



Risk Management Briefing

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The Construction Act 2009 - consequences on contract payment provisions

Introduction

CIC is publishing a second edition of the CIC Conditions to bring in the provisions of the Local Democracy, Economic Development and Construction Act 2009 ("the Act") which came into effect in England and Wales on 1 October 2011 and in Scotland on 1 November 2011.

This note gives a synopsis of the payment provisions as amended and then describes the amendments to the payment provisions of the CIC Conditions and PSC3 contract.

Construction contracts

The amended payment provisions apply to all construction contracts (except PFI sub-contracts) entered into after 1 October 2011 (or 1 November 2011 in Scotland). These contracts no longer have to be in writing. The provisions will therefore apply to most contracts entered into by consultants after the relevant date including novation agreements (as these create a new contract) but not generally collateral warranties or third party rights. It is therefore possible that there could be some contracts under the Construction Act 1996 and some under the 2009 Act in respect of the same project.

All provisions which relate to: entitlement to instalment, stage or periodic payments; also provisions providing an adequate mechanism for determining what payments become due when and; those providing for a final date for payment **are unchanged**. A construction contract has to provide for these matters or the Scheme provisions will apply insofar as the contract does not.

There are amendments which provide that:

- (i) *'pay when certified'* clauses are not an adequate mechanism;
- (ii) payment cannot be dependent on performance of obligations under another contract (except under a management contract).

Payment notices

The requirement on the payer to give a notice of payment has been replaced. The construction contract now has to provide for either the payer (or specified person on his behalf) or the payee to give a payment notice. If the contract does not so provide, the Scheme provides that the payer is to give the payment notice in the requisite form and within the correct time limit.

The payment notice has to be given no later than five days after the payment due date and specify the sum the payer (or payee in the case of a payee payment notice) considers to be due at the payment due date and the basis on which the sum is calculated.

The amount in the payment notice is the *'notified sum'*.

Failure of payer to give a payment notice

If the payer is required by the contract to give the payment notice and does not, or gives it late, the payee can then give a payee default notice containing the same information as is required in the payer payment notice and the final date for payment is postponed by the same number of days as the number of days after the payer payment notice should have been given that the payee default notice is given.

If, however, the contract requires or permits the payee to notify the payer of the matters required in a payment notice before the payer payment notice should have been given (for example, if the consultant's invoice contained the requisite information) then that can stand as the payee default notice and the final date for payment is not extended.

The amount in the payee default notice is then the *'notified sum'*.

Payment of *'notified sum'* and notice of intention to pay less

The payer has to pay the *'notified sum'* on or before the final date for payment unless he serves a notice of intention to pay less no later than an agreed period before the final date for payment. If there is no agreed period the Scheme provides for it to be seven days.

The notice has to be of the payer's intention to pay less than the notified sum and specify the sum the payer considers due on the date the notice is served and the basis on which that sum is calculated.

If such a notice is served the payer has to pay the amount if any in the notice of intention to pay less by the final date for payment. The amount in the notice to pay less can be zero.

Adjudicator decision

If an adjudicator decides that more than the sum in the payer payment notice or notice of intention to pay less should have been paid, that additional sum has to be paid within seven days from the date of the adjudicator's decision or the date which would otherwise have been the final date for payment, whichever is the later.

Insolvency of payee

If the payee becomes insolvent after the time for giving the notice of intention to pay less, the payer does not have to pay anything by the final date for payment.

Right to suspend performance

Where the payer fails to pay the notified sum or the amount if any in the notice of intention to pay less by the final date for payment, the payee has the right to suspend any or all of his obligations under the contract and the payer is liable to pay the payee a reasonable amount in respect of costs and expenses reasonably incurred by the payee as a result of the exercise of the right.

Any contractual time limits are also extended and include any consequences of suspension (e.g. de- and re-mobilisation time).

The right cannot be exercised unless the payee first gives the payer at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

Pay when paid

Making payment conditional on the payer receiving payment from a third party is still ineffective unless that third party is insolvent within the meaning of the Construction Act 1996 as amended.

The CIC payment provisions

The amendments to the CIC Conditions are to clause 3-8.

First, the invoice requirements in clause 3-8.3 have been extended so that the invoice also has to show the amount the consultant considers due at the payment due date and the basis on which those amounts have been calculated. This means that the payee has been required to give the payment notice – the Act requires the contract to stipulate whether the payer or payee is to give the notice – and that the invoice will stand as the payee payment notice as it will contain all the information required by the Act. Note: some additional information is also required: details of accrued instalments and other amounts that may be due, for example additional fees.

Clause 3-8.6.1 is unchanged. The due date for payment is still the date on which the client receives the invoice. So if the consultant sends his invoice in the correct form his payment notice will have been given 'no later than 5 days after the payment due date' as required by the Act.

The amendments to clause 3-8.6.2 then go on to state in terms that the invoice is the payment notice required by Section 110A(1) of the Act and under clause 3-8.6.3 that the amount that the client has to pay by the final date for payment (28 days after the due date) is the amount in the payment notice or (if less) the amount in any notice of intention to pay less given by the client.

The notice of withholding provisions in clauses 3-8.7 and 3-8.8 have been replaced by the notice of intention to pay less requirements in the Act and the client has to give this notice at least 7 days before the final date for payment, but not before the due date.

Clause 3-8.10 dealing with the consultant's right to suspend has been amended to refer to the notice of intention to pay less rather than the withholding notice and the consultant's rights to a reasonable amount in respect of costs and expenses reasonably and properly incurred in exercising this right to suspend have been added to that clause.

The PSC3 amendments

PSC3 has revised Option Y(UK)2 to bring in the new payment provisions.

The date on which payment becomes due and the final date for payment have not been changed. Payment becomes due seven days after the date of the consultant's invoice and the final date for payment is 14 days thereafter (although a different period could be stated in the Contract Data).

The consultant's invoice is now to be the notice of payment and is to specify the sum the consultant considers to be due at the payment due date. This is called '*the notified sum*'. The invoice has also to state the basis on which the amount is calculated and '*include details of the calculation in accordance with the contract*'.

This latter part (in italics) is in addition to what is required by S110A(3) and so consultants will need to be warned about this as their usual invoices could be Act-compliant but not PSC3-compliant, if details as to the calculation required are set out in the contract.

The notice of intention to pay less has to be given not later than seven days before the final date for payment. This in effect gives the client 7 days to decide whether or not he is going to serve such a notice.

The notice has to notify the amount the employer considers to be due and state the basis on which the amount is calculated and '*includes details of the calculation*'.

It is not made clear in the drafting that the amount considered to be due is to be that at the date the notice is served so this again could lead to unintentional non-compliance with the Act. The last part – '*... includes details of the calculation*' – is not required by the Act and so the same comment applies as above.

The amendment then states 'A Party pays the notified sum unless he has notified his intention to pay less than the notified sum'.

It would have been clearer if the amendment had actually provided that the employer had to pay the sum specified in the notice of intention to pay less rather than the notified sum as required by the Act. There does not seem to be an obligation to pay this lesser sum.

This briefing was compiled by Rachel Barnes of Beale & Co..

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