

Amendments to IChemE Form of Contract for Target Cost Contracts (The Burgundy Book) First Edition 2003, 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 contract on or after 1st October 2011 based on the IChemE Burgundy Book 1st Edition should ensure that the following amendments are incorporated in the contract.

1. Definition of terms

Add the following:

'Final Date for Payment' has the meaning set out in Sub-clause 39.5.

7. Statutory and other obligations

7.4 *In Sub-clause 7.4, line 6, delete "39.10" and insert "39.15".*

39. Payment

Replace the whole of Clause 39 with the following:

39.1 Unless the **Contract** otherwise provides, payment of the **Contract Price** shall be made by monthly instalments.

39.2 If any instalment is to be paid upon the completion of a specified task or milestone, the **Contractor** 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 19 (The Target Cost and payment).

39.3 Immediately following the making of the **Contract** the **Contractor** may submit a request for payment to the **Project Manager** showing his estimate of the expenditure that he has incurred and will incur and the sums that are and will be due to him in respect of the first month of the **Contract**.

By the end of the first month the **Contractor** shall submit a request for payment to the **Project Manager** showing his estimate of the expenditure that he has incurred and will incur and the sums that are and will be due to him in respect of the month in which the request is made plus the **Contractor's** estimate of the expenditure that he will incur and the sums that will be due to him in the second month, less the total of all sums previously certified by the **Project Manager** for payment.

Thereafter by the end of each subsequent month the **Contractor** shall submit a request for payment to the **Project Manager** showing:

- (a) the **Contractor's** total actual expenditure properly incurred and sums due to him to the end of the month before the month in which the request is made;

plus

- (b) the **Contractor's** estimate of the expenditure that he has incurred and will incur and the sums that are and will be due to him in respect of the month in which the request is made:

plus

- (c) the **Contractor's** estimate of the expenditure that he will incur and the sums that will be due to him in the month following the month in which the request is made;

less

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

The **Contractor's** request for payment, which shall be in accordance with Schedule 18 (Cost elements, rates and charges), shall be supported by all relevant documentary evidence appropriately itemised, including a statement showing the manner in which the total requested has been calculated.

The **Contractor's** final request for payment shall be submitted immediately after the issue of the last **Final Certificate** and shall state that it is his final request for payment.

- 39.4** 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 **Project Manager** shall issue a certificate to the **Contractor** and the **Purchaser** for the instalment to which the request for payment relates. The certificate shall show the sum which the **Project Manager** considers to be due at the payment due date determined in accordance with Sub-clause 39.5, and the basis on which it has been calculated. The total certified shall comprise all sums listed in the **Contractor's** request for payment which, in the opinion of the **Project Manager**, are properly payable under the **Contract** and shall show separately any elements within the sums certified in respect of nominated **Subcontractors**. The **Project Manager** may in any certificate delete, correct or modify any sum previously certified by him as he shall consider proper.
- 39.5** Any sum certified and notified as due in accordance with Sub-clause 39.4 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 **Project Manager** of the **Contractor's** request for payment in accordance with Sub-clause 39.3. The **Purchaser** 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 **Project Manager** of the **Contractor's** request for payment in accordance with Sub-clause 39.3.
- 39.6** If for any reason the **Purchaser**, or the **Project Manager** on his behalf, fails to notify the sum due in accordance with Sub-clause 39.4 by the payment due date determined in accordance with Sub-clause 39.5 the sum notified by the **Contractor** in his request for payment in accordance with Sub-clause 39.3 shall be due for payment by the **Final Date for Payment**.
- 39.7** If the **Purchaser** intends to pay less than the sum due in accordance with Sub-clause 39.4 or 39.6 for any reason including but not limited to sums that may be due from the **Contractor** to the **Purchaser** under the **Contract**, the **Purchaser** shall give notice to the **Contractor** 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.
- 39.8** If the **Purchaser** 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 39.5; or
 - (b) where applicable in accordance with a notice issued under Sub-clause 39.7; or
 - (c) where applicable in accordance with Sub-clause 39.6;

or if either party does not make any payment due under any other provision of the **Contract** 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**.

39.9 If the **Purchaser** 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 39.5; or
- (b) where applicable in accordance with a notice issued under Sub-clause 39.7; or
- (c) where applicable in accordance with Sub-clause 39.6;

the **Contractor** may give the **Purchaser** notice of his intention to suspend performance of any or all of his obligations under the **Contract**. 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 **Contractor** may suspend further performance of any or all as applicable of his obligations under the **Contract** until payment is made.

The **Project 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 **Contractor** in resuming his obligations and those of his **Subcontractors**. The additional **Cost** incurred by the **Contractor** as a result of such suspension and subsequent resumption shall form part of the **Actual Cost** and the **Target Cost** shall be adjusted in accordance with the provisions of Schedules 18 and 19.

39.10 If the suspension of performance of any, but not all, of the **Contractor's** obligations in accordance with Sub-clause 39.9 continues for a period of sixty days the **Contractor** at any time thereafter may with immediate effect notify the **Purchaser** that such obligation is excluded from the **Contract**. Thereafter the **Project Manager** shall by means of a **Variation Order** confirm the exclusion and the **Target Cost** shall be adjusted in accordance with the provisions of Schedules 18 and 19.

If the suspension of performance of all of the **Contractor's** obligations in accordance with Sub-clause 39.9 continues for a period of sixty days the **Contractor** at any time thereafter may with immediate effect terminate his employment under the **Contract** by notice to the **Purchaser** copied to the **Project Manager** and thereupon the rights and obligations of the parties shall be as stated in Clause 42 (Termination by the Purchaser for convenience).

39.11 Where the **Actual Cost** is less than the **Target Cost** and an additional amount is payable to the **Contractor** in accordance with the **Contract**, such additional amount shall be included in the final request for payment referred to in Sub-clause 39.3.

39.12 Notwithstanding any other provision of this Clause 39, where in the **Project Manager's** opinion the total **Actual Cost** is expected to be greater than the final value of the **Target Cost**, the amount certified for any interim payment under this Clause 39 shall be an amount that in the **Project Manager's** opinion is such that the final payment certificate under the **Contract** will show any remaining amount due for payment as payable to the **Contractor** and not from the **Contractor**.

If despite the provisions of this Sub-clause 39.12 the amount paid to the **Contractor** is more than that due to him in total under the **Contract**, the **Project Manager** shall issue a certificate to the **Contractor** and the **Purchaser** for such overpayment. The amount certified shall be due on the date of such certificate and shall be repaid by the **Contractor** to the **Purchaser**. The final date for payment shall be twenty-one days after the date of issue of such certificate.

39.13 If the amount of a payment which is:

- (a) notified in accordance with Sub-clause 39.4 (and no notice is given by the **Purchaser** under Sub-clause 39.7 in respect of such payment); or
- (b) stated in a notice given by the **Purchaser** under Sub-clause 39.7

is referred to an adjudicator appointed in accordance with Clause 46 (Adjudication) and if the decision of the adjudicator as to the amount which is to be paid by the **Purchaser** 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.

- 39.14** If as a result of any audit in accordance with Clause 19 (Records and audits) or otherwise an error is discovered in the amount paid to the **Contractor** then such error shall be corrected in the next payment due under the **Contract**.

If such error is discovered following the making of the last payment to be certified by the **Project 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 **Contractor** 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 **Project 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.

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

46 Adjudication

Re-number Sub-clause 46.9 as 46.11, and insert the following:

- 46.9** The Adjudicator may correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 46.10** 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 1.8 of the General Conditions of Contract shall apply to these Guide Notes.
2. Purchasers and Project Managers should be aware of the need to issue a certificate (under Sub-clause 39.4) or a 'pay less' notice (under Sub-clause 39.7) 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 39.6 – a requirement of the legislation).