

Amendments to IChemE Form of Contract for Subcontracts for Civil Engineering Works (The Brown Book) Second Edition 2004, including all reprints.

The following amendments to the General Conditions of Contract are necessary to accommodate the changes to the Housing Grants, Construction and Regeneration Act 1996 as set out in Part 8 of the Local Democracy, Economic Development and Construction Act 2009. Those changes are due to come into effect on 1st October 2011 and will apply to all construction contracts made after that date.

Those who are planning to enter into a subcontract on or after 1st October 2011 based on the IChemE Brown Book 2nd Edition should ensure that the following amendments are incorporated in the subcontract.

1. Definition of terms

Add the following:

'Final Date for Payment' has the meaning set out in Sub-clause 36.5.

7. Statutory and other obligations

7.4 *In Sub-clause 7.4, line 6, delete "36.10" and insert "36.14".*

36. Payment

Replace the whole of Clause 36 with the following:

- 36.1** The **Contractor** shall pay the **Subcontractor** for the **Subcontract Works** and the total of the sums payable shall constitute the **Subcontract Price**. The sums payable shall be calculated in accordance with the provisions of Schedule 13 (Cost elements, rates and charges), and be paid in accordance with the provisions of this Clause 36 and Schedule 14 (Terms of payment).
- 36.2** If any instalment is to be paid upon the completion of a specified task or milestone, the **Subcontractor** shall only be entitled to apply for payment for that instalment when he can provide evidence of completion of the task or milestone as stated in Schedule 14.
- 36.3** The **Subcontractor** shall submit a request for payment to the **Contract Manager** at intervals of not less than one calendar month showing:
- (a) the **Subcontractor's** assessment of the amount to be paid for the **Subcontract Works** carried out up to the end of the period for which it is

submitted, together with any other scheduled payment as may have become payable;

plus

- (b) the amounts to which the **Subcontractor** considers himself entitled in connection with all other matters for which provision is made under the **Subcontract**;

less

- (c) the total of all sums previously certified by the **Contract Manager** for payment.

The **Subcontractor's** request for payment shall be supported by all relevant documentary evidence appropriately itemised.

The **Subcontractor's** final request for payment shall state that it is his final request for payment.

36.4 Within fourteen days of the receipt of an interim request for payment, or in the case of the final request for payment within fifty-six days of its receipt, the **Contract Manager** shall issue a certificate to the **Subcontractor** and the **Contractor** for the instalment to which the request for payment relates. The certificate shall show the sum which the **Contract Manager** considers to be due at the payment due date determined in accordance with Sub-clause 36.5, and the basis on which it has been calculated. The total certified shall comprise all sums listed in the **Subcontractor's** request for payment which, in the opinion of the **Contract Manager**, are properly payable under the **Subcontract** and shall show separately any elements within the sums certified in respect of nominated **Sub-subcontractors**. The **Contract Manager** may in any certificate delete, correct or modify any sum previously certified by him as he shall consider proper.

36.5 Any sum certified and notified as due in accordance with Sub-clause 36.4 shall be due for payment fourteen days (or fifty-six days in the case of the final request for payment) after the date of receipt by the **Contract Manager** of the **Subcontractor's** request for payment in accordance with Sub-clause 36.3. The **Contractor** shall pay the amount so notified by a date (the **Final Date for Payment**) which shall be twenty-eight days (or seventy days in the case of the final request for payment) after the date of receipt by the **Contract Manager** of the **Subcontractor's** request for payment in accordance with Sub-clause 36.3.

36.6 If for any reason the **Contractor**, or the **Contract Manager** on his behalf, fails to notify the sum due in accordance with Sub-clause 36.4 by the payment due date determined in accordance with Sub-clause 36.5 the sum notified by the **Subcontractor** in his request for payment in accordance with Sub-clause 36.3 shall be due for payment by the **Final Date for Payment**.

36.7 If the **Contractor** intends to pay less than the sum due in accordance with Sub-clause 36.4 or 36.6 for any reason including but not limited to sums that may be due from the **Subcontractor** to the **Contractor** under the **Subcontract**, the **Contractor** shall give notice to the **Subcontractor** not later than one day before the **Final Date for Payment**, specifying the amount he considers to be due on the date the notice is given and the basis on which that sum is calculated.

36.8 If the **Contractor** does not make payment in full by the **Final Date for Payment** of the amount of an instalment:

- (a) certified and notified in accordance with Sub-clause 36.5; or
- (b) where applicable in accordance with a notice issued under Sub-clause 36.7; or
- (c) where applicable in accordance with Sub-clause 36.6;

or if either party does not make any payment due under any other provision of the **Subcontract** by the **Final Date for Payment** the amount not paid shall bear interest compounded daily from the **Final Date for Payment** until the amount not paid is received by the other party at an annual rate which is two per cent above the **Agreed Rate** for the first month of delay. The annual rate of interest shall be

increased by a further two per cent at the end of each further month of delay, up to the end of the third month. If the delay exceeds three months the annual rate of interest shall thereafter be ten per cent above the **Agreed Rate**.

36.9 If the **Contractor** does not make payment in full by the **Final Date for Payment** of the amount of an instalment:

- (a) certified and notified in accordance with Sub-clause 36.5; or
- (b) where applicable in accordance with a notice issued under Sub-clause 36.7; or
- (c) where applicable in accordance with Sub-clause 36.6;

the **Subcontractor** may give the **Contractor** notice of his intention to suspend performance of any or all of his obligations under the **Subcontract**. If such failure shall continue for seven days after the giving of such notice, then at any time thereafter and provided such failure is still continuing, the **Subcontractor** may suspend further performance of any or all as applicable of his obligations under the **Subcontract** until payment is made.

The **Contract Manager** shall determine by means of a **Variation Order** an extension to the **Approved Programme** and appropriate dates in Schedule 11 (Times of completion) for the full period of suspension plus any reasonable additional time incurred by the **Subcontractor** in resuming his obligations and those of his **Sub-subcontractors**. If the **Subcontractor** incurs additional **Cost** as a result of such suspension and subsequent resumption he shall be entitled to an increase in the **Subcontract Price** determined in accordance with Clause 18 (Subcontractor's claims).

36.10 If the suspension of performance of any, but not all, of the **Subcontractor's** obligations in accordance with Sub-clause 36.9 continues for a period of sixty days the **Subcontractor** at any time thereafter may with immediate effect notify the **Contractor** that such obligation is excluded from the **Subcontract**. Thereafter the **Contract Manager** shall by means of a **Variation Order** confirm the exclusion together with the applicable change in the **Subcontract Price**.

If the suspension of performance of all of the **Subcontractor's** obligations in accordance with Sub-clause 36.9 continues for a period of sixty days the **Subcontractor** at any time thereafter may with immediate effect terminate his employment under the **Subcontract** by notice to the **Contractor** copied to the **Contract Manager** and thereupon the rights and obligations of the parties shall be as stated in Clause 39 (Termination by the Contractor for convenience).

36.11 If the amount of a payment which is:

- (a) notified in accordance with Sub-clause 36.4 (and no notice is given by the **Contractor** under Sub-clause 36.7 in respect of such payment); or
- (b) stated in a notice given by the **Contractor** under Sub-clause 36.7

is referred to an adjudicator appointed in accordance with Clause 43 (Adjudication) and if the decision of the adjudicator as to the amount which is to be paid by the **Contractor** is that more shall be paid than the amount stated as in (a) or (b) as applicable, the additional amount shall be paid not later than:

- (i) seven days from the date of the adjudicator's decision; or
- (ii) the **Final Date for Payment**

whichever is the later.

36.12 The **Contractor** and the **Contract Manager** shall have the right at any time until three hundred and sixty-five days after the date of the last **Final Certificate** to carry out audits of the contemporary records referred to in Sub-clause 18.1 and to have such audits carried out by an auditing firm appointed by the **Contractor**. Such audit shall not extend to the make-up of any fixed or unit rate or price.

36.13 If as a result of any audit in accordance with Sub-clause 36.12 or otherwise an error is discovered in the amount paid to the **Subcontractor** then such error shall be corrected in the next payment due under the **Subcontract**.

If such error is discovered following the making of the last payment to be certified by the **Contract Manager**, the finding of the error shall be notified by one party to the other party as soon as possible. The amount to be paid to or from the **Subcontractor** shall, if notification is not challenged within twenty-eight days, become due for payment twenty-eight days after the date of such notification with the **Final Date for Payment** being forty-two days after the date of notification. If such notification is challenged the parties shall attempt to agree any amount to be paid. If not agreed within fifty-six days of the notification the **Contract Manager** shall determine the amount to be paid. The agreed amount shall be due fourteen days after the date of agreement or determination, with the **Final Date for Payment** twenty-eight days after the date of agreement or determination.

- 36.14** The **Subcontract Price** excludes Value Added Tax and to the extent that the tax is properly chargeable, the **Contractor** shall pay such tax as an addition to payments otherwise due to the **Subcontractor**.

43 Adjudication

Re-number Sub-clause 43.8 as 43.10, and insert the following:

- 43.8** The Adjudicator may correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 43.9** The Adjudicator may include in his decision a direction as to the allocation of his fees and expenses as between the parties.

Guide Notes

1. Sub-clause 2.7 of the General Conditions of Contract shall apply to these Guide Notes.
2. Contractors and Contract Managers should be aware of the need to issue a certificate (under Sub-clause 36.4) or a 'pay less' notice (under Sub-clause 36.7) even if the net sum to be paid to the Contractor is zero. Otherwise any sum sought by the Contractor will be payable (see Sub-clause 36.6 – a requirement of the legislation).
3. Users should note the requirement in Sub-clause 36.5 of the 2nd Edition (2004) that the Subcontractor submits an invoice following certification by the Contract Manager has been deleted above. This is to ensure, as required by the legislation, that the payment due date is not dependent on any action of the Contractor or Contract Manager.