

# Construction briefing

## Reminder: Construction Act changes on 1 October 2011

Changes to the "Construction Act" 1996 (the Act) will come into effect on 1 October 2011. Although there are exceptions, the provisions of the modified Act will continue to apply to the majority of construction contracts and professional services contracts in England and Wales.

The changes affect:

- > Payment provisions
- > Right to suspend works/services
- > Rules relating to adjudication of disputes

Contracts covered by the Act made before and including 30 September 2011 will still be governed by the current rules but contracts made on or after 1 October 2011 will be governed by the new rules. The provisions of the modified Act will apply and override non-compliant contract provisions.

### Payment Provisions

As now, contracts must include an adequate mechanism for determining what payments are due and when. 'Pay-when-paid' provisions remain unenforceable. In addition, 'pay-when-certified' clauses (eg under a higher tier contract) and 'catch 22' clauses aimed at making the due date dependent on the issue of an employer payment notice are ineffective under the modified Act. There are limited exceptions relating to management contracts and certain insolvency circumstances.

The contract may specify whether the payer or the payee issues a payment notice. If the payee is to issue the payment notice and fails to do so, no entitlement will arise to that interim payment. The payment notice must be served even where the sum is zero. Where the payer should, but fails, to issue the payment notice, the payee may issue a payment default notice where it has not made an earlier application (in that case the application stands as the default notice). Where a payment default notice is served the final date for payment is extended (if an earlier application stands as the default notice the final date for payment remains unchanged). Withholding notices are replaced by pay less notices, which must set out the sum the payer considers actually due and the basis on which that sum is calculated. Times for service of notices remain broadly the same.

Payment notices and pay less notices cannot be combined and must be issued separately at the correct time by the payer. This is different to the current rules relating to payment notices and withholding notices. In order to withhold any sum the payer must issue a pay less notice within the requisite time (whether or not the payment notice is issued by the payer or the payee).

It will be vital for payers and payees and contract administrators to understand and operate the new rules correctly and within the correct time.

### Right to Suspend Works/Services

The right to suspend works/services for non-payment is extended to allow partial suspension. The 7 day notice remains unchanged. Also, there is entitlement to an extension of time and related loss and expense arising from a valid suspension.

### Adjudication of Disputes

There is no longer any requirement for contracts to be in writing. Contracts made by oral agreement may be adjudicated. This change will increase the importance of ensuring written contract terms are in place and keeping contemporaneous notes and diary entries of, for example, meetings and discussions regarding variations and compromises, etc.

The new provision to outlaw 'Tolent' clauses (eg to hold the referring party responsible for party costs and adjudicator costs) is not clearly drafted and advice should be sought on drafting contract terms giving the adjudicator power to allocate his fees.

The adjudicator is allowed to correct clerical and typographical errors in his decision after the event.

## General

Parties entering into contracts at the end of September and early October need to consider which regime they intend to apply to their contracts. Note, a main construction contract dated prior to 1 October 2011 will be subject to the current rules and sub-contracts dated on/after 1 October 2011 will be subject to the new rules. This can have undesirable consequences for the main contractor which may indirectly affect the employer and the project.

If not already done, your standard contract documentation will need updating. The main JCT forms have been updated to take account of the changes and are available in their new form. Changes to the NEC3 suite of standard contracts are in the process of publication and should be available shortly.

If you need advice, please contact the partner best known to you or contact Joe Bellhouse direct on 01235 836615 or [joe.bellhouse@bsdr.com](mailto:joe.bellhouse@bsdr.com).

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