

Construction & Engineering

February 2010






Future Changes to the Construction Act: A Brief Guide

Changes to adjudication and payment notice procedures have come a step closer with the passage of the Local Democracy, Economic Development and Construction Act 2009.

When will it come into force?

The Act amends the existing Construction Act, but has not yet come into force. Before introducing the new Act, the Government intends to amend the accompanying Scheme for Construction Contracts. A draft of the new Scheme is to be issued for consultation shortly.

The Act will not be retrospective and will apply only to contracts entered into after a future date to be specified – which is likely to be several months, if not years, in the future.

| Change | | What it will mean for you |
|--|---|--|
| The Act will apply to all construction contracts whether in writing or not |  | It will be possible to adjudicate on disputes under oral contracts; and no matter how informal the contract, the new payment notice provisions must be followed. |
| Contract terms pre-determining which party pays the costs of any adjudication will be ineffectivealthough the contract can provide for the Adjudicator to determine which party pays the Adjudicator's fees |  | Clauses requiring the Referring Party to pay the costs of any adjudication regardless of outcome will no longer be effective. Parties will generally have to bear their own costs, unless they agree to allow the Adjudicator to award costs after the adjudication is underway. |
| A new payment notice regime will be introduced - highlights include: <ul style="list-style-type: none"> If the payer is required to issue a payment notice and fails to do so, the payee can issue its own notice - or can rely on its application for payment Withholding notices are abolished and replaced by section 111 notices |  | Payment notices will now have "teeth". If the Employer doesn't issue a notice on time, the Contractor will be able to issue his own, or the sum stated in the Contractor's application may become due. The Employer can still revisit what is due by issuing a " section 111 notice " within a stipulated time frame, stating the sum to be paid and any withholding (e.g. for liquidated damages or remedial costs). Construction contracts will need to be amended to comply with the new procedures - otherwise the Scheme will apply. |
| " Pay-when-certified " clauses will not be enforceable (subject to limited exceptions, e.g. for management contracting) |  | Equivalent project relief provisions in PFI sub-contracts will be ineffective . Construction contracts which include such clauses will need to be amended - otherwise, the payment terms in the Scheme will apply. |
| Suspension of part of the works will be possible; and the Contractor will have an automatic right to recover time and reasonable costs of suspending |  | Partial suspension of the works will be a powerful tool for Contractors looking to secure payment without suspending work completely. |

This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

If you would like any further information on these topics, please contact the person at D&W with whom you normally liaise, or the following specialist:

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