



Technical

How To Successfully Claim And Manage Change Under JCT (Article 73)

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Introduction

Change, in its broadest sense, commonly arises during the life of a Construction Project.

This “*Change*” could be a change in scope, quantity or how the work can be carried out which may or may not have a financial impact. However, “*Change*” can also be the Contractor being on site longer than anticipated or the Contractor may become entitled to loss and expense which changes the overall project value.

Every Contract should contain mechanisms that set out the procedures for claiming and managing change. In this article, we will consider change in terms of alteration to scope, quantity, quality, methodology and the like (what is commonly referred to as “*Variation*”) we will also explain how change should be presented and claimed under the JCT Suite of Contracts.

What is Change?

“*Change*” or “*Variations*”, as they are often referred, are modifications to the Contract Works. These changes may be to a Party’s performance under the Contract, for example, the addition, omission or alteration of work or the conditions to which the work is to be carried out. Changes can be instructed by the person administering the Contract or may be deemed Variations for example, compliance with a new Statutory Requirement. The Contractor is required to adhere to Statutory Requirements so has to incorporate changes as necessary, regardless of whether an instruction has been received.

The most commonly used standard forms of Construction Contract all contain express provisions to claim and manage change. These “*Variation*” clauses enable these changes to occur in a manageable straightforward manner. Without such provisions, introducing a change can be complicated and time consuming, as it would require changing the initial agreement itself or entering into an entirely separate Contract.

Change under JCT

As with most Standard Forms of Contract, the JCT Suite of Contracts contain provisions which enable “*Variations*” to be made. Each of the JCT Contracts provides its own specific definition of what a change is and the process of managing and valuing change.

The JCT Design and Build (DB) Contract 2016, for example:

Clause 5.1

“The term “Change” means:

- 1. A change in the Employer’s Requirements which makes necessary the alteration or modification of the design or quality of the Works, otherwise than such as may be reasonably necessary for the purposes of rectification pursuant to Clause 3.13 [Work not in accordance with the Contract], including:*
 - 1. The addition, omission or substitution of any work;*
 - 2. The alteration of the kind or standard of any of the materials or goods to be used in the works;*
 - 3. The removal from site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;*
- 2. The imposition by the Employer of any obligations or restrictions in regard to the following matters or any addition to or alteration or omission of any such obligations or restrictions that are so imposed or are imposed in the Employer’s Requirements in regard to:*
 - 1. Access to the site or use of any specific parts of the site;*
 - 2. Limitations of working space;*
 - 3. Limitations of working hours; or*
 - 4. The execution or completion of the work in any specific order”.*

The JCT Standard Building Contract (SBC) and Intermediate Building Contract (IC) contain similar definitions but use the term *“Variation”* as opposed to *“Change”*.

The JCT Minor Works Building Contract 2016 (MW) contains a simplified mechanism:

Clause 3.6.1

“The Architect/Contract Administrator may without invalidating this Contract issue instructions requiring an addition to, omission from, or other change in the Works or the order or manner in which they are to be carried out (a ‘variation’).”

It is important that the Parties to a Contract are familiar with the specific obligations with regards to Change/Variation and understand what constitutes a Change/Variation under that Agreement.

Managing Change Under JCT

Each of the JCT standard forms of Contract specifies how changes are to be managed and each standard form contains slightly different mechanisms, terminology, and obligations. However, the different JCT forms all generally contain a similar approach.

Below are some of the requirements contained within the JCT Standard Building Contract (SBC) With Quantities 2016, which address the management of change:

- **Clause 2.15** requires the Contractor to notify the Architect/Contract Administrator, with appropriate details, as soon as it becomes aware of any departure, error, omission or inadequacy of the Contract Bills and Contractor's Design Portion-related documents (Employer's Requirements). This is to ensure any discrepancies are dealt with at the earliest opportunity, enabling changes in cost and/or time can be managed accordingly.
- **Clause 3.10** places an obligation on the Contractor to comply with all instructions issued to him by the Architect/Contract Administrator, save for the exclusions identified within Clause 3.10.
- Should a Contractor not comply with an instruction within 7 days, **Clause 3.11** allows the Employer to employ and pay others to execute work of any kind that may be necessary to give effect to that instruction. The Contractor shall be liable for all additional costs incurred by the Employer in connection with such employment, and an appropriate deduction may be made from the Contract Sum. This provides the Employer with further surety that changes will be incorporated into the Project.
- Instructions are often provided that are not in writing, for example verbal instructions. To ensure that these changes are captured, **Clause 3.12** stipulates that the Contractor shall confirm the terms of an instruction in writing to the Architect/Contract Administrator within 7 days. Should the Architect/Contract Administrator then not dissent by notice to the Contractor within 7 days from receipt of the Contractor's confirmation, the instruction shall take effect as from the expiry of the latter 7-day period.

Valuing the Change

Once Entitlement to Change / Variation has been established, valuing the Change needs to be considered. At this point it should be noted that not every Change results in a change to the Contract Sum.

Prior to valuing Change / Variation under JCT Contracts, the following factors need to be considered:

1. The **character** of the work. Is the change similar in character to works undertaken elsewhere?
2. The **conditions** of the work. Dependent on the stage of the works when the change is required, may mean that access is constrained and/or productivity is reduced, potentially bringing about an increase in the cost to undertake the change.
3. The **quantity** of work undertaken. The volume of work required under the Change may have an effect of the cost of the works, due to economies of scale. For example, if a plasterer is instructed to carry out 1m² of plastering in isolation, the cost per m² will likely increase significantly compared to carrying out, say, 100m².
4. It may be prudent to ascertain if the Change will impact on **Preliminaries** and a decision may be required as to how to present such a claim. Unlike NEC the time impact of a

change does not necessarily need to be considered and presented at the time as a claim for Change is presented.

Each of the JCT Contracts contains its own requirements when valuing a change. However, generally the Valuation Rules are:

- Where the Contract contains a Bill of Quantities, a Schedule of Work or a Contract Sum Analysis, the works requiring a change should be measured and quantified using the same rules of measurement as that used to establish the rates in Bills of Quantities, Schedule of Work or Contract Sum Analysis. For example, if a Bill of Quantities contains a m³ rate for excavating trenches, any variation requiring excavation works should be measured on the same basis and not deviated to an alternate measurement for instance a linear metre rate.
- In situations where the change effects a lump sum item, allowances or percentage adjustments are to be applied from the Bills of Quantities.
- Where the Contract contains approximate quantities, if the approximate quantity identified in the Contract is a reasonable forecast of the quantity of work undertaken, then the rate in the Bills of Quantities are to be used in the valuation. Should the approximate quantity in the Contract not be a reasonable forecast of the actual work carried out, the rate in the Bills of Quantities should be used as a basis for the valuation and a fair allowance made for the change in quantity.
- Should a Change not be of similar character to work set out in the Contract priced documents, the Change is to be valued at fair rate and prices.
- In some circumstances, usually due to the nature of the work in question, change may be valued on a “daywork” basis, which is a resource time, plant, and materials utilised basis usually calculated on the basis of pre-agreed rates or pre-agreed percentage uplift to demonstrable costs.

Conclusion

When it comes to claiming and/or managing change under JCT, there is not a “*one size fits all*” approach. Each of the JCT Contracts provide its own definition of what constitutes a change/variation, although they clearly follow a broadly similar approach.

The parties need to ensure they are comfortable with the provisions of its individual Contract when it comes to managing a change, to ensure that the correct Notices are submitted and the correct procedures are followed. Similarly, the valuation rules of any change will also be identified within the Contract, giving parties guidance on how any change is to be valued and these should be followed to avoid disagreements.

Some practical tips for managing change are:

- Ensure that you can link the claimed change to an instruction or a new Statutory Requirement.
- Advise as soon as possible of a change or a potential change.
- Follow the valuation mechanisms correctly.

- Provide sufficient information and make any presentation easy to follow (marked-up drawings, relevant correspondence and instructions, photographs, provide a brief narrative explanation of the change, wherever possible refer sums claimed back to the original contract).
- Include any change into any interim account claim / application for payment.
- Provide evidence of actual cost if possible.
- If valuing change as a daywork, ensure the daywork sheets are signed and the correct rates and percentage uplifts are utilised.