

CLC TASKFORCE: COVID-19 CONTRACTUAL GUIDANCE



TEMPLATE G – DEED OF VARIATION UNDER JCT 2016 D&B

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Version 1.0

SUMMARY

- To be read in conjunction with [CLC COVID-19 Contractual Guidance – Best Practice](#).
- If the parties to an existing contract wish to change it to accommodate the impact of COVID-19 and their agreed/negotiated approach, a Deed of Variation should be used to record those agreed/negotiated changes to the existing contract and ensure they are legally binding on all parties.
- This template contains a precedent Deed of Variation designed to work with the JCT 2016 Design and Build (D&B) Contract. It contains a number of options which could be considered if negotiating changes to existing contracts.
- The template can be adapted for use with other forms of consultancy, sub-contract, or framework/term agreements.
- CLC advocates collaboration in the context of fair and responsible contractual behaviour and therefore encourages the parties to share risks arising from pandemics to safeguard project delivery and industry sustainability as opposed to applying commercial pressures to transfer risk.

1. EXPLANATORY NOTES

- 1.1. This is a template Deed of Variation to allow the parties to a JCT 2016 Design and Build Contract (JCT 2016 D&B) to record their collaborative agreement as a change to the ongoing contract.
- 1.2. The template provides for a number of options to be used and should be adapted to suit the agreed way forward as negotiated and agreed by the parties. The options are:
 - (i) Certification of payment for undelivered work due to COVID-19;
 - (ii) Revised Stage Payments if Alternative A (Stage Payments) applies;
 - (iii) More regular payments applicable to both Alternative A (Stage Payments) and Alternative B (Periodic Payments);
 - (iv) Advance Payment;
 - (v) Suspension of work during an agreed COVID-19 Suspension Period;
 - (vi) Extension of time by including COVID-19 event as a Relevant Event;
 - (vii) Extension of time and payment of contractor's loss and expense due to a COVID-19 Event;
 - (viii) Extension of time and payment of predetermined percentage of contractors' loss and expense due to a COVID-19 Event;

- (ix) Termination provision where the works are suspended for the relevant continuous period as set out in the Contract particulars due to a COVID-19 Event.
- 1.3. This is general guidance and the letter is a general template. Nothing in this document constitutes legal advice. A party's contractual rights will depend on the wording of its particular contract and the factual circumstances on its project. If in doubt, advice should be sought.
- 1.4. If you have any comments or feedback please email:
construction.enquiries@beis.gov.uk

DEED OF VARIATION OF JCT 2016 DESIGN AND BUILD CONTRACT

DATED [* 2021]**

**DEED OF VARIATION OF JCT DESIGN AND BUILD CONTRACT 2016
FOR [*** INSERT PROJECT DETAILS]**

between

(1) [* EMPLOYER]**

and

(2) [* CONTRACTOR]**

This deed is dated [*** INSERT DATE]

Parties

- (1) [*** **EMPLOYER**] of [*** ADDRESS] (the "**Employer**"); and
- (2) [*** **CONTACTOR**] (company number [***]) whose registered office is at [*** ADDRESS] (the "**Contractor**").

BACKGROUND

- (A) The Employer and the Contractor are party to a JCT Design and Build Contract agreement (2016 edition, as amended) dated [*** INSERT DATE OF AGREEMENT] for [*** INSERT DESCRIPTION OF PROJECT] at [*** INSERT LOCATION OF SITE] (the "**Site**") (the "**Contract**").
- (B) The Parties intend to collaborate by [*** INSERT DETAILS OF THE RELIEF SOUGHT DUE TO COVID-19 – PLEASE SEE THE RELIEF OPTIONS BELOW]
- (C) Consequently, the Parties have agreed to enter into this Deed to vary the Contract to give relief to the Contractor due to the adverse impacts of COVID-19. The relief is provided during the COVID-19 Relief Period and with effect from the COVID-19 Relief Commencement Date.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. TERMS DEFINED IN THE CONTRACT

- 1.1 In this deed, expressions defined in the Contract (as amended pursuant to this Deed) shall have the meanings set out in the Contract (unless otherwise defined in this Deed). The rules of interpretation set out in the Contract apply to this Deed.
- 1.2 In this Deed any reference to a "clause" or "appendix" is, unless the context otherwise requires, a reference to a clause or appendix of this Deed.

2. VARIATION

- 2.1 With effect from the COVID-19 Relief Commencement Date, the Parties acknowledge and agree that the Contract shall be amended and restated so that it shall be read and construed as set out in the following clauses [2.2 – 2.14 (*** AMEND THESE CLAUSE NUMBERS IN LINE WITH THE RELEVANT OPTIONS SELECTED)]:
- 2.2 Insert the following new definitions at clause 1.1 of the Contract in alphabetical order:
 - (a) 'Average Amount' means:
 - i) the average of the total of the previous three Payment Notices and/or if applicable, Pay Less Notices issued by the Employer or where fewer than three Payment Notices and/or Pay Less Notices have been issued, all Payment Notices and/or Pay Less Notices issued to date; less
 - ii) the Contractor's profit included within such Payment Notices and/or Pay

Less Notices provided that:

- (1) if the Employer considers one or more Payment Notice and/or Pay Less Notice used to calculate (i) above has or have been disproportionately high, such Payment Notice(s) and/or Pay Less Notice(s) shall be disregarded in the calculation; and
 - (2) if no Payment Notices and/or Pay Less Notices have been issued to date, the amount reasonably forecast by the Contractor (less the Contractor's profit) shall be used.
- (b) 'COVID-19': means the coronavirus disease 2019 including mutations thereof (an infectious disease caused by severe acute respiratory syndrome) and any other outbreak of an infectious human disease.
- (c) 'COVID-19 Event' means:
- i) the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease,
 - ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to COVID-19 from time to time, and/or
 - iii) any consequences of COVID-19 which are outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works, the Contractor being unable to reasonably adequately resource the Works.
- (d) 'COVID-19 Relief' means and includes any relief contained in this Contract being referred to as a COVID-19 Relief.
- (e) 'COVID-19 Relief Payment' means:
- i) a sum that the Parties agree is required in order to allow the continuity of the Works and the retention of the Contractor's Persons during and after the COVID-19 Relief Period provided that such sum shall:
 - ii) not include an element of profit margin for the Contractor and the Contractor's Persons;
 - iii) be accompanied by a transparent and open-book break-down of the sum and its application (including but not limited to its application to Contractor's Persons) together with any other relevant supporting information;
 - iv) be consistent with the Average Amount and the progress of the Works;
 - v) shall not be subject to Retention; and
 - vi) be considered a COVID-19 Relief.
- (f) 'COVID-19 Related Hardship' means and refers to circumstances where the Contractor's ability to meet its contractual obligations pursuant to this Contract has been adversely affected as a result of COVID-19.

- (g) 'COVID-19 Relief Commencement Date': means [*** INSERT DATE].
- (h) 'COVID-19 Relief Period': means the period from the COVID Relief Commencement Date to [*** INSERT DATE INDICATING END OF PERIOD], or such other date as may be agreed between the Parties in writing.
- (i) 'COVID-19 Suspension Date': means [*** INSERT DATE WHEN SUSPENSION STARTS].
- (j) 'COVID-19 Suspension Period': means the period from COVID-19 Suspension Date to [*** INSERT DATE], or such other date as may be agreed between the Parties in writing.
- (k) 'COVID-19 Suspension Time Extension' has the meaning set out at clause 2.7(b)(1).
- (l) 'Open Book Interim Data': means the complete and accurate financial and non-financial information which is required by the Employer to enable the Employer to understand all COVID-19 related relief, grants, interventions or other measures received by the Contractor and/or the Contractor's Persons from the Government and to verify the payments made by the Employer to the Contractor and from the Contractor to the Contractor's Persons during the COVID-19 Relief Period (including any COVID-19 Relief) and including:
 - i) the Contractor's actual cost breakdown based on the items listed on the Contract Sum Analysis, including the Contractor's overheads;
 - ii) all interest, expenses and other third party financing costs incurred in relation to the carrying out of the Works; and
 - iii) full details of the payment of the Contractor's Persons and any other third parties in relation to the carrying out of the Works.
- (m) 'Reconciled Value': means the whole or any part of any payments made to the Contractor as a COVID-19 Relief the value of which is determined by the Employer and notified to the Contractor.

2.3 ***** OPTIONAL CLAUSE: CERTIFICATION OF PAYMENT FOR UNDELIVERED WORK DUE TO COVID-19**

- (a) At the end of 4.13.3.2 delete the full stop and insert a new paragraph as follows:
 - i) "provided that during the COVID-19 Relief Period, if the Contractor is suffering a COVID-19 Related Hardship the Contractor shall be entitled to include within the Gross Valuation a COVID-19 Relief Payment, which shall be treated as an addition to the Contract Sum".

2.4 ***** OPTIONAL CLAUSE: REVISED STAGE PAYMENTS IF ALTERNATIVE A (STAGE PAYMENTS) APPLIES**

- (a) In the entry "4.7.1 Method of payment – alternatives, Alternative A: Stage Payments" of the Contract Particulars on page 11 in the JCT Design and Build

Contract 2016 booklet.

i) [after "The stages are set out in the following document" delete the current entries and replace with "[*** insert name of new document which sets out revised stage payments as] as annexed in Annex A (revised Stage Payments)"]

[or]

ii) [after "The stages are as follows" delete the current entries and replace with the following:

Stages	Cumulative Value	COVID-19 Relief
[*** INSERT]	[*** INSERT]	[*** INSERT]

2.5 * OPTIONAL CLAUSE: MORE REGULAR PAYMENTS APPLICABLE TO BOTH ALTERNATIVE A (STAGE PAYMENTS) AND ALTERNATIVE B (PERIODIC PAYMENTS)**

(a) In the entry "4.7.2 Interim Payments – Interim Valuation Dates" of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet insert after "in that month" the words "or during the COVID-19 Relief Period, as a COVID-19 Relief [*** insert agreed timeframe e.g. weekly/fortnightly".

2.6 * OPTIONAL CLAUSE: ADVANCE PAYMENT**

(a) In the entry "4.6 Advance payment" of the Contract Particulars on page 10 in the JCT Design and Build Contract 2016 booklet:

- i) delete "does not apply";
- ii) insert after "If applicable: the advance payment will be" the words "£ [*** INSERT SUM] / "% [*** INSERT PERCENTAGE OF THE CONTRACT SUM]" provided as COVID-19 Relief;
- iii) insert after "and will be paid to the Contractor on" the words "[*** INSERT DATE]"; and
- iv) insert after "it will be reimbursed to the Employer in the following amount(s) and at the following time(s)" the words "[*** INSERT THE AMOUNT(S) AND THE DATE(S) FOR REIMBURSEMENT OF ADVANCE PAYMENT TO THE EMPLOYER]".

(b) In the entry "4.6 Advance Payment Bond" of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet delete "[*** "is"] / [*** "is not required"]".

2.7 ***** OPTIONAL CLAUSE: SUSPENSION OF WORK DURING AN AGREED COVID-19 SUSPENSION PERIOD**

- (a) The Contractor's obligations to carry out and perform the Works under clauses 2.1 and 2.2 of the Conditions shall be disapplied for the COVID Suspension Period.
- (b) For the purposes of clauses 2.24 and 2.25 of the Conditions, it is agreed that:
 - i) the Contractor shall be treated as having made an application for an extension of time for completion of the Works equal to the COVID-19 Suspension Period (the "COVID-19 Suspension Time Extension"); and
 - ii) the COVID-19 Suspension Time Extension shall be treated as if the cause of the delay to the Works during the COVID-19 Suspension Period was a Relevant Event (whether or not it would normally amount to such an event) and the Employer shall be deemed to have given an extension of time for completion of the Works equal to the COVID-19 Suspension Period,

provided always that the following terms of the Contract shall be disapplied during the COVID-19 Suspension Period:

- iii) Clause 2.25.1.6.1 of the Conditions (requiring the Contractor to use his best endeavours to prevent delay in the progress of the Sub-Contract Works or of such works in any Section, however caused, and to prevent their completion being delayed); and
 - iv) Clause 2.25.1.6.2 of the Conditions (requiring the Sub-Contractor to do all that may reasonably be required to the satisfaction of the Contractor to proceed with the Sub-Contract Works in the event of any delay); and
- (c) The Employer shall not issue any instructions to the Contractor in connection with the Works during the COVID-19 Suspension Period;
- (d) The valuation and payment provisions in the Contract will be varied during the COVID-19 Suspension Period such that:
 - i) In the entry "4.7.2 Interim Payments – Interim Valuation Dates" of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet the next Interim Valuation Date for the purposes of the Contract shall be the COVID-19 Suspension Date;
 - ii) there shall be no further Interim Valuations during the COVID-19 Suspension Period;
- (e) Clause 8.4 of the Conditions (Termination by Employer for Default by Contractor) shall be disapplied during the COVID-19 Suspension Period;
- (f) Clause 8.9 of the Conditions (Termination by Contractor for Default by Employer) shall be disapplied during the COVID-19 Suspension Period;
- (g) The Contractor shall not be responsible for protection or security of the Works during the COVID-19 Suspension Period.

- (h) Neither party shall have a claim against the other for any loss and/or expense relating to or connected with or arising from this Deed, including, without limitation, as the result of, or arising from, or connected with:
 - i) any delay in the carrying out or completion of the Works during the COVID-19 Suspension Period, or
 - ii) the COVID-19 Suspension Time Extension made pursuant to this Deed; or
 - iii) any claim for loss and/or expense due to prolongation of the Works during the COVID-19 Suspension Period under clause 4.19 of the Conditions or otherwise.
- (i) Not later than once every 2 weeks during the COVID-19 Suspension Period, the parties agree to review, in good faith, whether the COVID-19 Suspension Period should be adjusted and, if so, what steps, if any, should be taken to mobilise labour and materials so as to enable the Works to proceed in a proper and workmanlike manner after the expiry of the COVID-19 Suspension Period. The parties shall record any adjustment to the COVID-19 Suspension Period in writing.

2.8 ***** OPTIONAL CLAUSE: EXTENSION OF TIME BY INCLUDING A COVID-19 EVENT AS A RELEVANT EVENT**

- a) Add a new clause 2.26.15: "a COVID-19 Event".

2.9 ***** OPTIONAL CLAUSE: EXTENSION OF TIME AND PAYMENT OF CONTRACTOR'S LOSS AND EXPENSE DUE TO A COVID-19 EVENT**

- a) Add a new clause 2.26.15: "a COVID-19 Event".
- b) Add a new clause 4.21.6: "a COVID-19 Event".

2.10 ***** OPTIONAL CLAUSE: EXTENSION OF TIME AND PAYMENT OF PREDETERMINED PERCENTAGE OF CONTRACTOR'S LOSS AND EXPENSE DUE TO A COVID-19 EVENT**

- a) Add a new clause 2.26.15: "a COVID-19 Event".
- b) In clause 4.19.1, after "subject to clause 4.19.2", add: "and 4.19.3".
- c) Add new clause 4.19.3: "Notwithstanding clause 4.19.1, in the event of the regular progress of the Works or any part of them being materially affected by the Relevant Matter referred to at clause 4.21.6, the Contractor shall only be entitled to the reimbursement of [*** INSERT APPROPRIATE FIGURE]% of the direct loss and expense which it would otherwise be entitled to as a result of such circumstances under these clauses 4.19 – 4.23".
- d) Add new clause 4.21.6: "a COVID-19 Event".

2.11 ***** OPTIONAL CLAUSE: TERMINATION PROVISION WHERE THE WORKS ARE SUSPENDED FOR THE RELEVANT CONTINUOUS PERIOD AS SET OUT IN THE CONTRACT PARTICULARS DUE TO COVID-19 EVENT**

- a) In clause 8.11.1, after "Contract Particulars", add: "(or in the case of clause 8.11.1.7, for [*** INSERT NUMBER OF DAYS] days)".
- b) Add new clause 8.11.1.7: "a COVID-19 Event".

2.12 Insert a new clause 8.10A:

"8.10A Termination by Contractor during COVID-19 Relief Period"

8.10A Notwithstanding the provisions of clause 8.9, 8.10 and 8.11, the Contractor shall not be entitled to terminate this Contract neither:

8.10A.1 during the COVID-19 Relief Period; nor

8.10A.2 for any period thereafter as a result of COVID-19 or a COVID-19 Related Hardship where COVID-19 Relief Payments are being made or reviewed (and where appropriate such payments are set-off or deducted from further payments) in accordance with clause 10.5".

2.13 In clause 8.11.2, after the words "8.11.1" in the first line insert the words "during the COVID-19 Relief Period or".

2.14 Insert a new section 10 as follows: **"Section 10 COVID-19 Relief Open Book Reporting"**

10.1. During the COVID-19 Relief Period and for any period thereafter where COVID-19 Relief Payments are being made or reviewed (and where appropriate such payments are set-off or deducted from further payments) in accordance with clause 10.5, the Contractor shall:

10.1.1 at the Employer's request, promptly provide a full cost breakdown which sets out the Contractor's actual costs, expenses, cash flow and profits contained in the Gross Valuations for the previous three months;

10.1.2 ensure that the payments made by the Employer as a COVID-19 Relief are promptly and solely applied to the purposes for which they are made including payments to the Contractor's Persons;

10.1.3 make available to the Employer upon request any information and/or evidence (including Open Book Interim Data) which the Employer may reasonably require in order to:

- (a) verify and assure that the Contractor has applied any monies received as a COVID-19 Relief for the intended purpose (or as agreed with the Employer), including copies of accounts, ledgers, cash-flow forecasts, balance sheets, profit and loss accounts and any other documentary evidence; and
- (b) verify and assure that monies intended for the Contractor's Persons have been properly and promptly paid;

- 10.1.4 ensure that all invoices clearly set out which elements of the invoice are attributable to COVID-19 Relief;
- 10.1.5 maintain full and accurate records and a written audit trail of COVID-19 Relief received, which the Contractor will provide to the Employer on request; and
- 10.1.6 act transparently and with integrity and at all times in good faith and using best endeavours in relation to any COVID-19 Relief.

Payments during COVID-19 Relief Period

- 10.2 During the COVID-19 Relief Period, the Contractor shall not be entitled to combine and shall procure that the Contractor's Persons shall not combine any COVID-19 Relief provided pursuant to this Contract or otherwise with any Government COVID-19 related relief, grant, intervention or other measure which results in the Contractor and/or the Contractor's Persons receiving relief twice for the same underlying cashflow issue which in the reasonable opinion of the Employer would amount to the Contractor and/or Contractor's Persons taking undue advantage of a COVID-19 Relief.

Recovery of payments by Employer

- 10.3 If the Contractor:
 - 10.3.1 fails to comply with any of the provisions of this Section 10; and/or
 - 10.3.2 in the Employer's opinion takes or a Contractor's Person takes undue advantage of any COVID-19 Relief; and/or
 - 10.3.3 has failed to expend any COVID-19 Relief for the intended purpose (or as agreed by the Employer)the Employer shall be entitled to, without limitation, retain or set-off the Reconciled Value from any amount due and/or outstanding to the Contractor under this Contract or any other contract and/or recover the Reconciled Value from the Contractor as a debt due and payable by the Contractor to the Employer and the Reconciled Value shall be deducted from the Contract Sum.

Warranties

- 10.4 The Contractor warrants to the Employer that during the COVID-19 Relief Period:
 - 10.4.1 the receipt of any COVID-19 Relief will not place the Contractor in breach of any financial or non-financial covenants pursuant to the terms of any finance agreement or other agreement which the Contractor has entered into in relation to the Works or otherwise; and
 - 10.4.2 it will not seek to enforce any security against any Contractor's

Person or other third party engaged in relation to the Works.

Payments

10.5 The Contractor agrees and acknowledges that any Interim Payments paid to the Contractor by the Employer during the COVID-19 Relief Period are not acceptance by the Employer as to the validity of the Interim Payment, Payment Notice and/or Pay Less Notice and that the Employer shall be entitled to subsequently review any Interim Payment, Payment Notice and/or Payless Notice and set-off or deduct from further payments due to the Contractor under this Contract any sums that it considers should not have been included within such Interim Payments, Payment Notice and/or Payless Notice”.

3. CONSTRUCTION CONTRACT REMAINS EFFECTIVE

3.1 This Deed is supplemental to the Contract. It is agreed and declared that, except to the extent that they are varied by this Deed, the terms and conditions set out in the Contract shall remain in full force and effect.

3.2 Except to the extent set out in this Deed, this Deed shall not constitute a waiver of any right or remedy of the Employer or the Contractor, arising before, during or after this Deed.

4. EXCLUSION OF RIGHTS UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

4.1 A person who is not party to this Deed shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

5. JURISDICTION AND LAW

5.1 This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including any non-contractual dispute or claim) shall be governed by and construed in accordance with the law of England and Wales and subject to the jurisdiction of the courts of England and Wales.

THIS DEED is executed and delivered as a deed on the date stated at the beginning hereof.

[* INSERT EXECUTION BLOCKS]**

[ANNEX A (REVISED STAGE PAYMENTS)]

[Drafting note: Where Option at Clause 2.4 is selected, the Employer is to insert the document which includes the revised stage payments here.]