

# Ice construction contract



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**The ICE Conditions of Contract 7th edition****Measurement Version****1. Introduction**

The ICE contract has been around since 1945 and is intended for use on civil engineering work. Civil engineering work is fundamentally different from building work – it involves fewer trades, but can be much bigger in scale; there is greater uncertainty in civil engineering work, particularly in ground works. When a site investigation takes place for building work, bore holes and trial pits usually give a good indication of the extent of ground water, rock and the like; in the case of a large reservoir, for example, it is impossible to be as certain. This in turn can mean that structural work needs to be varied. For these reasons the work has to be remeasured and valued as it progresses, the bill of quantities being approximate – a point of confusion is when should work be measured and valued under the contract's variation provisions, and when should the remeasurement provisions be used. The bill of quantities therefore has two main functions; firstly, as a tendering document; and secondly, as a basis for valuation.

The contract does not recognise the existence of a quantity surveyor. All payment and valuation is by the engineer, although a Q. S. may actually do some of this work.

This note does not cover everything in the conditions, but highlights some of the more contentious areas.

## 2. Discussion of Clauses

### Generally

The clauses contain no punctuation. Only a court can decide where punctuation can go.

### Clause 1 – definitions and interpretations

Sub-clause (1)(c) defines the “ Engineer”. The “ Engineer” is a “ person or Firm...”. This should be read in conjunction with clause 2(2)(a) – the contractor must know who will be giving it instructions.

Sub-clause (1)(v) defines the “ site”. This can include “ other places” and not just the land where work is taking place.

Sub-clause (2) defines “ cost” – “.... all expenditure properly incurred or to be incurred whether on or off site including overhead finance and other charges properly allocatable thereto but does not include any allowance for profit.”

### Clause 2 – The Engineer and the Engineer’s Representative

#### The Engineer

- Carries out duties specified in or implied by the contract
- Has the authority specified in or implied in the contract
- A named Chartered Engineer must act as the engineer – if a firm is stated in the contract, a named individual must be nominated within 7 days of the award of the contract, and before the works commencement date
- The Engineer can be replaced – the contractor must be informed

**The Engineer's Representative**

- Has more power than the clerk of works under JCT
- Engineer's duties may be delegated, apart from decisions and certificates under 12(6), 44, 48, 60(4), 61, 65 or 66. Delegation shall be in writing with a copy to the contractor

**Assistants**

The Engineer or the ER may appoint assistants to assist the ER. Names shall be notified to the contractor. Assistants are purely concerned “ to secure the acceptance of materials and workmanship as being in accordance with the contract”. They can issue instructions only in relation to these matters.

**Instructions**

- Shall be in writing
- However, the contractor shall comply with oral instructions – different from JCT.
- Oral instructions can be confirmed in writing by the contractor or Engineer – no time limit, but “ as soon as is possible under the circumstances”
- The Engineer or ER can be asked to specify under which of the Engineer's duties or authorities the instruction was issued. It does not refer to an empowering provision, another clause in the contract, unlike JCT

**Clause 5 (documents mutually explanatory)**

This clause is very brief but highly contentious. On the face of it, it says that the various documents forming the contract shall be taken as mutually

explanatory and any ambiguities shall explained and adjusted by the engineer who shall thereupon issue instructions in writing to the contractor. These instructions shall be regarded as instructions issued under clause 13. (More will be said about clause 13 later on!).

Does this clause mean that only ambiguities and discrepancies included in the tender documents can be adjusted? If an error in the tender documents was so obvious when looking at the documents as a whole, should an engineer refuse to issue an instruction?

Unlike JCT, the contractor does not have to notify the engineer about any matters requiring clarification.

On the other hand the word “ shall” imposes a duty on the engineer to issue instructions and does not confer any discretion on the engineer.

It is curious that clause 13(3) refers back to clause 5 and allows for payment to be made to the contractor, but clause 5 itself makes no mention of payment.

See also the comments on clause 8 below.

### **Clause 7 (further drawings specifications and instructions)**

There are two classes of “ further drawings specifications and instructions”:

- i). Those which amplify and explain what is already in the contract.
- ii). Those which “ require any variation to any part of the Works....”. In this case the work is “ deemed to be a variation under clause 51 – i. e. no formal instruction in writing is needed.

The express link between clause 7 and clause 51 implies that the valuation rules under clause 52 should apply.

It should also be noted that the contractor could be paid under clause 13, although clause 7 does not state this.

Under sub-clause (1) the information shall be supplied “ from time to time”. This means that the engineer can take into account the contractor’s actual progress on the job.

Sub-clause (3) States that the “ contractor shall give adequate notice in writing....” and sub-clause (4) allows for the contractor to be given an extension of time and extra costs if it is delayed “ by failure or inability of the Engineer to issue at a time reasonable in all the circumstances Drawings, Specifications or instructions requested by the contractor....”. The words “ requested by the contractor” are rather ambiguous - is formal written notice under sub-clause (3) a condition precedent to the operation of sub-clause (4)?

### **Clause 8(1) (contractor’s general responsibilities)**

Under this provision the contractor shall

(a) construct and complete the works (the meaning of such phrases has already been covered)

(b) “ provide all labour materials.....and everything.... required .... for such construction and completion so far as the necessity for providing the same is specified in or reasonably to be inferred from the Contract.” The highlighted words suggest that if ambiguities and discrepancies could be corrected by

inference from other contract documents, then the contractor could not expect the engineer to act under clauses 5 and 13.

### **Clause 10 (performance security)**

This very important clause will be discussed in the lecture on “ insurances and bonds”.

Clauses 11 and 12 (the basis on which the tender was based/ claims arising from adverse physical conditions and artificial obstructions)

### **Clause 11**

Sub-clause (1) - under ICE 6 the employer was “ deemed” to have made available to the Contractor, before submission of tenders, all information on ground works “ obtained by or on behalf of the Employer from investigations undertaken relevant to the Works”. This meant that the employer should have given the contractor every piece of information about the site that was in the employer’s possession, and if he did not do so the contractor could have grounds for a claim under clause 12 irrespective of the contractor’s obligation to inspect the site under sub-clause (2). The wording has now been changed to reflect the fairer position that the contractor should have priced that job on the basis of the information actually passed to it (subject to its obligation to inspect the site under sub-clause (2)).

A new section (1)(b) has been added covering “ pipes and cables in on or over the ground”.

Second part of 11(1) - the contractor is responsible for “ the interpretation of all such information for the purposes of constructing the Works....” - does this refer to the tender preparation or the work on site?

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Sub-clause (2) – inspection of site – the contractor is “deemed” to have

(a) inspected the site

(b) to have satisfied himself so far as is practicable and reasonable on

(i) the form and nature of the ground

(ii) the extent and nature of the work

(iii) means of communication and access etc. to the site

(iv) obtaining information “as to risks contingencies and all other circumstances...”

Sub-clause (3) – basis and sufficiency of tender – the contractor shall be “deemed” to have

(a) based his tender on his own inspection and the information made available by the Employer or obtained by the contractor

(b) satisfied himself “as to the correctness and sufficiency of the rates and prices stated by him in the bill of quantities....”

## **Clause 12**

Sub-clause (1) – Has the Contractor encountered “physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions...” which could not “reasonably have been foreseen by an experienced Contractor”? Clearly, foreseeability would need to be examined in the light of what information the employer passed to the contractor under



11(1) and the information that should have been gathered by the contractor under 11(2). If so “ written notice” should be given

Under sub-clause (2) the Contractor “ shall at the same time or as soon thereafter as may be reasonable inform the Engineer in writing pursuant to Clause 53 and/or Clause 44(1) that he intends to claim costs and/or time

**NB clause 53 has a 28 day limit!**

Sub-clause (3) requires the Contractor to give details of any anticipated effects of the physical conditions or artificial obstructions; measures he has taken or is taking; and anticipated effects, costs and delays in or interference with the carrying out of the Works (whether or not the contractor intends to submit a claim).

Sub-clause (4) - action by the engineer - he may require the Contractor to investigate and report on alternative measures; he can give written consent to the measures taken by the Contractor; give written instructions as to how the physical condition or artificial obstruction should be dealt with; and he can order “ suspension” under clause 40 or a variation under clause 51

Up to this point there is no admission of liability on behalf of the employer unless a variation has been ordered

Sub-clause (5) - if the Engineer decides that the physical condition or artificial obstruction “ could have been reasonably foreseen by an experienced Contractor”

then the Engineer shall inform the Contractor in writing - however, any variation ordered under sub-clause (4)(d) shall be paid under Clause 52.

Sub-clause (6) - the engineer determines the delay and costs incurred with a reasonable addition for profit, and any extension of time provided that the “ conditions or obstructions could not reasonably have been foreseen by an experienced contractor”. There is no need for the contractor to submit a separate claim for an extension of time under clause 44.

### **Clause 13**

Sub-clause (1) (work to be to satisfaction of engineer)

“ Save insofar as it is legally or physically impossible the Contractor shall construct and complete the Works in strict accordance with the Contract.... and shall comply with and adhere strictly to the Engineer’s instructions on any matter connected therewith (whether mentioned in the Contract or not) ....”

These words have barely changed over the years, and have been considered by the courts in several prominent cases.

Consider the following scenario: A contractor is asked to forward a method statement with his tender. When the work starts it soon becomes apparent that the contractor’s method statement is impossible to work to, and he has to do the work in a more expensive manner. Can the contractor claim the extra costs involved?

Sub-clause (2) states that the mode and manner of construction shall be to the engineer’s satisfaction.

Sub-clause (3) gives the procedure for dealing with delay and extra costs.

A final point to consider; should variations be issued under clause 51 or 13?!

### **Clause 14 – The Programme**

The programme under ICE has much more significance than under ICE, but not as much as under the NEC. It is, however, not a contract document.

The programme should be submitted by the contractor within 21 days of the award of the contract. There are procedures for the Engineer to accept or reject the programme with reasons. In that case the contractor must amend and resubmit the programme. These procedures are all carried out in 21 day time frames.

Together with the programme the engineer may request a general description of the arrangements and methods of construction.

The accepted programme should be revised if the Engineer considers that the actual progress of work does not confirm to the programme.

### **Clause 40**

The Engineer may instruct the contractor to suspend the progress of the works or any part thereof. Subject to the exceptions listed, the contractor can be given an extension of time and costs.

### **Clause 41**

The contractor shall start the works as soon as is reasonably practicable after the works commencement date. The contractor should proceed with due expedition and without delay.

**Clause 44**

The contractor should give notice within 28 days if the matters listed entitle him to an extension of time.

Note sub-clause (1)(f) – “ other special circumstances of any kind whatsoever...” This would be interpreted contra proferentem by a court.

The Engineer shall make an assessment of the delay and notify the contractor in writing. The Engineer shall also make an assessment in the absence of a written notice from the contractor.

The Engineer can make an interim extension award. This cannot later be reduced.

The Engineer makes a further assessment at the due date for completion. Again, this cannot later be reduced.

The Engineer makes a final determination within 28 days of substantial completion.

**Clause 46**

If the Engineer considers that the contractor’s rate of progress is too slow, he may issue a notice to the contractor. The contractor shall then take steps to expedite the progress of the works. This is not acceleration. Acceleration is covered by sub-clause (3).

**Clause 47 – liquidated damages**

Unlike JCT, the Engineer does not issue a notice of non-completion/

Note that under ICE, the deduction of LAD's is suspended for the period of an intervening variation, then resumes. JCT does not specifically state this, but legally the position is the same.

### **Clause 48**

This covers substantial completion, which is different from practical completion under JCT.

- under ICE the contractor starts the procedure by notifying the Engineer; there is no such notice under JCT. The Engineer decides within 21 days. The work so certified shall have passed any final test.
- Outstanding work can be completed after substantial completion; there are no criteria defining when such work can so be permitted.

### **Clause 49**

Covers “outstanding work”. The contractor must continue insuring this work until it is accepted.

### **Clauses 51 and 52 – variations and their valuation**

These are similar to JCT. Note that if the contractor informs the Engineer that a rate for work not the subject of the variation is rendered inapplicable by the variation, the Engineer shall “fix” the rate.

### **Clause 53 – additional payments**

Claims are submitted under this clause, apart from any dealt with by clauses 12 or 13. Note that the basis of payment is “cost”, not “loss and/or expense”.

**Clauses 55-57 – “ Measurement”**

ICE is a measure and value contract, so procedures for remeasurement need to be included.

- The quantities in the BQ are estimates
- The Engineer ascertains by “ admeasurement”
- Rates can be adjusted if the quantity of an item increases or decreases  
– this is determined by the engineer after consulting the contractor
- The contractor is to be given an opportunity to attend for measurement – if he does not, the Engineer’s measurements are taken to be correct.
- Remeasured work may be valued on daywork
- The method of measurement is CESMM unless otherwise provided in the contract

**Clause 60 – Certificates and Payments**

- The contractor prepares interim payment applications unless the contractor decides one is not needed
- Payments are made monthly
- A minimum amount stated in the appendix must be reached before a payment is made
- Interest is payable on overdue payments. This is in addition to the right of suspension under the Construction Act.
- Within 3 months of the defects correction certificate, the contractor shall forward to the Engineer a “ statement of final account”.
- Within a further 3 months the Engineer issues the certificate. This is only a payment certificate and signifies nothing else.

## **Clause 61 – Defects Correction Certificate**

### **This is issued**

- At the end of the DC period
- If more than one DC period applies, it is issued at the end of the last period
- Outstanding work under 48 must be completed
- Making good under 49 and 50 must be completed

The certificate states the date when the contractor shall have completed his obligations to construct and complete the Works to the Engineer's satisfaction. This is the most important certificate under ICE. Compare this certificate with the final certificate under JCT.