PART 1: VALUING CHANGE UNDER JCT STANDARD BUILDING CONTRACT WITHOUT QUANTITIES 2016

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In the first of this two-part piece, Simon Edney explores the Valuation Rules contained within the JCT Standard Building Contract Without Quantities 2016 and asks: when do prelims become loss and expense?

VALUING CHANGE UNDER THE JCT STANDARD BUILDING CONTRACT WITHOUT QUANTITIES 2016 – PART 1

Many of us would consider loss and expense as being one of the hardest, and usually the last, parts of the project account to be wrapped up and agreed.

One good reason for this is that whilst under the JCT suite of contracts the contractor is generally able to forecast for *"amounts likely to be incurred"*, they are also required to regularly update these forecasts and provide ***actual costs*** in order for the Architect / Contract Administrator / Quantity Surveyor (herein referred to as the ***"Contract Administrator"***) to ascertain the amount of loss and expense "incurred".

Actual cost demonstration (as opposed to using the contract rates and prices) is necessary because loss and expense claims are essentially 'damages' for breaches of contract, the aim of which is to put the injured party back into the position it would have been in had the contract been performed.

This process can take a lot of the parties' time and effort to conclude.

You also need to deal with the age-old question of whether *overheads and profit* are permissible within a loss and expense claim, and what level of evidence is necessary to ascertain the amount of loss and expense incurred.

Compare this to the valuation of a Variation where the Contractor's valuation is discussed with the Contract Administrator and (in theory) agreed soon after; the advantages of pricing a Variation, as opposed to loss and expense, therefore are numerous - but it's not always possible...

Working as a Contractor's QS, and then later as a Commercial Manager, I've had plenty of experience trying (often unsuccessfully) to persuade the Contract Administrator that I should be allowed to include the proverbial kitchen sink within the valuation of a Variation. The CA's responses were often the same: ***"why should I pay for the Site Manager when he's already covered under the prelims?"*** and ***"your prolongation forecasts seem high, let's wait and see what happens…"***.

Later in life, as an advisor to both employers and contractors, I've offered similar arguments in response to variation claims; striking out items from the assessment because they should be included in the *"loss and expense account*", for example, or denying claims for profit and/or overheads on prolongation costs.

We've all heard the arguments for and against, but when a Variation occurs, what should happen?

And with specific reference to the **JCT Standard Building Contract Without Quantities 2016** (the "***the JCT Contract***"), what does the contract actually tell us about what is permissible when assessing Variations?

HOW DOES THE JCT SBC ENVISAGE THE VALUATION OF CHANGE?

BY AGREEMENT

It's an often-overlooked fact but, as confirmed by clause 5.2.1, the parties are free to agree to anything they like – absolutely anything. And quite frankly, they should! The benefits of agreeing a figure early on include cost / value certainty for both contractor and employer, less management time and effort spent reviewing long lists of unagreed variations, and, potentially, improved relationships as a result of not having to repeatedly argue over relatively small sums of money.

The NEC4 has a similar mechanism for agreement in the form of clause 63.2 whereby, if the Project Manager and the Contractor agree, *"rates or lump sums"* may be used to assess change but, as with 5.2.1, I've rarely seen this clause put to good use.

(i) SCHEDULE 2 QUOTATIONS AND CONFIRMED ACCEPTANCE

If an agreement is not possible, then the Contract Administrator has the ability to request a formal *Quotation* in accordance with Schedule 2 (clause 5.3.1).

Schedule 2 says that the Contractor can include, separately, for the following cost items:

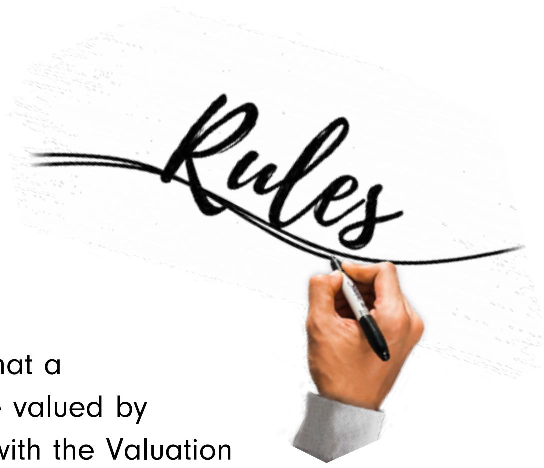
- The effects of complying with the instruction, by reference, where possible, to the rates and prices contained within the Priced Document, including, "where appropriate", allowances for any adjustment of preliminary items (clause 1.2.1),
- Any adjustment, or extensions of time, for completion of the Works (clause 1.2.2),
- Amounts for direct loss and/or expense not included elsewhere (clause 1.2.3) and
- The reasonable costs of preparing the quotation (clause 1.2.4) - more on this to come...

So, Schedule 2 allows the Contractor to consider all the cost elements within its quotation which could be incurred as a result of the Variation, up front. But, despite having this facility, in my experience Schedule 2 is rarely used and, when it is, is not implemented in the way that the Contract envisages. This is a missed opportunity for both parties in my opinion.

If the Schedule 2 Quotation mechanism isn't used, the Contractor refuses to provide a Quotation or the parties fail to agree a price for any Variation, it then falls to the final option: *Valuation* under the *Valuation Rules*.

VALUATION RULES

The Valuation rules are intended to provide guidance to the CA to value Variations during the currency of a project, but they're also adopted when issues become contentious, and a change is being valued in an adjudication or other tribunal.



Clause 5.6 of the JCT Contract states that, to the extent that a Valuation relates to additional work that can properly be valued by measurement, such work *shall* be valued in accordance with the Valuation Rules. These rules are summarised as follows:

- Where work is of a similar character and doesn't significantly change the quantity, the rates and prices for the work set out in the Priced Document should be used (clause 5.6.1.1)
- Where work is of a similar character but is not executed under similar conditions, or the Variation significantly changes the quantities, the rates and prices set out in the Contract Documents shall be the basis for determining the valuation and shall include a **fair allowance** for such difference (clause 5.6.1.1)
    - As an example, if the work is now being carried out during winter months, it may be appropriate to allow for reduced daylight hours or less favourable weather conditions.
- • Where the additional work is not of similar character, the work shall be valued at ***"fair rates and prices"*** (clause 5.6.1.2)
    - The definition of "fair rates and prices" has been the subject of considerable legal debate, with various positions being adopted for different situations. Should profit be included? Should the valuation be based on actual cost? The answer will be determined according to the facts and the circumstances of each individual case.
- Where the additional work cannot be valued in accordance with clause 5.6 of 5.8, as applicable, the Valuation shall comprise dayworks (clause 5.7)
    - You can find a fantastic article on verified and unverified timesheets within DGA's online 'Reading Room' resource centre at **Only a matter of Time[sheets]**
- Where a Variation affects the conditions under which ***other work*** is executed, then the other work shall be treated as a Variation and valued in accordance with the Valuation Rules (clause 5.9)

And finally,

- • If the Valuation applies to work that:
    - Isn't addition or omission and
    - Isn't substituted work and
    - Can't be valued under any of the Valuation rules above,

then a ***fair*** valuation shall be made (clause 5.10)

- The types of costs that might be included here could be hyper-inflation or goods and services affected by a war in Europe, perhaps? The lines between these types of issues and what may be deemed a force majeure are unclear. Regardless, this rule is essentially a ***catch-all*** for anything else that might not be captured within the other rules.

OVERHEADS AND PROFIT

The subject of overheads and profit (**"oh&p"**) could easily justify an article all of its own, and it's fair to say that the individual context and facts behind each and every Variation will dictate how and when oh&p can, and should, be applied.

Suffice to say that the concept of a "fair" valuation would, according to the RICS , also indicate the inclusion of an allowance for oh&p in line with that included within the Priced Document.

Interestingly, NRM2 also confirms that overheads and profit should be applied to not only the usual preliminaries, measured work and work resulting from the expenditure of provisional sums, but also to risk allowances. This should assist the next time you're having a debate about whether to include risk 'below the line'.

VALUATION OF PRELIMINARIES

In terms of the inclusion of Preliminaries, clause 5.6.3 of the JCT Contract confirms that the valuation of Measurable Work shall allow for *"any addition to or reduction of preliminary items of the type referred to in the Measurement Rules"*.

The Measurement Rules are confirmed under clause 1.1 as the RICS' New Rules of Measurement – Detailed Measurement for Building Works (the "***NRM2***").

Within its usefully appended pricing schedules, NRM2 provides a detailed list of preliminaries which the contractor may price. These items include management and staff, site accommodation, services and facilities, mechanical plant, and temporary works items. Arguably, therefore, the preliminaries element of the valuation might also include the existing site team's cost of pricing and coordinating the Variation.

So, it seems pretty clear: any Variation under the JCT Contract can be valued in accordance with rates and measures, or on a fair and reasonable basis, and can include preliminaries and oh&p.

This begs the question of where loss and expense comes into play?

WHY USE LOSS AND EXPENSE?

In answer to the question; ***"When does Loss & Expense apply?",*** the RICS says :

> ***"There are many tools on the quantity surveyor's work bench for valuing all sorts of changes to work... If these tools are used properly, and to their full extent, there are likely to be limited occasions where the contractor needs to seek ascertainment of Loss & Expense."***

This is where things start to become murky. It could clearly be argued that, if the contractor and quantity surveyor used the JCT's tools correctly, and priced preliminaries in with the Variation, then there would be no need for a loss and expense account at all.

Or would there?

What about losses arising from other Relevant Matters?

What about delays to the regular progress of the works?

What about staff thickening?

The answers to these questions are far from clear but I will attempt to answer them in the next edition of EBrief, due to be released in December 2023.

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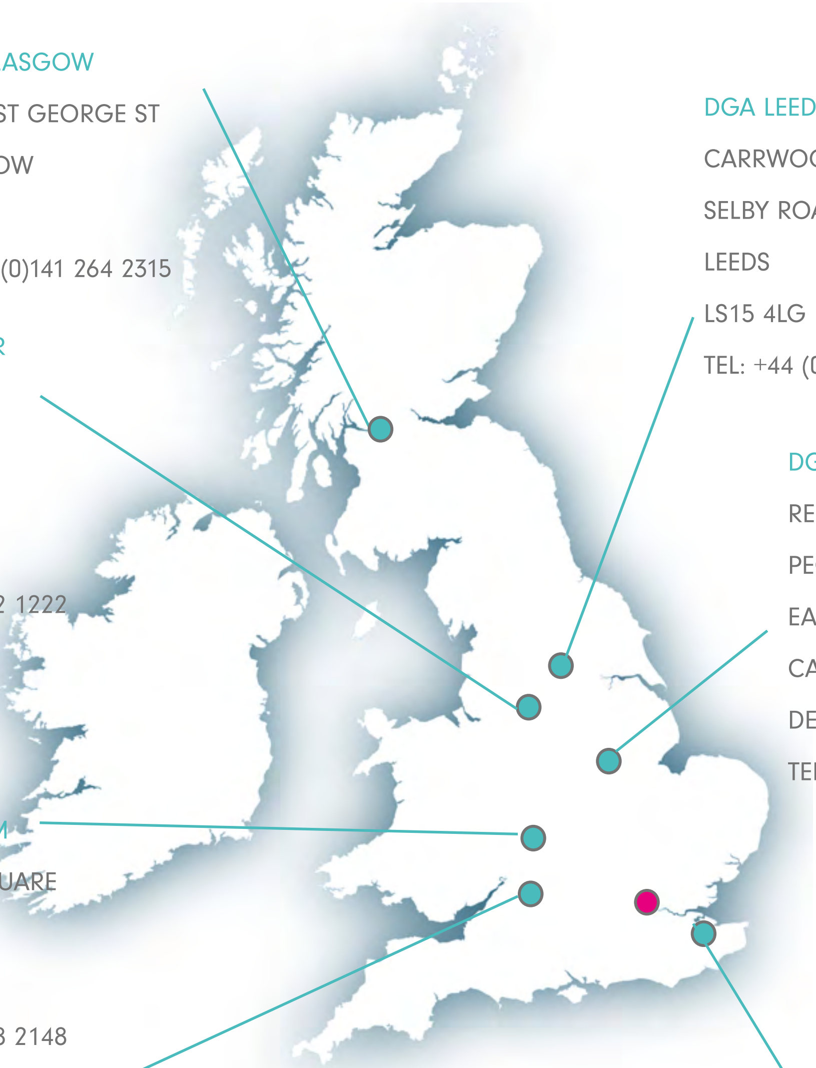

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