

Amendments to the Construction Act

The amendments to the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) came into force on 1st October 2011. The changes will apply to any construction contract entered into on or after that date. If a construction contract is entered into before this date it will continue to be governed by the old rules.

The key changes are as follows:

Contracts in writing: it will no longer be necessary for construction contracts to be in writing in order to be covered by the Act. This change is likely to increase the number of disputes in construction projects that are referred to adjudication.

Adjudication cost allocation: parties will no longer be able to incorporate clauses into their construction contracts which set out that a particular party will bear the cost of any adjudication proceedings. Such clauses will be invalid. The parties may, however, include clauses in the contract that detail how the adjudicator's fees and expenses will be allocated amongst the parties. If the contract does not expressly stipulate how the adjudicator's fees will be allocated, the adjudicator will have the power to allocate his fees and expenses between the parties as he sees fit: typically the losing party pays.

Payment procedure: whilst the "due date" and the "final date" requirements for payment are unaffected, the changes have resulted in the service of payment notices on the payee becoming more payer-led. Furthermore, the current "withholding" notice has been replaced with a "pay less" notice, which must be issued no later than 7 days before the final date of payment (subject to any other period expressly provided for in the contract).

Contractor insolvency: if an employer wishes to have the ability to withhold monies after a contractor/consultant becomes insolvent, this must be expressly set out in the construction contract.

Pay-when-paid clauses: under the previous regime, in some instances main contractors were circumventing the prohibition, with respect to pay-when-paid clauses, by inserting "pay-when-certified" clauses; whereby the main contractor would link payment (to its sub-contractors) directly to the certification of payment under the main contract between the employer and contractor. The changes to the Act make it expressly clear that payment

under a construction contract cannot be linked to or conditional upon performance of another contract.

Release of retentions to sub-contractors: the changes expressly state that the release of retentions to a contractor's sub-contractors (under sub-contracts) cannot be made contingent upon the issuing of the certificate of making good defects or payment of the main contractor's retention (under the main contract). This change will be welcomed by sub-contractors in the industry.

Suspension: the Act used to allow contractors (and consultants) to suspend performance of the works/services in the event they are not paid in accordance with the Act. The changes to the Act now entitle a contractor to an additional statutory right to recover remobilisation and demobilisation costs and any analogous costs associated with the suspension, together with an extension of time in respect of the suspension.

We would recommend that developers/employers and main contractors ensure that their forms of appointment and building contracts (including amendments to standard form building contracts) are reviewed and amended to ensure that the same are consistent with the changes to the law.