been taken into consideration.

Having received the Architect’s certificate, the Employer has to give notice of the intention to deduct money at least 7 days before making the deduction, to give the Contractor time to protest.

To allow time for a deduction from an interim payment, the Architect must give the certificate in plenty of time. A deduction made in breach of the Contract may result in the Contractor determining the Contract.

Clause 25 sets out the rules covering EoT’s. There is a very comprehensive list of “events” that entitle the Contractor to an EoT.

Two notices should be sent by the Contractor but there are no absolute deadlines by which the Contractor is to send the them, other than that the 1st of them must be sent at some point before the issue of the Final Certificate (and even then, the parties have 28 days to dispute the Architect’s assessment).

The Contractor does not have to send the 2nd notice, giving the supporting details, in order to be granted an EoT, but that will leave the decision entirely up to the Architect.

In any case, the Contractor must “continuously use his best endeavours to prevent or mitigate delay”. This also appears to be a condition precedent to getting an EoT. This condition should be met by the Contractor continuing to work “regularly and diligently” i.e. not further contributing to the delay.

In assessing delay, the Architect can take into consideration any contribution by the Contractor to the delay.
The Architect must give reasons for giving (or not giving) an EoT, within 60 days of receiving the Contractor’s 2nd notice. If no 2nd notice, then the Architect still has to consider the 1st notice and make an assessment, based on the information available.

Clause 25.2(1)(b) refers to the “predictable length of the delay. Clause 25.3(1) refers to “likely to be delayed “. Taken together, it is clear that, provided the Contractor complies with clause 25, the Architect is bound to consider granting an EoT before or during the delay.

To get an EoT, there needs to be an actual delay to the completion of the Works (25.3(1)). This implies that the Employer owns the float. This would cause a problem for the Contractor if the Architect sees fit to reduce the amount of time already granted, just before the date for completion.

The Architect cannot reduce the (revised) time for completion once the Substantial Completion Certificate has been issued.

The Architect must finally review the EoT’s and fix the Completion Date (not any earlier than the date already fixed) within 90 days of (the date of) Substantial Completion. The Contractor can still challenge the Architect’s assessment up to 28 days after the issue of the Final Certificate.

Clause 26 empowers the Architect to attempt to agree with the Contractor the recovery of any delay for which the Contractor is otherwise entitled to an EoT. This option underlines the need for early delay notices from the Contractor.

The Contractor makes a proposal to meet a specific request from the Architect, for the Architect’s agreement. If there is no agreement, the Architect may still instruct the Contractor to implement the delay recovery proposals (which the Contractor is bound to do). In which case, the Contractor is to hand over the supporting documents to the Architect for the QS to value the proposal based on cost plus 15%.

If the Contractor does not entirely catch up the lost time, the Architect shall grant an EoT for the balance. The EoT notice rules do not apply.

If the Architect does not instruct the delay recovery measures, the Contractor is paid the cost of the wasted effort – so needs to keep records.

Clause 27 sets out the rules governing “direct loss and/or expense” (as defined in clause 1.6).

There must be a written notice followed by a claim i.e. early warning, followed by the details.

It is essential that the Contractor does not exceed the time limits placed on the notices set out in clause 28, or the claim will be deemed to have been waived. There is no early arbitration for this.

There is a fairly comprehensive list of “qualifying events”. If any occur, or are likely to occur, the Contractor must send a notice to the A “within 28 days of it becoming apparent to the C that an event has occurred”.

This is straightforward enough when time runs from e.g. the date of receipt of a suspension notice, but it is much more difficult proposition when the possible delay is caused by late information. The Architect has the problem of deciding when the Contractor should (reasonably) have noticed it might cause a delay. Fortunately this problem does not apply to a Variation.
The Contractor must send the details within 60 days of the date of the 1st notice. Where this is not possible, because the effect(s) of the event will not occur until after the 60 days have expired, the Contractor must give a notice to that effect. There is also a notice mechanism for on-going delays.

The QS has to “ascertain” (i.e. find out for certain) the amount due to the Contractor within 60 days of having the details sent by the Architect. The QS must make the assessment on the information received and include the amount in the next interim payment certificate.

Clause 29 deals with NSC/NS’s. The clause does not ban “pay when/if paid” except when the Architect decides, with the agreement of the Contractor, which cannot be unreasonably withheld, to pay off a NSC/NS early. The Contractor can of course still withhold money for any legitimate reason.

If the Architect nominates on different terms than those in the Standard Forms, the Contractor is entitled to a Variation.

The NSC may be nominated in one of two ways - either where the NSC follows the Contractor’s programme, or where the NSC has a specific start and completion dates.

The Contractor can object to any sub-contractor on any tender list. If the Architect still nominates, the Contractor is indemnified against any default by the NSC for the reason of the objection.

The Contractor also has a right of objection to a nomination for reasons covering safety, financial and programming issues and is similarly indemnified against such defaults.

In either case, the clause 28 notice rules apply.

The Contractor is not liable for the NSC’s design work, which is covered by a direct warranty to the Employer. The Contractor needs to check what remedies are included before accepting a nomination. Not including appropriate remedies will likely produce a complaint from the Contractor and if the Architect/Employer persists, the Employer will be exposed to the protection given by clause 29.2(7).

The Contractor is to notify the Architect if any NSC fails to complete on time.

The Architect is entitled to pay off a NSC early, provided that the Contractor has an indemnity against latent defects.

If the NSC is terminated for a valid reason, and with the Architect’s agreement, which cannot be unreasonably withheld, the Architect must re-nominate (under the same rules) and the Contractor is entitled to any increase brought by the replacement NSC’s price and an EoT if the replacement cannot meet the Contractor’s programme.

Clauses 30 and 31 deal with persons engaged by the Employer and statutory undertakings. The Contractor is entitled to more money if the BQ does not fully describe the attendances etc. Clause 28 notice rules apply.
Clause 32 sets out the rules covering payment certificates, the calculation of the Retention and how the Contract Sum is adjusted. There are no material changes from the usual.

The QS prepares the final account, which the Contractor is entitled to receive in instalments.

The Contractor is required to send all supporting documents required by the QS, to the QS, no later than 6 months after the date of (the usually back-dated) the Substantial Completion Certificate or 3 months before the end of the period of final measurement (as set out in the Appendix) whichever is the earlier.

There is some potential for trouble with this arrangement, particularly if the Certificate substantially back dates “completion”.

It is most likely that the date plus 6 months will be the earlier of the two. The clause doesn’t say what happens if the QS doesn’t request the necessary information and the C doesn’t send anything voluntarily, other than there is a duty placed on the QS to complete the final account within the period of final measurement, it being a breach of contract not to.

The Final Certificate is to be issued “as soon practical” after the issue of the DRC, but it cannot be issued until 28 days after the final account, signed by the QS, has been issued to the parties. The Contractor needs to check the final account very quickly, or risk losing out.

The parties have a further 28 days to dispute any aspect of the Final Certificate which will include any aspect of the final account. The Final Certificate is conclusive of all matters not expressly excluded, subject only to latent defects, fraud etc.

If matters that are expressly excluded are not subject to “either party taking a further step in the proceedings” within 12 months of the Final Certificate, the matters are deemed concluded.

Clause 33 refers to the security bond, which is performance not “on demand”.

It must be delivered within 28 days of acceptance of the tender, after which the Employer can withhold from interim payments an amount no greater than the value of the bond until it is.

Clause 34 describes what has to be done if an antiquity is found. The Contractor is entitled to additional money for any disturbance caused. Clause 28 notice rules apply.

Clauses 35, 36 and 37 deal with determination by the Employer, by the Contractor and by either party on a “no fault” basis.

Clause 38 deals with fluctuations, if included.

Clause 39 sets out the rules governing notices. The parties (i.e. not the Architect) can agree to receive notices by fax and/or email.

Clause 40 sets out the Employer’s right to recover money from the C. It is a condition precedent to any such action (including the deduction of LD’s) that the Employer gives at least 7 days notice before making any deduction.
Clause 41 deals with dispute resolution. There is a limited list of disputes that can be taken directly to early arbitration.

In any case, the Contractor is bound to keep working “regularly and diligently” and respond to all instructions given.

Otherwise it is a three tier process viz:

1. Uninvolved directors try to reach a settlement.
2. Mediation.
3. Arbitration.

There is a potential problem in getting to arbitration for those disputes not included in the early arbitration list. Mediation must be attempted before moving on to arbitration.

If the appointing bodies (HKIA/HKIS) do not appoint the mediator, the parties cannot move on to arbitration. There is no appeal to the HKIAC (as for arbitration).

If they appoint an unsatisfactory mediator, the chance to settle the dispute by non-confrontational means, whilst work continues, is lost.

Peter Berry
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