

Following our recent seminar on the changes to the Construction Act, we are pleased to provide a reference document for the coming months to assist you in planning changes to your internal subcontract documentation and payment procedures.

The following is a consolidation of the changes to the Housing Grants Construction and Regeneration Act 1996 ('HGCRA') PART II as amended by the Local Democracy Economic Development and Construction Act 2009 ('LDEDCA').

Additions to the HGCRA are shown **thus** with deletions shown ~~thus~~.

104 Construction contracts – (NO CHANGE)

- (1) In this Part a “construction contract” means an agreement with a person for any of the following—
 - (a) the carrying out of construction operations;
 - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
 - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement—
 - (a) to do architectural, design, or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- (3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the [1996 c. 18.] Employment Rights Act 1996).
- (4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.
No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.
- (5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.
An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).
- (6) This Part applies only to construction contracts which—
 - (a) are entered into after the commencement of this Part, and
 - (b) relate to the carrying out of construction operations in England, Wales or Scotland.
- (7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

105 Meaning of “construction operations” – (NO CHANGE)

- (1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions—
 - (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
 - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
 - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
 - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
 - (f) painting or decorating the internal or external surfaces of any building or structure.
- (2) The following operations are not construction operations within the meaning of this Part—
- (a) drilling for, or extraction of, oil or natural gas;
 - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
 - (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—
 - (i) nuclear processing, power generation, or water or effluent treatment, or
 - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
 - (d) manufacture or delivery to site of—
 - (i) building or engineering components or equipment,
 - (ii) materials, plant or machinery, or
 - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;
 - (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.
- (3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.
- (4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106 Provisions not applicable to contract with residential occupier

- (1) This Part does not apply—
- (a) to a construction contract with a residential occupier (see below), ~~or~~
 - ~~(b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.~~
- (2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.
- In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose—
- “dwelling-house” does not include a building containing a flat; and

“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

- (3) The Secretary of State may by order amend subsection (2).
- (4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106A Power to disapply provisions of this Part

- (1) The Secretary of State may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations (not being operations in Wales) which is specified in the order.
- (2) The Welsh Ministers may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations in Wales which is specified in the order.
- (3) The Scottish Ministers may by order provide that any or all of the provisions of this Part, so far as extending to Scotland, shall not apply to any description of construction contract which is specified in the order.
- (4) An order under this section shall not be made unless a draft of it has been laid before and approved by resolution of—
 - (a) in the case of an order under subsection (1), each House of Parliament;
 - (b) in the case of an order under subsection (2), the National Assembly for Wales;
 - (c) in the case of an order under subsection (3), the Scottish Parliament.”

107 Provisions applicable only to agreements in writing

- ~~(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.~~
- ~~(2) There is an agreement in writing—
 - ~~(a) if the agreement is made in writing (whether or not it is signed by the parties),~~
 - ~~(b) if the agreement is made by exchange of communications in writing, or~~
 - ~~(c) if the agreement is evidenced in writing.~~~~
- ~~(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.~~
- ~~(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.~~
- ~~(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.~~
- ~~(6) References in this Part to anything being written or in writing include its being recorded by any means.~~

108 Right to refer disputes to adjudication

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose “dispute” includes any difference.
- (2) The contract shall **include provision in writing so as to—**
 - (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
 - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
 - (e) impose a duty on the adjudicator to act impartially; and
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide **in writing** that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- (3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.**
- (4) The contract shall also provide **in writing** that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
 - (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.
 - (6) For England and Wales, the Scheme may apply the provisions of the [1996 c. 23.] Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.
For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

108A Adjudication costs: effectiveness of provision

- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
- (2) The contractual provision referred to in subsection (1) is ineffective unless—
 - (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
 - (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.

109 Entitlement to stage payments

- (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—
 - (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
- (4) References in the following sections to a payment **provided for by the contract** ~~under the contract~~ include a payment by virtue of this section.

110 Dates for payment

- (1) Every construction contract shall—
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) provide for a final date for payment in relation to any sum which becomes due.
- The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
- (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—
- (a) the performance of obligations under another contract, or
 - (b) a decision by any person as to whether obligations under another contract have been performed.
- (1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).
- (1C) Subsection (1A) does not apply where—
- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
 - (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.
- (1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.
- ~~(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if—~~
- ~~(a) the other party had carried out his obligations under the contract, and~~
 - ~~(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.~~
- (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) ~~or (2)~~, the relevant provisions of the Scheme for Construction Contracts apply.

110A Payment notices: contractual requirements

- (1) A construction contract shall, in relation to every payment provided for by the contract—
- (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
 - (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
- (2) A notice complies with this subsection if it specifies—
- (a) in a case where the notice is given by the payer—
 - (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated;
 - (b) in a case where the notice is given by a specified person—
 - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies—

- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
 - (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (6) In this and the following sections, in relation to any payment provided for by a construction contract—
- “payee” means the person to whom the payment is due;
 - “payer” means the person from whom the payment is due;
 - “payment due date” means the date provided for by the contract as the date on which the payment is due;
 - “specified person” means a person specified in or determined in accordance with the provisions of the contract.

110B Payment notices: payee's notice in default of payer's notice

- (1) This section applies in a case where, in relation to any payment provided for by a construction contract—
- (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
 - (b) notice is not given as so required.
- (2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
- (3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
- (4) If—
- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—
 - (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated, and
 - (b) the payee gives such notification in accordance with the contract,
- that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

111 Requirement to pay notified sum

- (1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
- (2) For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means—
- (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
- (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

- (4) A notice under subsection (3) must specify—
- (a) the sum that the payer considers to be due on the date the notice is served, and
 - (b) the basis on which that sum is calculated.
- It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
- (5) A notice under subsection (3)—
- (a) must be given not later than the prescribed period before the final date for payment, and
 - (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
- (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
- (7) In subsection (5), “prescribed period” means—
- (a) such period as the parties may agree, or
 - (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
- (8) Subsection (9) applies where in respect of a payment—
- (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
 - (b) a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
- (9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
- (a) seven days from the date of the decision, or
 - (b) the date which apart from the notice would have been the final date for payment, whichever is the later.
- (10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where—
- (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
 - (b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
- (11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.

~~111 Notice of intention to withhold payment~~

- ~~(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.~~
- ~~(2) To be effective such a notice must specify—~~
- ~~(a) the amount proposed to be withheld and the ground for withholding payment, or~~
 - ~~(b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.~~
- ~~(3) The parties are free to agree what that prescribed period is to be. In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.~~
- ~~(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than—~~
- ~~(a) seven days from the date of the decision, or~~
 - ~~(b) the date which apart from the notice would have been the final date for payment, whichever is the later.~~

112 Right to suspend performance for non-payment

- (1) ~~Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given,~~ the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of **any or all of** his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).
- (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of **the sum referred to in subsection (1)** ~~the amount due.~~
- (3A) **Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.**
- (4) Any period during which performance is suspended in pursuance of, **or in consequence of** the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.
Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113 Prohibition of conditional payment provisions

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- (2) For the purposes of this section a company becomes insolvent—
 - (a) on the making of an administration order against it under Part II of the [1986 c. 45.] Insolvency Act 1986,
 - (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,
 - (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
 - (d) on the making of a winding-up order under Part IV or V of that Act.
- (3) For the purposes of this section a partnership becomes insolvent—
 - (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or
 - (b) when sequestration is awarded on the estate of the partnership under section 12 of the [1985 c. 66.] Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.
- (4) For the purposes of this section an individual becomes insolvent—
 - (a) on the making of a bankruptcy order against him under Part IX of the [1986 c. 45.] Insolvency Act 1986, or
 - (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.
- (5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.
- (6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.
In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.