

Closing the Books: Managing Final Accounts in JCT and NEC Contracts

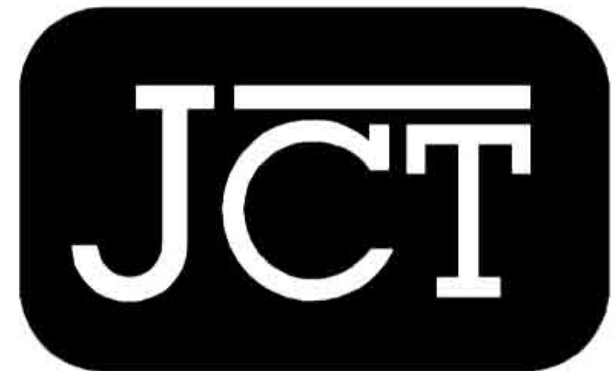
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Introduction

1. What do we mean by “*Final Account*”?
2. How does the JCT Final Account process work?
3. What provision does the NEC form make for resolving the Final Account?
4. Top Tips



What is a “*Final Account*”?

- Final determination of what monies are due under the Contract (latent defects aside)
- Contrast with interim payments
- *Secretary of State for Transport v. Birse-Farr Joint Venture* (1993) 62 B.L.R. 45, Hobhouse J :

*"Certification may be a complex exercise involving an exercise of judgment and an investigation and assessment of potentially complex and voluminous material. An assessment by an engineer of the appropriate interim payment may have a margin of error either way. It may be subsequently established that it was too generous to the contractor just as it may subsequently be established that the contractor was entitled to more.... **At the interim stage it cannot always be a wholly exact science.** Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor."*

What is a “*Final Account*”?

- Important to get it right!
- Some contracts do not have a final account process
- Others have complex rules to close the account which need to be followed

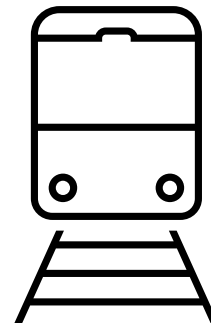
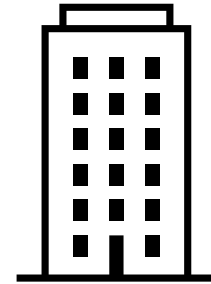
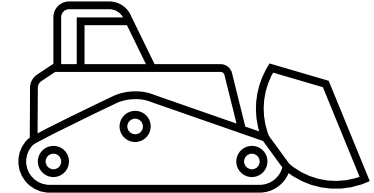


JCT 2024 – Final Account



JCT Final Account - Topics

- JCT Design and Build – The Final Statement
- JCT Standard Building Contract – The Final Certificate
- Final Account Timeframes
- Evidencing your Final Account
- Effect of the Final Statement / Certificate



JCT Design and Build 2024

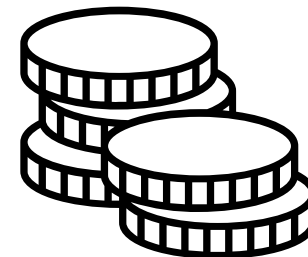
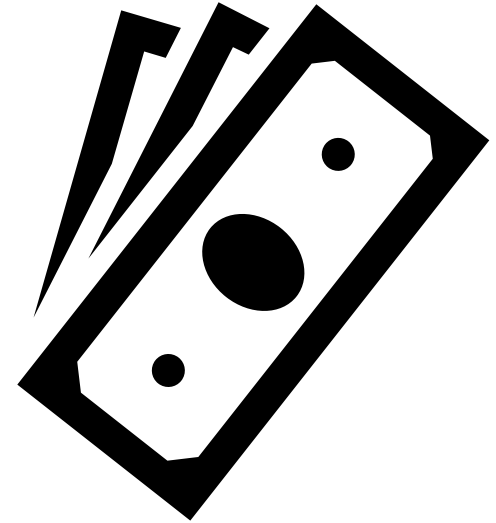
The Final Statement

Clause 4.24.1 – *“Following practical completion of the Works the Contractor shall submit the Final Statement to the Employer and supply such supporting documents as the Employer may reasonably require”.*

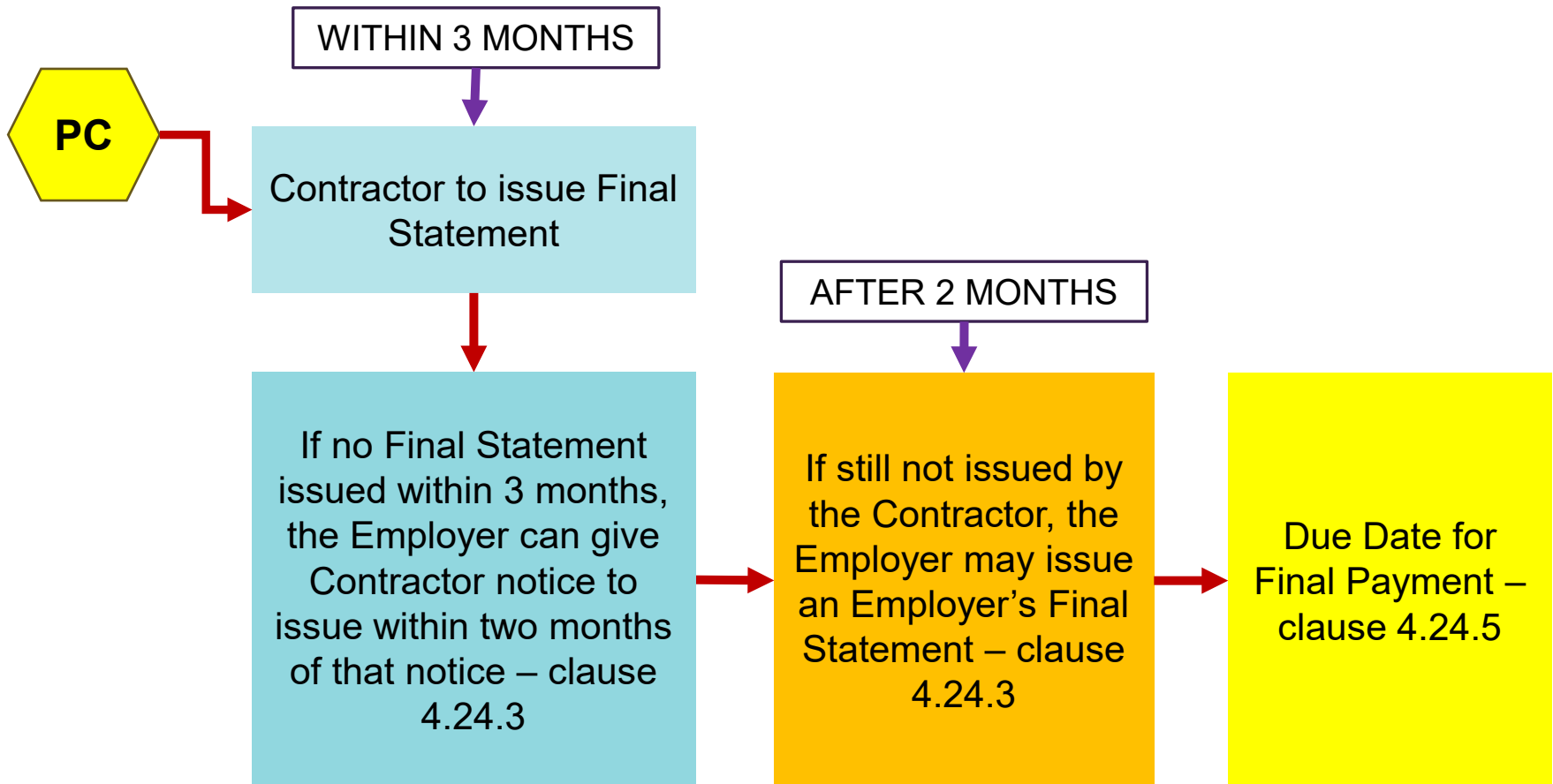
Clause 4.24.2 – *“The Final Statement shall set out the adjustments to the Contract Sum to be made in accordance with clause 4.2 and shall state:*

- .1 The Contract Sum, so adjusted; and*
- .2 The sum of amounts already paid by the Employer to the Contractor,*

and the final payment shall be the difference (if any) between the two sums, which shall be shown as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be.”



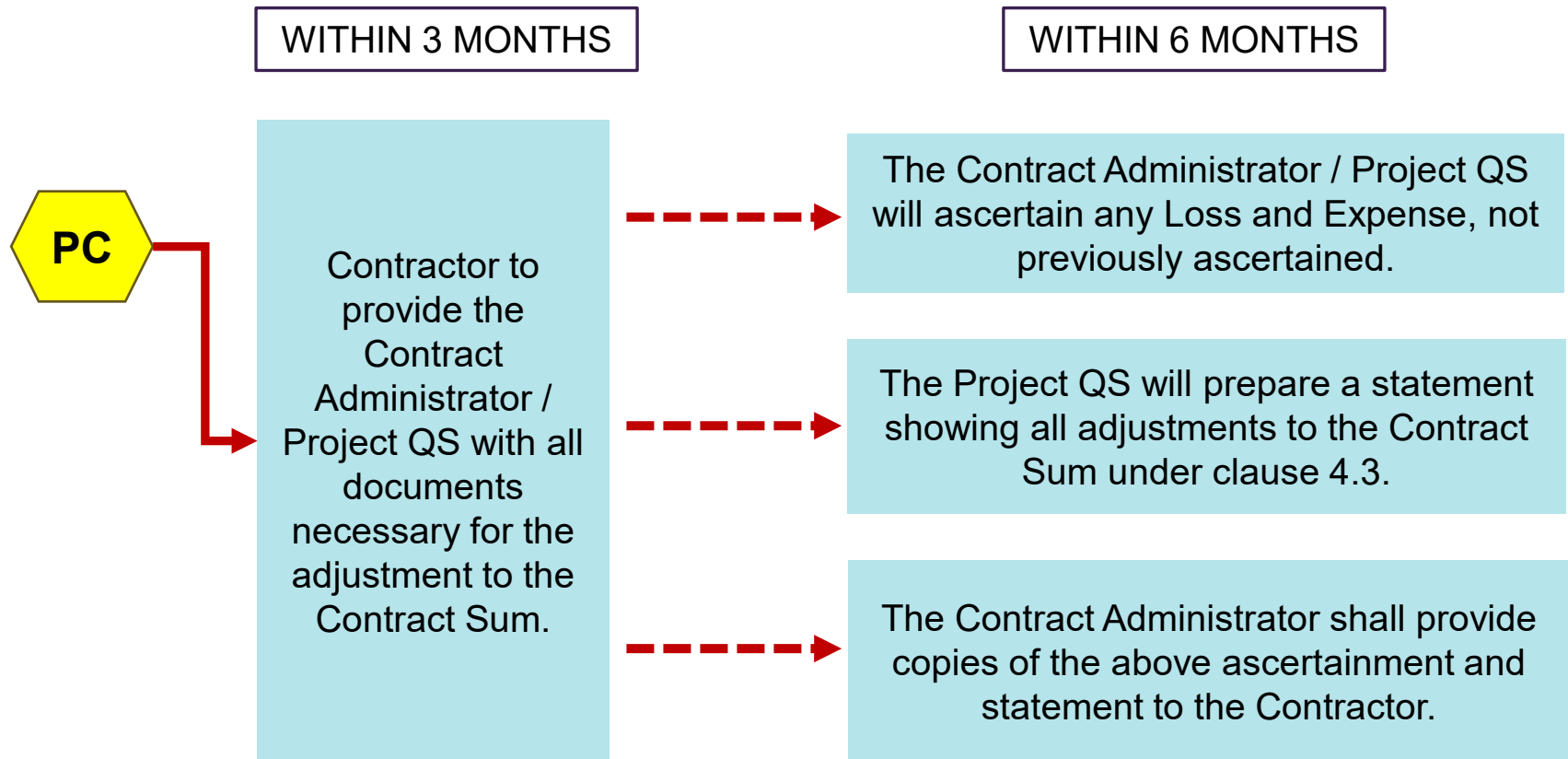
The Final Statement - Timeframes



JCT Standard Building Contract 2024

The Final Certificate

Timeframes under Clause 4.25

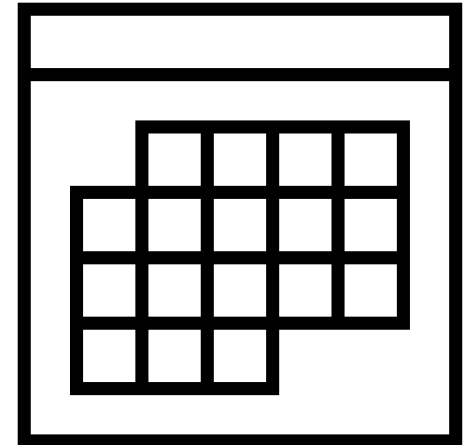


The Due Date for Final Payment

JCT Design and Build Clause 4.24.5 – due date for final payment is one month after:

- The end of the Rectification Period
- The date in the Notice of Completion of Making Good; or
- The date of the submission of the Final Statement or Employer's Final Statement

whichever is latest.



Proving the Final Account

Clause 4.1 JCT D&B and Clause 4.2 JCT SBC

Proofs of
Delivery

Valuation of
Defects

'Run Rates' for
periods of Delay

Fluctuation
Calculations

Timesheets

Adjustments to the Contract Sum

- Sums due under the Valuation Rules
- The value of Changes / Variations
- Acceleration Costs
- Fluctuations (if applicable)
- Deduction of Provisional Sums
- Omissions (if permitted)
- Loss and Expense
- Insurance Premiums
- Unnecessary 'Opening Up'
- Costs reasonably incurred for exercising the right to suspend for non-payment
- LESS deductions (e.g. defects not rectified etc)

Quotations

Emails etc
evidencing
agreement to costs

Invoices

Photographs

Contract
Administrator
Instructions

The Effect of the Final Statement



JCT Design and Build 2024

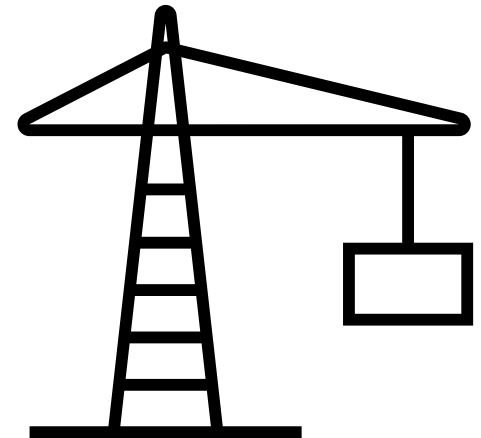
The Effect of the Final Statement

Clause 1.8.1 - As from the due date for the final payment specified in clause 4.24.5, the Final Statement shall be CONCLUSIVE EVIDENCE:

- that the quality of any materials or goods or any particular standard of an item of workmanship (as per the Employer's Requirements or instruction etc) was to the Employer's reasonable satisfaction*;
- that all extensions of time have been given; and
- that all due direct loss and or expense has been agreed ascertained or valued.

Clause 1.8.2 – the conclusive effect of the Final Statement shall be suspended where an adjudication, arbitration or other proceedings are commenced before or within 28 days after the due date for final payment.

**but not conclusive evidence that they or any other materials, goods or workmanship comply with any other requirement or term of the contract.*



JCT Standard Building Contract 2024

The Effect of the Final Certificate

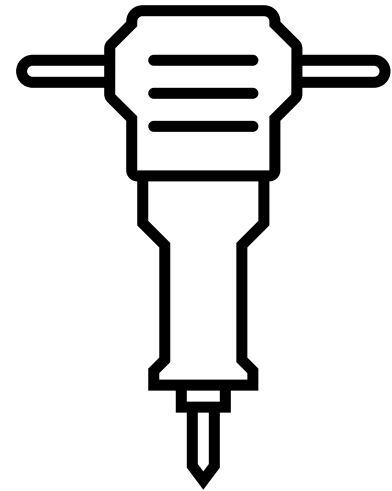
Clause 1.9.1 - The Final Certificate shall be CONCLUSIVE EVIDENCE:

- that the quality of any materials or goods or any particular standard of an item of workmanship (as per the Employer's Requirements or instruction etc) was to the Employer's reasonable satisfaction*
- that all extensions of time have been given;
- ***that all necessary adjustments to the Contract Sum have been made*****;
- that all due direct loss and or expense has been agreed ascertained or valued.

Clause 1.9.2 - The conclusive effect of the Final Certificate shall be suspended where an adjudication, arbitration or other proceedings are commenced before or within 28 days after the date of the issue of the Final Certificate.

**but not conclusive evidence that they or any other materials, goods or workmanship comply with any other requirement or term of the contract.*

*** save where there has been an erroneous inclusion or exclusion of any work, materials, goods or figure or an arithmetic error.*



Final Certificates and 'Conclusive Evidence'

Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd [2015] EWHC 70 (TCC)

- Under the JCT SBC, all matters within the Final Certificate that are disputed must be referred to a dispute resolution process within the specified timeframe under clause 1.9.2.
- If an element of the Final Certificate is not included in these proceedings, it cannot be added after the time period for bringing the action has expired.

D McLaughlin & Sons Ltd v East Ayrshire Council [2022] CSIH 42 (Scottish Case)

- JCT Standard Building Contract was amended to include an addition timeframe i.e. if the Decision in an Adjudication brought in respect of the Final Certificate was disputed, legal proceedings in respect of that decision had to be commenced within 28 days of the Decision.
- The Inner House determined that the Employer's challenge to the Decision, issued 72 days after the Decision was communicated, was out of time. Therefore, for the purpose of the Contract, the Adjudicator's Decision had become final and binding.

What does 'Commencing Proceedings' mean? **FENWICK ELLIOTT**

Bennett v FMK Construction Limited [2005] EWHC 1268 (TCC)

- The requirement to 'commence an Adjudication' was satisfied when the 'Notice of Intention to Refer a Dispute' was issued within the 28 day period under the JCT Standard Building Contract.
- This was the case notwithstanding that the Referring Party did not issue the Referral Notice within the prescribed 7 days.
- Supported in *University of Brighton v Dovehouse Interiors Limited* [2014] EWHC 940 (TCC)
- NOTE! Clause 1.8.3 of the D&B / Clause 1.9.3 of the Standard Building Contract

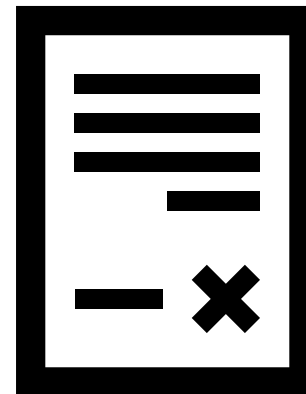


NOTE: JCT Design and Build Clause 4.24.6

“Except to the extent that prior to the due date for the final payment the Employer gives notice to the Contractor disputing anything in the Final Statement or the Contractor gives notice to the Employer disputing anything in the Employer’s Final Statement, and subject to clause 1.8.2, the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.24.2 and have the further effect as stated in clause 1.8”



NO PROVISION SIMILAR IN THE JCT
STANDARD BUILDING CONTRACT



Notice under JCT D&B Clause 4.24.6

CC Construction Limited v Raffaele Mincione [2021] EWHC 2502 (TCC)

The Facts:

- A Contractor's Final Statement is sent to the Employer on 1 December 2020.
- The Employer writes to the Contractor on 18 December 2020 disputing the Final Statement.
- The Due Date for Final Payment was 1 January 2021.
- The Employer does not commence any proceedings re the Final Statement within 28 days.

The Argument

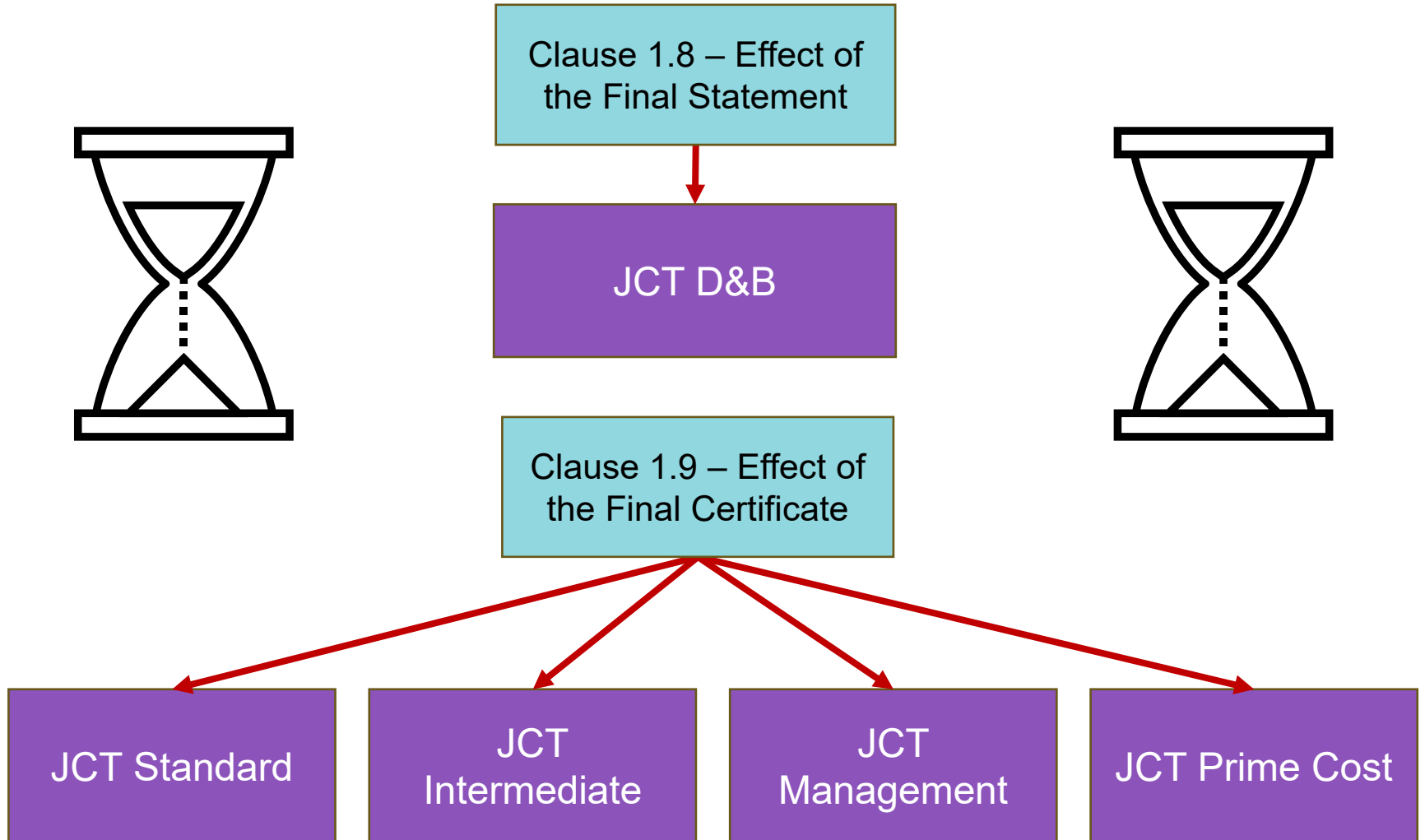
- The Contractor argued that the Final Statement was conclusive evidence of the sums due.
- The 18 December letter not sufficient to avoid the Final Statement becoming conclusive on because the Employer had not also commenced proceedings within the required timeframe.

The Decision:

- Held that the 18 December letter was sufficient to avoid the Final Statement becoming conclusive.
- This was due to the requirements under (equivalent) clause 4.24.6 were “*different rather than cumulative*” as against clause 1.8 – meaning that the Employer could give notice of the dispute **OR** commence proceedings.

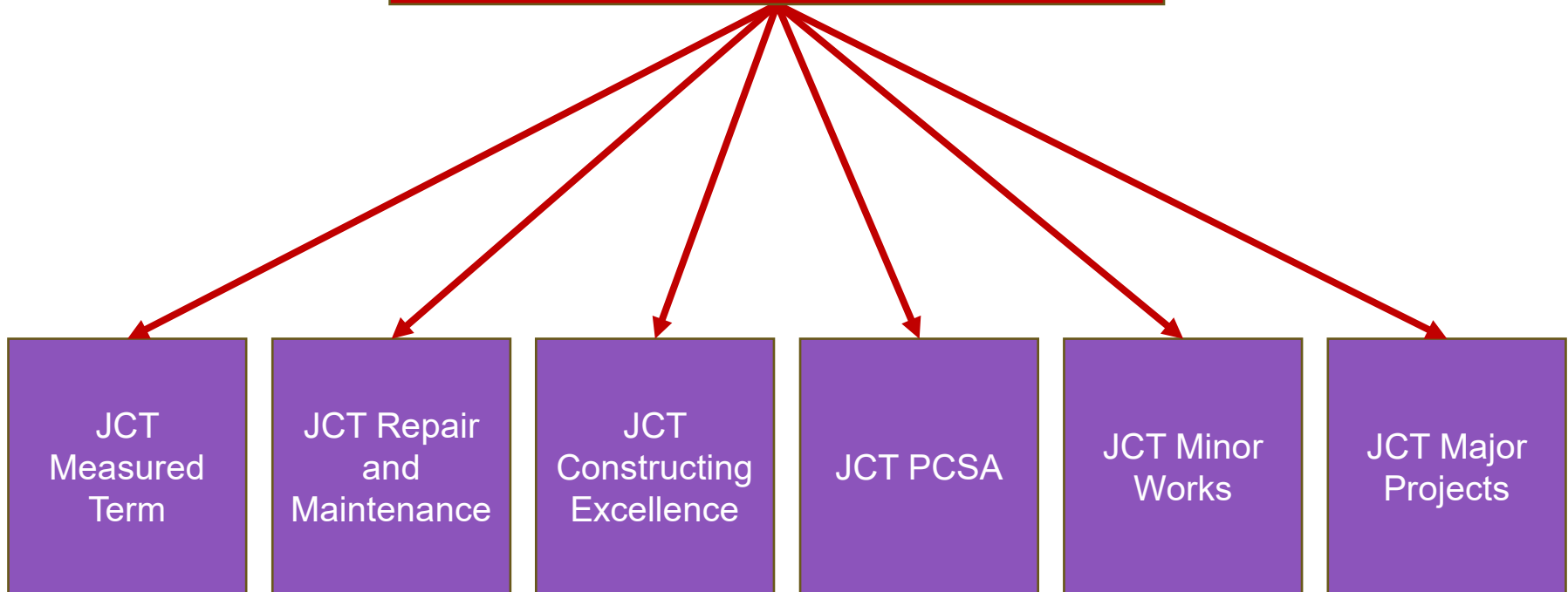
JCT Standard Forms

Final Account Time Bars

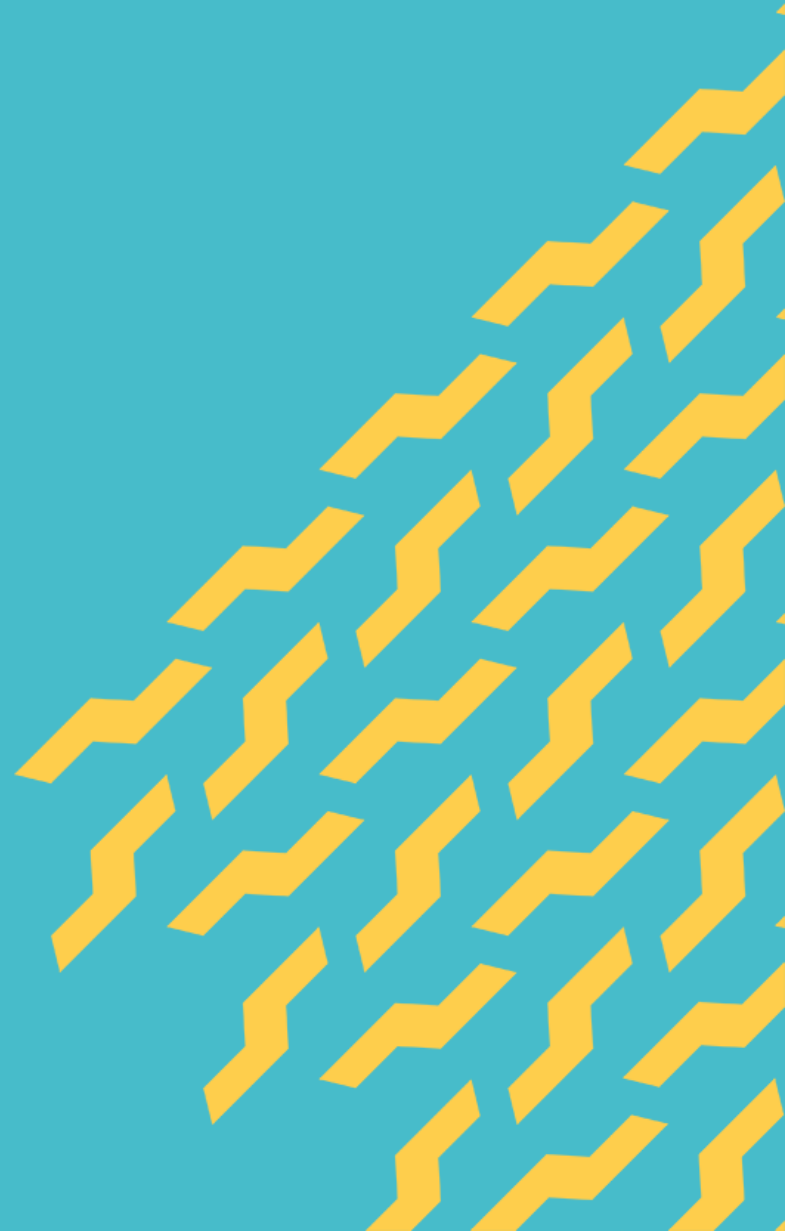


JCT Standard Forms – No Strict Time Bars

... but be aware of amendments!

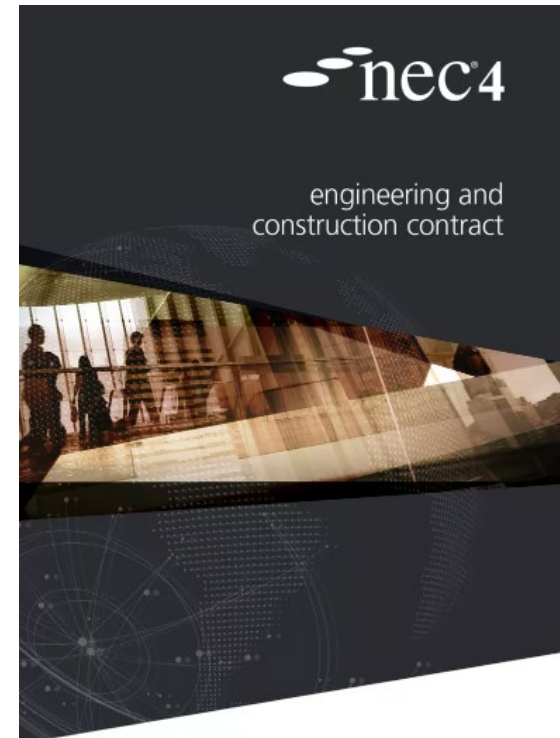


NEC and the Final Account



The NEC approach

- “Collaborative working requiring the early identification of problems and proactive approach to addressing problems”
- Compensation events notified promptly, and effects forecast after the “dividing date”
- Encourages effective management of the risk that has occurred
- Forecast involves an element of “guesswork”
 - “Win some, lose some”
 - Parties can move on
- NEC3: Final account process “conspicuously absent”



June 2017

NEC4: All change!

- Clause 53 provides for a “*Final Assessment*”
 - “*This clause brings about assessment of the final amount due under the contract. The Parties should of course have been building up to this point and **very little should need to be done to close the account.***” [Emphasis added]
- Is this the reality?
 - Have Quotations (time and money) been agreed as the works have proceeded?
 - Has the amount of Disallowed Costs been agreed on a rolling basis?
 - Have the parties notified CEs within the applicable time bars or is this disputed?
 - Have the parties used “*on account*” payments when the contract doesn’t provide for them?

NEC4: All change!

- Clause 53.1:

“The Project Manager makes an assessment of the final amount due and certifies a final payment, if any is due, no later than

- ***Four weeks** after the Supervisor issues the **Defects Certificate** or*
- ***Thirteen weeks** after the project Manager issues a **termination certificate***

*The Project Manager gives the Contractor details of how the amount due has been assessed. The final payment is made within **three weeks of the assessment** or, **if a different period is stated in the Contract Data**, within the period stated.”*

[Emphasis added]

- Timetable for resolution to prevent drift
- Strict timetable:
 - (Theoretically) lots of notice where the works are completed as normal
 - Longer time period where works are terminated (which may also be for convenience)

What if the PM forgets? (1)

- Clause 53.2 provides:

“If the Project Manager does not make this assessment within the time allowed, the Contractor may issue to the Client an assessment of the final amount due, giving details of how the final amount due has been assessed. If the Client agrees with this assessment, a final payment is made within three weeks of the assessment or, if a different period is stated in the Contract Data, within the period stated.”

- Project Manager needs to stay on their toes “to avoid this happening” [The Guide]
 - Is the PM in a position to properly assess the final account based on the information provided?
 - Think about requesting additional information and/or back up in anticipation of having to assess the final account?

What if the PM forgets? (2)

- For the Contractor preparation is key:
 - What is your position?
 - Have you properly prepared your account where there are significant disagreements?
 - Do you have the records required to support your position?
 - Take the timetable for next steps (Dispute Resolution) into account
 - Is expert evidence required / useful to break the deadlock if there if a dispute is likely?



What if the PM forgets? (3)

- Some debate as to whether the Contractor should submit an application to prompt an assessment
- None provided for expressly in the NEC4 as a trigger to the assessment
- What does the PM have to work off?
 - Submit details of your account anyway?
- Keating on NEC (Second Edition):

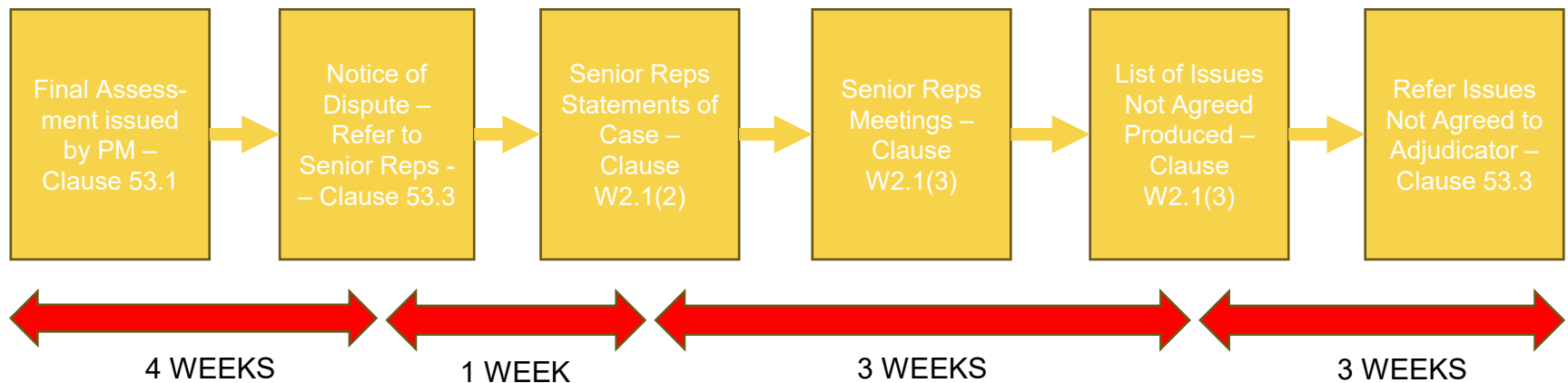
“It is suggested that parties ought to consider amending the contract so as to clarify whether the Contractor is obliged to make an application for payment for the final amount due, the basis on which the final amount is due is calculated, whether there is an assessment date and, if so, when”.

- Overly complex?



Deadlines!!!!

- Clause 53.3:
 - Assessment “**conclusive evidence of the final amount due under or in connection with the contract unless a Party takes the following actions....**”
 - Referral required within four weeks for all DRP Options

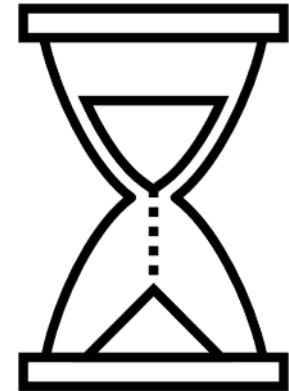


Option W2: Housing Grants Act applies

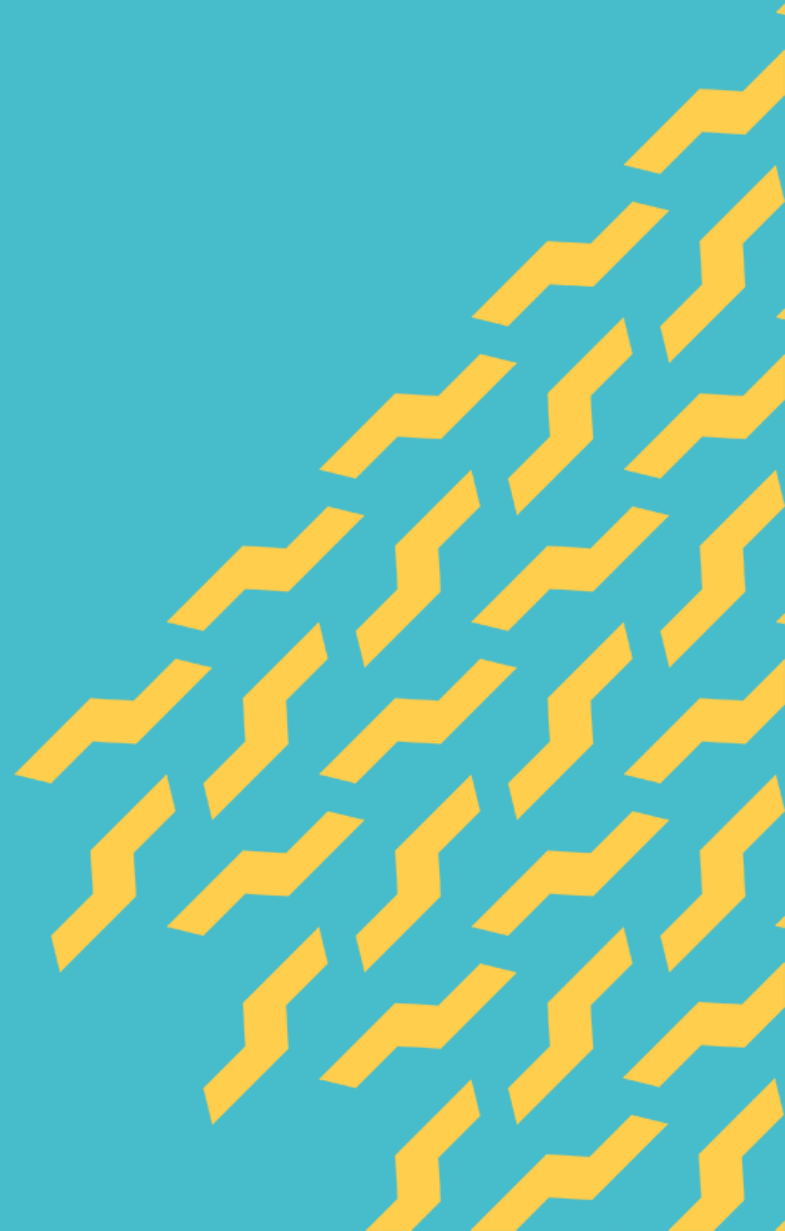
- Refer to Senior Representatives (“**SRs**”) or Adjudication within four weeks
- SR Checklist
 - Check the notice provisions in the Contract
 - Do you have SRs appointed?
 - Does the other side have SRs appointed?
 - What is the focus of your statement of case (Option W2.1 (3))?
 - Are they available in the required time period? [Three weeks for meetings]
 - Brief your SRs
 - Is it worth agreeing an EOT with the other side for the whole process OR is the timetable helpful to keep the pressure on?
 - Ensure the list of issues to be decided by the SRs is comprehensive
 - Think about how to structure your list of issues agreed and issues not agreed

Option W2: Housing Grants Act applies

- Next Step after the list of issues that are agreed and issues that are not agreed = Adjudication
- **Three week deadline** to launch an Adjudication or becomes binding
- Prepare for Adjudication in parallel to the SR process just in case?
- Engage experts if not already done so?
- After the Adjudication:
 - Issue a Notice of Dissatisfaction
 - **Four week deadline** for serving or Decision is binding
 - Be very clear as to what you are disagreeing with
- Arbitration or Court proceedings are the next steps



Top tips!



Final Account – Top Tips

1. Records, Records, Records!
2. Check the Contract
3. Start Early
4. Open Lines of Communication
5. Plan out the Contractual Timeframes
6. Be ready to Adjudicate



Thank you.
Questions?



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