**ICN Fluctuation costs – JCT Design and Build 2016 Contract Rider**

**OPTION 1 – Fluctuations linked to individual packages**

**CONTRACT PARTICULARS**

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| **[DN: to be added in between Contract Particulars 3.18 and 4.6 of the ICN JCT Design and Build Contract amends****Clause 1.12 – needs amending to "All references to arbitration provisions in this Contract shall be deemed to be deleted"]** |
| **Fluctuations:** |
| 4.2, 4.12 and 4.13  | Fluctuations Provision*If this entry is left blank or incomplete, then Schedule 7 shall not apply* | [Schedule 7 applies] / [Schedule 7 does not apply] |
|  | BCIS Base Date | The date of the Contract |
|  | Fluctuations Costs Cap | £[ ■ ][[1]](#footnote-1) |
|  | Works Packages subject to fluctuation | Refer to the table in the Annex to Schedule 7 |
| **Risk sharing of fluctuations:** |
|  | Fluctuation Risk Sharing*If this entry is left blank or incomplete, then Fluctuation Risk Sharing as set out in paragraph ‎6 of Schedule 7 does not apply* | [Applies] / [Does not apply] |
|  | Employer's Risk Portion[[2]](#footnote-2) | [Not applicable /[Means the first [ ■ ]% of any Fluctuations Costs payable in respect of a Works Package] |

**Definitions**

*Add the following new definitions in Clause 1.1 of the Conditions:*

Delete Fluctuations Provision and insert:

"**Fluctuations Provision:** the provisions as comprised in the Contract Particulars and Schedule 7 (against reference to clauses 4.2, 4.12 and 4.13)."

**Schedule 7 JCT Fluctuations Option A (Contribution, levy and tax fluctuations)[[3]](#footnote-3)**

*Delete Schedule 7 and insert new Schedule 7 as follows:*

"**Schedule 7 – Fluctuation Provisions**

1. Definitions and interpretation
	1. In this Schedule 7, the following definitions shall apply:

**BCIS Base Date**: means the latest Building Cost Information Service Index compiled and published by the Royal Institution of Chartered Surveyors as applicable at the time as set out in the Contract Particulars.

**BCIS General Building Cost Index**: means the latest Building Cost Information Service Index compiled and published by the Royal Institution of Chartered Surveyors as applicable at the date of the Interim Valuation Date of the Fluctuation Costs.

**Disallowed Costs**: means in relation to a Works Package:

* The gross aggregate of previous sums paid in respect of the relevant Works Package;
* Fluctuation Costs previously paid to the Contractor in previous Interim Valuation Payments;
* Amounts for works valued under clauses 5.4, 5.5. and 5.7 of this Contract;
* Amounts for unfixed materials and goods;
* Amounts payable in respect of loss and expense ascertained under clauses 4.19 and 4.20 which relate to the Works Packages;
* Any Provisional Sums which relate to the Works Packages;
* Any increase in the cost of a Works Package (including through sub-contractor claims under a sub-contract) arising as a result of a breach, neglect or other default of the Contractor;
* Amounts withheld by way of retention from a sub-contractor undertaking works as part of a Works Package.

**Fluctuation Costs Cap**: means the sum set out in the Contract Particulars.

**Fluctuation Costs**: means the addition to, or the deduction from, the Works Package Baseline Cost as calculated in accordance with the Fluctuation Costs Formula.

**Fluctuation Costs Formula**: means in respect of a Works Package:

* I = V x (B2 – B1) / B1

Where:

* I = fluctuation amount to be added or subtracted to the valuation (in pounds sterling);
* V = the total value of work in relation to the Works Package carried out in that period pursuant to the terms of this Contract, less any Disallowed Costs;
* B2 = BCIS General Building Cost Index value at the time of the relevant Interim Valuation Date;
* B1 = the BCIS General Building Cost Index at the BCIS Base Date.

**Fluctuations Template:** means the template Microsoft Excel spreadsheet which contains a pro-forma formula for calculating the Fluctuations Costs and which may periodically be updated by the Employer and re-issued to the Contractor. References to the Fluctuations Template shall mean the current version issued to the Contractor by the Employer.

**Original Completion Date**: means the original Date for Completion of the Works as stated in Contract Particular 1.1 at the point at which the Contract was entered into and prior to any adjustment of the same in accordance with the terms of the Contract.

**Reconciliation Milestone:** is defined in paragraph ‎4.2 below.

**Works Package:** means each package of works described in the Annex to this Schedule 7.

**Works Package Baseline Cost**: means the baseline cost for each Works Package as set out in the table in the Annex to Schedule 7.

1. Applicability of Schedule 7
	1. This Schedule 7 shall not apply unless so specified in the Contract Particulars. If the Contract Particulars are left blank or incomplete in respect of the applicability of this Schedule 7, then this Schedule 7 shall not apply and there shall be no fluctuations applicable to the Contract Sum.
	2. Where this Schedule 7 applies, in the event of any conflict or discrepancy with this Schedule 7 and the balance of this Contract, the provisions of this Schedule 7 shall prevail.
2. Fluctuation Costs
	1. Subject to paragraph 3.2 below, the parties acknowledge the likelihood of the cost of materials and labour varying during the construction of the Works due to inflation and have agreed to apportion Fluctuation Costs which the Contractor or the Employer (as the case may be) shall be entitled to payment of in accordance with Section 4 of the Contract and which shall be calculated on the terms set out in this Schedule 7.
	2. Subject always to reconciliation in accordance with paragraph ‎4 below and the Fluctuations Costs Cap, the Contractor shall be entitled to apply for the Fluctuations Costs on each Interim Valuation Date from the Date of Possession up to and including the Interim Valuation Date preceding the Original Completion Date.
	3. When applying for Fluctuation Costs in accordance with paragraph ‎3.2 above, the Contractor shall ensure that:
		1. It utilises and submits to the Employer with each application a completed, up-to-date copy of the Fluctuations Template;
		2. In respect of a Works Package, it only applies to the value of work in progress on that Works Package during the relevant period and fully accounts for any Disallowed Costs;
		3. Insofar as risk sharing of Fluctuation Costs applies in accordance with paragraph 6 below, it accounts for the relevant risk share portions in its application.
	4. The Contractor acknowledges that the Employer will not be required to consider any claim for fluctuations under this Schedule 7 unless the same has been presented utilising the Fluctuations Template.
	5. The parties acknowledge that the BCIS General Building Cost Index may go lower than the Works Package Baseline Cost. In such circumstances,any savings below the Works Package Baseline Cost shall be shared equally between the parties.
	6. Notwithstanding that the Works may be delayed by Relevant Events or otherwise, the Fluctuations Costs shall not be applied at any Interim Valuation Dates falling after the Original Completion Date and for the avoidance of doubt, any costs incurred after the Original Completion Date shall not be subject to fluctuation in accordance with this Schedule 7.
	7. The Contractor acknowledges and agrees that it shall not be entitled to any extension of time under clauses 2.24 to 2.26 (inclusive) or any loss and/or expense under clauses 4.19 to 4.21 (inclusive) or other relief in relation to the operation of this Schedule 7 and that it has made due allowances within the Contract Sum and its programme for performing its obligations under this Schedule 7.
3. Reconciliation of Fluctuation Costs
	1. The parties acknowledge that the BCIS General Building Cost Index is likely to fluctuate during the course of the Works and as such, interim assessments of the Fluctuation Costs will not necessarily represent the final, outturn adjustment required to a Works Package Baseline Cost. Accordingly, the parties have agreed to reconcile the Fluctuation Costs as set out in this paragraph ‎4.
	2. The parties have agreed that the Fluctuation Costs for a Works Package shall be reconciled upon:
		1. The practical completion of the relevant Works Package; or
		2. Where the Employer has given written notice to the Contractor that it requires there to be a reconciliation in accordance with this paragraph ‎4; or
		3. In circumstances where the Contractor's employment is terminated under clause 8 of the Contract,

each a **Reconciliation Milestone**.

* 1. Within 7 days of the occurrence of a Reconciliation Milestone, the Contractor shall provide a statement to be produced on the Fluctuations Template (a **Reconciliation Statement**) setting out:
		1. A calculation of the Fluctuation Costs charged to date under paragraph ‎3.2 above;
		2. A calculation of the Fluctuation Costs applicable on the date of the production of the Reconciliation Statement;
		3. Taking into account the Fluctuation Costs Cap, a breakdown of the difference (if any) between the sums stated in paragraphs ‎4.3.1 and ‎4.3.2 below (a **Fluctuations Balancing Payment**);
		4. Where the works within the relevant Works Package are not yet practically completed at the date of the Reconciliation Statement, then the total projected Fluctuation Costs (using the latest BCIS General Building Cost Index as a guide) that may become payable in respect of that Works Package.
	2. Following its receipt of the Reconciliation Statement, the Employer may request such further information, documents and assistance as is reasonably necessary to audit the Reconciliation Statement, which the Contractor shall provide as soon as reasonably practicable. Such information, documents and assistance shall include (but is not limited to) open book costs information in respect of the costs claimed in relation to a Works Package.
	3. In circumstances where the Contractor fails to produce a Reconciliation Statement in accordance with paragraph ‎4.3 or breaches its obligations under paragraph ‎4.4 above, the Employer may produce the Reconciliation Statement in lieu of the Contractor, whereupon it shall serve the same upon the Contractor and:
		1. If the Contractor fails to respond to the Employer's Reconciliation Statement within 14 days of the Contractor's receipt of the Reconciliation Statement, then the Employer's Reconciliation Statement shall be binding on the parties;
		2. If the Contractor disputes the Employer's Reconciliation Statement, then the parties may refer the dispute to the dispute resolution procedures in accordance with section 9 of the Contract.
	4. Where, pursuant to a Reconciliation Statement, a Fluctuations Balancing Payment is due, then the paying party shall remit the Balancing Payment to the receiving party within 21 days.
1. Fluctuation Costs Cap
	1. The Employer's aggregate liability for Fluctuation Costs shall not in any circumstances exceed the Fluctuation Costs Cap.
	2. In the event that the Employer's liability for Fluctuation Costs exceeds the Fluctuation Costs Cap, then the Contractor accepts all risk for any Fluctuation Costs in excess of the Fluctuation Costs Cap that the Employer would otherwise be responsible for. The Contractor is deemed to have allowed for such excess Fluctuation Costs within the Contract Sum and its programme.
	3. In the event that a reconciliation in accordance with paragraph ‎4 above shows that:
		1. Payments in excess of the Fluctuation Costs Cap have been made by the Employer, then the Contractor shall forthwith repay the amount in excess of the Fluctuation Costs Cap;
		2. There is still headroom on the Fluctuation Costs Cap as against payments made by the Employer, then the Contractor shall be permitted to utilise such headroom, subject always to the terms of paragraph ‎3 above.
2. Fluctuations Risk Sharing
	1. The Employer shall only be responsible for the Employer's Risk Portion of the Fluctuation Costs (as specified in the Contract Particulars).

**Annex to Schedule 7**

**Works Packages**

|  |  |  |  |
| --- | --- | --- | --- |
| **Ref** | **Works Package Name** | **Detailed description** | **Works Package Baseline Cost** |
| A | [*Insert brief description of package, eg 'Groundworks'*] | [*Insert full description of the package. Preferable to include a reference to specifications, drawings, BOQs and the like]*  | [*Insert value of package which will then be subject to indexation*] |
| B |  |  |  |
| C |  |  |  |

**OPTION 2 – Fluctuation linked to the overall Contract Sum**

**CONTRACT PARTICULARS**

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| **[DN: to be added in between Contract Particulars 3.18 and 4.6 of the ICN JCT Design and Build Contract amends.** **Clause 1.12 – needs amending to "All references to arbitration provisions in this Contract shall be deemed to be deleted"]** |
| **Fluctuations:** |
| 4.2, 4.12 and 4.13  | Fluctuations Provision*If this entry is left blank or incomplete, then Schedule 7 shall not apply* | [Schedule 7 applies] / [Schedule 7 does not apply] |
|  | BCIS Base Date | The date of the Contract |
|  | Fluctuations Costs Cap | £[ ■ ][[4]](#footnote-4) |
| **Risk sharing of fluctuations:** |
|  | Fluctuation Risk Sharing*If this entry is left blank or incomplete, then Fluctuation Risk Sharing as set out in paragraph ‎6 of Schedule 7 does not apply* | [Applies] / [Does not apply] |
|  | Employer's Risk Portion[[5]](#footnote-5) | [Not applicable /[Means the first [ ■ ]% of any Fluctuations Costs payable in respect of the Works (subject to the terms of Schedule 7 and the Fluctuations Costs Cap)]  |

**Definitions**

*Add the following new definitions in Clause 1.1 of the Conditions:*

Delete Fluctuations Provision and insert:

"**Fluctuations Provision:** the provisions as comprised in the Contract Particulars and Schedule 7 (against reference to clauses 4.2, 4.12 and 4.13)."

**Schedule 7 JCT Fluctuations Option A (Contribution, levy and tax fluctuations)[[6]](#footnote-6)**

*Delete Schedule 7 and insert new Schedule 7 as follows:*

"**Schedule 7 – Fluctuation Provisions**

1. Definitions and interpretation
	1. In this Schedule 7, the following definitions shall apply:

**BCIS Base Date**: means the latest Building Cost Information Service Index compiled and published by the Royal Institution of Chartered Surveyors as applicable at the time as set out in the Contract Particulars.

**BCIS General Building Cost Index**: means the latest Building Cost Information Service Index compiled and published by the Royal Institution of Chartered Surveyors as applicable at the date of the Interim Valuation Date of the Fluctuation Costs.

**Disallowed Costs**: means in relation to Contract Sum:

* The gross aggregate of previous sums paid in respect of the Works;
* Fluctuation Costs previously paid to the Contractor in previous Interim Valuation Payments;
* Amounts for works valued under clauses 5.4, 5.5. and 5.7 of this Contract;
* Amounts for unfixed materials and goods;
* Amounts payable in respect of loss and expense ascertained under clauses 4.19 and 4.20 which relate to the Works;
* Any Provisional Sums which relate to the Works;
* Any increase in the cost of the Works (including through sub-contractor claims under a sub-contract) arising as a result of a breach, neglect or other default of the Contractor;
* All preliminary costs included withing the Contract Sum Analysis;
* Amounts withheld by way of retention as part of the Works.

**Fluctuation Costs Cap**: means the sum set out in the Contract Particulars.

**Fluctuation Costs**: means the addition to, or the deduction from, the Contract Sum as calculated in accordance with the Fluctuation Costs Formula.

**Fluctuation Costs Formula**: means in respect of the Contract Sum:

* I = V x (B2 – B1) / B1

Where:

* I = fluctuation amount to be added or subtracted to the valuation (in pounds sterling);
* V = the total value of work in relation to the Contract Sum carried out in that period pursuant to the terms of this Contract, less any Disallowed Costs;
* B2 = BCIS General Building Cost Index value at the time of the relevant Interim Valuation Date;
* B1 = the BCIS General Building Cost Index at the BCIS Base Date.

**Fluctuations Template:** means the template Microsoft Excel spreadsheet which contains a pro-forma formula for calculating the Fluctuations Costs and which may periodically be updated by the Employer and re-issued to the Contractor. References to the Fluctuations Template shall mean the current version issued to the Contractor by the Employer.

**Original Completion Date**: means the original Date for Completion of the Works as stated in Contract Particular 1.1 at the point at which the Contract was entered into and prior to any adjustment of the same in accordance with the terms of the Contract.

**Reconciliation Milestone:** is defined in paragraph ‎4.2 below.

1. Applicability of Schedule 7
	1. This Schedule 7 shall not apply unless so specified in the Contract Particulars. If the Contract Particulars are left blank or incomplete in respect of the applicability of this Schedule 7, then this Schedule 7 shall not apply and there shall be no fluctuations applicable to the Contract Sum.
	2. Where this Schedule 7 applies, in the event of any conflict or discrepancy with this Schedule 7 and the balance of this Contract, the provisions of this Schedule 7 shall prevail.
2. Fluctuation Costs
	1. Subject to paragraph 3.2 below, the parties acknowledge the likelihood of the cost of materials and labour varying during the construction of the Works due to inflation and have agreed to apportion Fluctuation Costs which the Contractor or the Employer (as the case may be) shall be entitled to payment of in accordance with Section 4 of the Contract and which shall be calculated on the terms set out in this Schedule 7.
	2. Subject always to reconciliation in accordance with paragraph ‎4 below and the Fluctuations Costs Cap, the Contractor shall be entitled to apply for the Fluctuations Costs on each Interim Valuation Date from the Date of Possession up to and including the Interim Valuation Date preceding the Original Completion Date.
	3. When applying for Fluctuation Costs in accordance with paragraph ‎3.2 above, the Contractor shall ensure that:
		1. It utilises and submits to the Employer with each application a completed, up-to-date copy of the Fluctuations Template;
		2. In respect of the Works, it only applies to the value of work in progress on the Works during the relevant period and fully accounts for any Disallowed Costs;
		3. Insofar as risk sharing of Fluctuation Costs applies in accordance with paragraph 6 below, it accounts for the relevant risk share portions in its application.
	4. The Contractor acknowledges that the Employer will not be required to consider any claim for fluctuations under this Schedule 7 unless the same has been presented utilising the Fluctuations Template.
	5. The parties acknowledge that the BCIS General Building Cost Index may go lower than the Contract Sum. In such circumstances,any savings below the Contract Sum shall be shared equally between the parties.
	6. Notwithstanding that the Works may be delayed by Relevant Events or otherwise, the Fluctuations Costs shall not be applied at any Interim Valuation Dates falling after the Original Completion Date and for the avoidance of doubt, any costs incurred after the Original Completion Date shall not be subject to fluctuation in accordance with this Schedule 7.
	7. The Contractor acknowledges and agrees that it shall not be entitled to any extension of time under clauses 2.24 to 2.26 (inclusive) or any loss and/or expense under clauses 4.19 to 4.21 (inclusive) or other relief in relation to the operation of this Schedule 7 and that it has made due allowances within the Contract Sum and its programme for performing its obligations under this Schedule 7.
3. Reconciliation of Fluctuation Costs
	1. The parties acknowledge that the BCIS General Building Cost Index is likely to fluctuate during the course of the Works and as such, interim assessments of the Fluctuation Costs will not necessarily represent the final, outturn adjustment required to the Contract Sum. Accordingly, the parties have agreed to reconcile the Fluctuation Costs as set out in this paragraph ‎4.
	2. The parties have agreed that the Fluctuation Costs for the Contract Sum shall be reconciled upon:
		1. The practical completion of the whole of the Works; or
		2. Where the Employer has given written notice to the Contractor that it requires there to be a reconciliation in accordance with this paragraph ‎4; or
		3. In circumstances where the Contractor's employment is terminated under clause 8 of the Contract,

each a **Reconciliation Milestone**.

* 1. Within 7 days of the occurrence of a Reconciliation Milestone, the Contractor shall provide a statement to be produced on the Fluctuations Template (a **Reconciliation Statement**) setting out:
		1. A calculation of the Fluctuation Costs charged to date under paragraph ‎3.2 above;
		2. A calculation of the Fluctuation Costs applicable on the date of the production of the Reconciliation Statement;
		3. Taking into account the Fluctuation Costs Cap, a breakdown of the difference (if any) between the sums stated in paragraphs ‎4.3.1 and ‎4.3.2 below (a **Fluctuations Balancing Payment**);
		4. Where the Works are not yet practically completed at the date of the Reconciliation Statement, then the total projected Fluctuation Costs (using the latest BCIS General Building Cost Index as a guide) that may become payable in respect of that Works.
	2. Following its receipt of the Reconciliation Statement, the Employer may request such further information, documents and assistance as is reasonably necessary to audit the Reconciliation Statement, which the Contractor shall provide as soon as reasonably practicable. Such information, documents and assistance shall include (but is not limited to) open book costs information in respect of the costs claimed in relation to the Contract Sum.
	3. In circumstances where the Contractor fails to produce a Reconciliation Statement in accordance with paragraph ‎4.3 or breaches its obligations under paragraph ‎4.4 above, the Employer may produce the Reconciliation Statement in lieu of the Contractor, whereupon it shall serve the same upon the Contractor and:
		1. If the Contractor fails to respond to the Employer's Reconciliation Statement within 14 days of the Contractor's receipt of the Reconciliation Statement, then the Employer's Reconciliation Statement shall be binding on the parties;
		2. If the Contractor disputes the Employer's Reconciliation Statement, then the parties may refer the dispute to the dispute resolution procedures in accordance with section 9 of the Contract.
	4. Where, pursuant to a Reconciliation Statement, a Fluctuations Balancing Payment is due, then the paying party shall remit the Balancing Payment to the receiving party within 21 days.
1. Fluctuation Costs Cap
	1. The Employer's aggregate liability for Fluctuation Costs shall not in any circumstances exceed the Fluctuation Costs Cap.
	2. In the event that the Employer's liability for Fluctuation Costs exceeds the Fluctuation Costs Cap, then the Contractor accepts all risk for any Fluctuation Costs in excess of the Fluctuation Costs Cap that the Employer would otherwise be responsible for. The Contractor is deemed to have allowed for such excess Fluctuation Costs within the Contract Sum and its programme.
	3. In the event that a reconciliation in accordance with paragraph ‎4 above shows that:
		1. Payments in excess of the Fluctuation Costs Cap have been made by the Employer, then the Contractor shall forthwith repay the amount in excess of the Fluctuation Costs Cap;
		2. There is still headroom on the Fluctuation Costs Cap as against payments made by the Employer, then the Contractor shall be permitted to utilise such headroom, subject always to the terms of paragraph ‎3 above.
2. Fluctuations Risk Sharing
	1. The Employer shall only be responsible for the Employer's Risk Portion of the Fluctuation Costs (as specified in the Contract Particulars).
1. This is the maximum amount that the Employer may be required to pay in fluctuations over and above the Contract Sum. Should be stated as a monetary sum. [↑](#footnote-ref-1)
2. Insert 'Not applicable' if (i) there is no risk sharing or (ii) if there is risk sharing and the Employer is not incurring 100% of an agreed % of any Fluctuation Costs [↑](#footnote-ref-2)
3. Insert this at page 44 of the ICN D&B amendments [↑](#footnote-ref-3)
4. This is the maximum amount that the Employer may be required to pay in fluctuations over and above the Contract Sum. Should be stated as a monetary sum. [↑](#footnote-ref-4)
5. Insert 'Not applicable' if (i) there is no risk sharing or (ii) if there is risk sharing and the Employer is not incurring 100% of an agreed % of any Fluctuation Costs [↑](#footnote-ref-5)
6. Insert this at page 44 of the ICN D&B Schedule of Amendments [↑](#footnote-ref-6)