



PROVISIONAL SUMS IN CONSTRUCTION CONTRACTS

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1 Table of Contents

2	What Are Provisional Sums?	2
3	A Judicial View!	2
4	“Defined or Undefined?”, That is ‘The’ Question!	3
5	Pricing of Provisional Sums	4
6	How Do The Differing Principal Standard Forms Deal With This Issue?	8
7	Detail Them In Your Programme	11
8	That Annoying Habit Some Architect’s/Contract Administrators Have...	14
9	A Final Point, ‘Cos I Have To!	15

2 What Are Provisional Sums?

Provisional Sums are financial allowances included within construction contracts. They are included to cover work which cannot be fully designed or detailed at the time a construction project is put out to tender. So cannot be properly priced and included within the fixed price element of a contract sum.

There may be many reasons why this is the case, such as:

- The Client hasn't yet decided on a particular finish.
- The design might be pending the result of some early opening-up works on a refurbishment, or some exploratory excavation.
- The work involved is later in the programme and the design hasn't yet been developed.
- The work may be subject to a Planning or Listed Building Consent which hasn't yet been decided on.
- The design team wants input from a specialist subcontractor, once they are appointed, to help with completion of a particular area of design.
- It is for work which may not be carried out at all. Such as a 'nice to have' item, budget allowing, or for a pure contingency allowance.

There are numerous possible reasons.

3 A Judicial View!

A useful description of Provisional Sums was provided by Lord Justice May in the Court of Appeal judgment in *Midland Expressway Ltd v Carillion Construction Ltd* (No.1) in 2006. He stated:

"[a provisional sum is] used in pricing construction contracts to refer either to work which is truly provisional, in the sense that it may or may not be carried out at all, or to work whose content is undefined, so that the parties decide not

to try to price it accurately when they enter into their contract. A provisional sum is usually included as a round figure guess. It is included mathematically in the original contract price but the parties do not expect the initial round figure to be paid without adjustment. The contract usually provides expressly how it is to be dealt with. A common clause in substance provides for the provisional sum to be omitted and an appropriate valuation of the work actually carried out to be substituted for it. In this general sense, the term "provisional sum" is close to a term of art but its precise meaning and effect depends on the terms of the individual contract."

4 "Defined or Undefined?", That is 'The' Question!

There are two types of provisional Sums:

- Defined Provisional Sums
- and
- Undefined Provisional Sums

This is as prescribed by the Royal Institute of Chartered Surveyors' (RICS) New Measurement Rules (NRM), which became effective from 1 January 2013. (Or, for those of us old enough to remember its predecessor, The Standard Method of Measurement 7th Edition (SMM7)).

NRM Part 2: Rules for Detailed Measurement of Building Works is the relevant section, and Clause 2.9, Non-Measurable Works, the specific provision. This states:

2.9 *Non-measurable Works*

2.9.1 *Provisional Sums*

2.9.1.1. *Where building components / items cannot be measured and described in accordance with the tabulated rules of measurement they should be given as a 'Provisional Sum' and identified as either Defined work or Undefined work as appropriate*

2.9.1.2 *A Provisional Sum for Defined work is the sum provided for work that is not completely designed, but for which the following information should be provided:*

1. *A description of the nature and construction of the work;*
2. *A statement of how and where the work is to be fixed to the building and what other work is to be fixed thereto;*
3. *A quantity or quantities that indicate the scope and extent of the work; and*
4. *Any specific limitations and the like.*

5 Pricing of Provisional Sums

NRM Clause 2.9, Non-Measurable Works, continues by providing specific rules as to how the pricing of Provisional Sums is to be carried out. This is extremely important for Contractors, and I particularly draw your attention to clauses 2.9.1.3 and 2.9.1.5.

2.9.1.3 *Where provisional sums are given for Defined work the contractor will be deemed to have made due allowance in his or her programming, planning, and pricing preliminaries.*

This is why the differentiation between Defined and Undefined Provisional Sums is so important. A contractor is required to make due allowance, for the work covered by any Defined Provisional Sums, within the time periods included as part of their construction programme.

The instruction to expend a Defined Provisional Sum and undertake the work covered by it, will not, as such, constitute a variation, and will not, of itself, entitle the contractor to an extension of time.

It is important to fully understand the nature of Defined Provisional Sums and to ensure that you price for them accordingly. This is particularly so with regards to preliminaries.

Specifically, any supervision and the like, will need to be included. Along with any other items of a 'General Attendance' nature.

Items of a 'Special Attendance' nature may, more normally, be deemed to be a cost to be expended from the Provisional Sum itself. However, this decision will be guided by the pricing structure adopted for the rest of the works. It will also be guided by the wording of any Preambles and Preliminaries documents.

For example, if the cost of all the craneage and lifting equipment required for the works, is included within the cost build-up for each work item, then the craneage for the Defined Provisional Sum work should come from the Provisional Sum allowance.

Equally, if the contractor has included all the craneage and lifting equipment, required for the works, within their overall Preliminaries allowance, then they should include the same for the Defined Provisional Sum work.

However, caution should be employed in understanding any specific provisions, with regards to method of pricing, set out in the Preambles and Preliminaries Documents.

If there are any concerns or lack of clarity, in this regard, they should ideally be resolved prior to contract signing.

NRM Clause 2.9, Non-Measurable Works, continues by providing clarity as to what must happen if the required level of detail cannot be provided to meet the threshold for a Defined Provisional Sum.

2.9.1.4 Where any aspect of the information required by paragraph 2.9.1.2 above cannot be given, work should be described as an Undefined

Provisional Sum. Where provisional sums are given for Undefined work the contractor will be deemed not to have made any allowance in programming, planning and pricing preliminaries.

It is important to note the words “where any aspect of the information required”. This is a specific and prescriptive requirement. It does not allow for some of the information, most of the information or even nearly all of the information to be provided. It is clear and straightforward - if the information doesn't meet the grade, then it's not Defined!

NRM Clause 2.9, Non-Measurable Works, concludes on this issue by stating:

2.9.1.5 Any Provisional Sum given for Defined work that does not comprise the information required under 2.9.1.2 above shall be construed as a provisional sum for Undefined work, irrespective that it was given in the BQ as a Provisional Sum for Defined work.

The delineation between Defined and Undefined Provisional Sums is quite clear. And yet, sadly, is commonly mistaken and, frankly, often abused by members of those advising Employers.

Far too often, I have seen elements of work which, simply do not pass the threshold for inclusion as a Defined Provisional Sum, being so described in Bills of Quantities, Schedules of Work, Preliminaries documents, and the like.

In fact, on more than one occasion, I have seen Provisional Sum allowances for “Contingencies”, and such like, detailed as being Defined Provisional Sums. This simply cannot be the case, legitimately, and this sort of conduct is unprofessional to the point of potentially being fraudulent, in my opinion.

I say this because, where a Provisional Sum is intentionally mis-described as being Defined, when it cannot possibly be properly considered as such, then it seems clear that, the party responsible for doing so, is seeking to gain a pecuniary advantage from so doing. Either directly, through reduced preliminaries costs, or indirectly, by benefitting from not awarding an

extension of time that might otherwise be due to the contractor. This is especially so if the contract is based upon the use of the NRM (or SMM7).

It is done to try and ensnare the contractor into being liable for the programme implications and Preliminaries pricing associated with those items. It is shabby and underhand conduct, which brings the profession of those responsible into disrepute.

It simply won't stand up in court if challenged, in my opinion. Though contractors should be on the lookout for this in tender documents and, if found, should seek to have the relevant Provisional Sums re-categorised, in the actual Contract Documents, prior to signature.

Particularly so, where the NRM are described as not applying, or not fully applying.

This is a far safer approach than relying on the courts upholding 2.9.1.5, if push comes to shove.

I would personally also see this as an alarm bell as to the level of professionalism and likely conduct of the other side.

And finally on pricing of Provisional Sums...

2.9.1.6 Provisional Sums should be exclusive of Overheads and Profit. Separate provision is to be made in the BQ for Overheads and Profit.

The typical norm is, that wherever the Provisional Sums are included within the Pricing Schedule or Bills of Quantities that immediately after each is a further sum of money included for the associated Overheads and Profit (OH&P).

Quite often there will be a box identified for the contractor to include a percentage for OH&P, and then this percentage is applied to the Provisional

Sum to create a sum of money which is then included within the total contract price.

Such sum is then adjusted, pro-rata, depending on the final outcome cost for the Provisional Sum.

If there is no provision within the Pricing Schedule or Bills of Quantities for the contractor to include for their OH&P on the Provisional Sums, then the Provisional Sum will normally be deemed to include the allowance for the contractor's OH&P.

However, caution should once again be employed, in understanding any specific provisions with regards to method of pricing set out in the Preambles and Preliminaries Documents. As there may be wording to the effect that the contractor's OH&P should be included within their overall pricing. Even though no provision is made within the pricing documents for this.

Once again, I consider this underhand and designed to trip up unwary and unsuspecting contractors. I see no equitable justification for such pricing documents not to be clear and transparent in this regard.

6 How Do The Differing Principal Standard Forms Deal With This Issue?

JCT is written such that, the JCT forms of contract compel the Employer to issue instructions to carry out work detailed in the Provisional Sums.

This obligation arises regardless of whether the Provisional Sums are 'Defined' or 'Undefined'.

As a contractor it is important to note this requirement. Any contractor who proceeds to undertake work covered by a Provisional Sum without the requisite instruction does so at their own risk. It is arguable that, say issuing a drawing "For Construction" which shows the work covered by a Provisional

Sum, constitutes an instruction to undertake the works. However, I am not aware if this hypothesis has ever been tested in the courts.

The far safer approach is always to seek a specific written instruction to undertake the works for which a Provisional Sum has been provided.

However, under the JCT forms, the Provisional Sums form part of the scope of The Works. Whether or not the Provisional Sums are 'Defined' or 'Undefined', and irrespective of the level of detail to which they are scoped or specified.

As a result, an Employer who subsequently decides to omit the Provisional Sum works and appoint another contractor to complete these items could be faced with a breach of contract claim; for the loss of profit suffered by the original contractor.

To remove this potential risk, the contract can be amended to give the Employer a specific ability to proceed in this way. However, except in specific circumstances, I would question the need to do this. It is certainly contrary to the intent of the JCT.

This is, of course, separate to the ability to omit Provisional Sum works altogether. Which makes inordinate sense when talking about those items an Employer has always been unsure about the need for - such as contingencies and 'nice to haves' which are perhaps budget dependent.

The Architect or Contract Administrator may omit work covered by a Provisional Sum if the work is not going to be done, or if the risk does not materialise. However, they may not omit such work in order to give the work to someone else, without the Employer running the risk of a claim for breach of contract and damages.

In *Amec Building Ltd v. Cadmus Investments Co. Ltd* [1997] 51 ConLR 105, the Architect omitted a Provisional Sum for a Food Hall, and subsequently gave the work to another Contractor. Amec were awarded loss of their

anticipated profit as damages, by an Arbitrator. On appeal the arbitrator's findings were upheld by Judge Kallipetis.

In *Abbey Developments Ltd v PP Brickwork Ltd* (2003), the earlier authorities were reviewed by Judge Lloyd. Again there were standard provisions for variations, including omissions, which would not vitiate the contract. Once again, omission of work was nevertheless found to be a breach, on the same basis as in the earlier cases. The judge stated:

"The justification for these decisions is in my judgment to be found in fundamental principles. A contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out...

...the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else...The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost..."

I have personally been involved in a project where the Employer, knowing they were unable to provide the requisite details for the fitted joinery works in time to meet the programme requirements, attempted to avoid granting an extension of time for this by seeking to omit all the Defined Provisional Sums related to these works. With the suggestion that they may, or may not, subsequently be re-instructed.

However, they then soon realised that they had come up against the loss of profit issue. Particularly when we pointed out to them that we would not accept their instructing of someone else to undertake these works, and definitely not, if expecting us to allow them on site as "Artists and Tradesmen".

So, I would caution all contractors to be very wary of accepting an amendment that allows the blanket omission of Provisional Sums and re-instruction to others.

By contrast, NEC contracts do not provide for the use of Provisional Sums. This approach is adopted on the basis that clarity is the priority and if an Employer cannot clearly define an aspect of the works at the time the contract is concluded, then that work should not be included in the contract. Because the Contractor will not have a sufficiently clear idea of the cost and programme of the work in question.

Under the NEC suite, the preferred approach is for those items of work to be dealt with under the Early Warning System and Risk Register. In the event that a work item is required, it will be valued as a Compensation Event in accordance with the provisions of the contract.

It's an entirely different approach and one that people should be aware of. Especially those advising clients on which form of contract to choose. Whilst NEC's driver is clarity and certainty, this approach may not suit a client whose principal driver is perhaps more about speed on to site, or perhaps seeing an altered space before making fit out decisions.

Albeit there is the Cost Reimbursement Option available with NEC. Although it could be argued that taking this approach, in such circumstances, is somewhat counterintuitive. Equally it is not unknown for NEC contracts to be amended to incorporate the concept of Provisional Sums.

7 Detail Them In Your Programme

As we have already seen, under JCT provisions, where Defined Provisional Sums are included in a contract, the contractor is liable for including the time implications of these within their programme.

To protect the contractors position it is important that the Employer is made aware of the date by which the instruction for expenditure of these Provisional Sums is required.

In accordance with any other information request, under a JCT contract, such date should neither be too early nor too late.

So, it is important that realistic dates are provided. However, it is also important that a contractor provides dates which are robust and take account of the actions they need to take once instructed. These include:

- Reviewing, assessing, and understanding the information provided.
- Procurement: - sourcing relevant and competent suppliers and/or subcontractors. Obtaining relevant quotations, including providing sufficient subcontract tender periods to obtain realistic, robust and competent quotations. Reviewing these quotations, undertaking post tender interviews, negotiating terms and conditions to achieve a final compliant offering. Finalising the subcontract order paperwork. Pre-start meetings.
- Design Time: - if applicable
- Material Lead Times
- Labour availability and lead times
- Plant availability and lead times

The following should also be noted:

- A contractor is not required to simply drop everything else and deal solely with an instruction to expend a Provisional Sum, just because a client has gotten around to issuing their instruction. Therefore, the timing notified to the client should allow for dealing with the above factors whilst also dealing with all of those other requirements upon them as anticipated at that stage.

- Equally though, where the work is for a Defined Provisional Sum in particular, then the contractor will already be aware of virtually all the details of the work and so arguably should have the subcontractor identification/selection process at least partially in hand before instruction.
- If the instruction for expenditure of a Provisional Sum ultimately details work which is noticeably different in scope or nature, from that detailed in the Provisional Sum, then, regardless of the requirement for the contractor to make allowance for the programme and Preliminaries requirements of a Defined Provisional Sum, such an instruction will constitute a variation and the contractor will be entitled to seek an extension to his contract period, if the revised scope of work is likely to cause a delay to the progress of the works. In such circumstances the contractor must notify the Employer of this in accordance with the contract requirements.
- If the instruction to expend a Provisional Sum is issued late, the contractor is only required to employ the same measures to mitigate the delay as it is required to do, by the contract, in respect of all other delays, i.e., typically, reasonable or best endeavours.

In respect to notifying the client of the required instruction dates, another option, and I would recommend that a contractor do both, is to include the instruction for expenditure of any Provisional Sums as items within your Information Required Schedule (IRS).

I would also suggest that you highlight the same for the Undefined, as Day 1 milestones, both on your programme and in your IRS. That way you have flagged them up and they can be reviewed on a regular basis, at least monthly within Progress Reports and Progress Meetings.

This way they are kept on everyone's agenda and the contractor is more than fulfilling their responsibilities in respect of the Undefined Provisional Sums.

8 That Annoying Habit Some Architect's/Contract Administrators Have...

I have never understood the mentality or logic of those Architects/Contract Administrators who issue an instruction on Day 1, or shortly thereafter, to omit all of the Provisional Sums.

Here's my take on it, though I am not a lawyer, nor am I aware that this rational has ever been tested in the courts. If you know that it has, then please do let me know when and what the outcome was?

The contract provisions are clear in respect of Provisional Sums. The contractor is not going to somehow walk off into the sunset with a pot of money because you haven't omitted the Provisional Sums. All will be calculated and properly addressed in the final account computations.

Moreover, the moment you omit all of the Provisional Sums, they are gone and you release the contractor from his responsibility in respect of the programme implications of Defined Provisional Sums.

You cannot reinstate a Provisional Sum once omitted, you can only issue a new instruction at a later date.

That instruction will not be for the expenditure of a Provisional Sum - you omitted it, remember? So, it stands as a new and isolated instruction.

So, where is the benefit to your client?

Not only that, but you have exposed your client to the potential of a claim for loss of OH&P, as we have already mentioned.

So, again, where is the benefit to your client?

Plus, you have told the contractor that he will not now be doing that work. So, the contractor is under no obligation to remind you of it, chase for information

required, or an instruction in respect of it, or even concern their pretty little head about it at all - it's gone!

So, once again, where is the benefit to your client?

Pet peeve mentioned, I feel better now. Have you ever considered this? What's your take on it?

9 A Final Point, 'Cos I Have To!

This document is provided for information purposes only. No warranty is provided or implied by it, and no liability shall be accepted in respect of any reliance placed upon it. For that, you have to pay me, which I'm sure you understand.

Notwithstanding this, I hope you find this document useful, informational, helpful and thought provoking.

I always welcome feedback - good, bad or indifferent. So why not drop me a DM through LinkedIn and let me know what you thought and any experiences you've had on such matters? No one knows everything about such matters, and I certainly don't claim to.

Thank you...

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Chief Executive

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