

building blocks

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hello

welcome to the
winter 2010 edition
of *Building Blocks*

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editorial



Welcome to this fourth edition of *Building Blocks* for 2011.

The Housing Grants Construction and Regeneration Act 1996 (commonly called the Construction Act) has been amended by the Local Democracy, Economic Development and Construction Act 2009. The Scheme for Construction Contracts (England and Wales) Regulations 1998 has also been amended. The Scheme will apply if there is no provision in the contract for compliance with either adjudication and/or payment provision. The changes came into force on 1 October 2011 and are big news for the construction industry. This edition concentrates on those changes.

Hot topics provides details of what amendments the publishers of the standard forms have made to reflect the new Construction Act. Articles by Stuart Thompson, Ron Plascow, Martino Giaquinto, Laura Taylor and our guest author, Robert Alflatt from R G Carter look at the effect of the changes from the perspective of the employer, the contractor, the sub-contractor and the consultant.

In keeping with last year we have also included a festive crossword. The answers are all contained somewhere in the articles and there is a prize of a New Year hamper.

The end of the year is a time for reflection on the past year. This year we have held a number of successful seminars on topics as diverse as insolvency in the construction industry to the changes to the Construction Act. In the New Year we will be holding seminars in our Birmingham, Cambridge, London and Norwich offices on "NEC Z clauses – Are they necessary?" and in Cambridge and London on "Insurance provisions and construction contracts". If you are interested in attending either of these seminars please email rachel.snow@mills-reeve.com.

This year has also seen the successful launch of our construction blog, www.practical.completion.co.uk. You will find useful legal tidbits in relation to the construction industry on the blog, including quite a few blogs about the changes to the Construction Act.

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hot topics

This edition of *Building Blocks* concentrates on changes to the Construction Act that came into force on 1 October 2011



The changes to the Construction Act apply to all construction contracts signed after 30 September 2011. They include:

- the right to adjudicate, which now applies to all construction contracts whether they are in writing or verbal;
- a new payment regime, which applies to all construction contracts whether they are in writing or verbal;
- the right of the receiving party to serve a default notice. If the paying party fails to serve a payment notice (the sum stated in the payment notice or default notice is payable unless something called a pay less notice is served by the paying party);
- the replacement of the withholding notice with the pay less notice, which must state the sum the paying party considers to be due and the basis on which that sum is calculated;
- the widening of the suspension provisions; and
- the outlawing of pay-when-certified clauses.

The publishers of the standard forms have made amendments to reflect the changes. Some of the changes, especially in relation to payment, are fundamental, so it is important that up to date forms are used or amendments are included.

JCT

In September 2011 JCT issued a full suite of contracts, primarily to take into account changes to the Construction Act. These are available from the publishers and the JCT's usual stockists. For more information go to: www.jctltd.co.uk

NEC 3

Unlike JCT, NEC has not chosen to issue a new suite of contracts. It has simply issued amendments to its existing contracts. These were also issued in September 2011.

The amendments to the NEC 3 Engineering and Construction Contract are a little over half a page long. The amendments to the NEC 3 Engineering and Construction Subcontract are a page long. There are also amendments to the Short Contract, Short Sub Contract, Professional Services Contract, Term Services Contract and Term Service Short Contract, but not to the Supply Contract.

For more information go to: www.neccontract.com

PPC2000 Amendments

The Association of Consultant Architects (ACA) has published a loose leaf updater containing a set of amendments, which should be incorporated into the PPC2000.

The ACA has said that these amendments will be incorporated into the published form when it is next updated and republished.

For more information go to: www.ppc2000.co.uk

GC Works

No amendments have been issued to GC Works and as we understand it, none are planned. Use this form with caution as it will need to be amended.

RIBA

RIBA published amendments in October 2011 and free copies are available to download from each of its agreement product pages. Alternatively, when purchasing a printed version of one of the RIBA appointments 2010, a copy of the relevant amendments is included.

For more information go to: www.ribabookshops.com

ACE

ACE has updated a number of agreements relating to design; advisory, investigatory and other services; design and construct; sub-consultancy and adjudication.

For more information go to: <http://agreements.acenet.co.uk>

IChemE

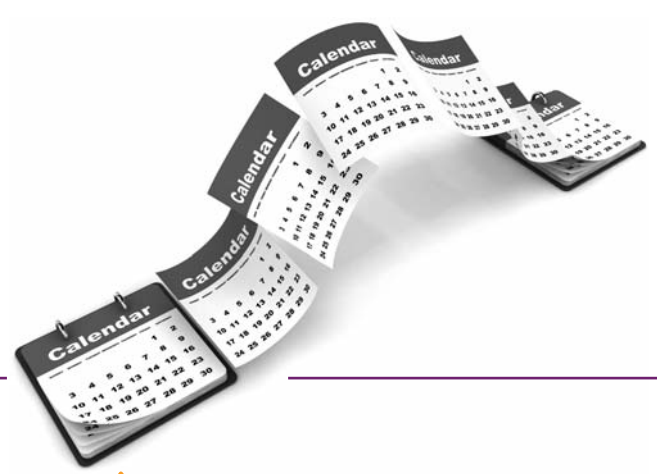
IChemE has issued amendments to its forms of contract. The amendments can be freely accessed from IChemE's website.

For more information go to: www.icheme.org

IMechE and IET

IMech, alongside the Institute of Engineering and Technology, has published Revision 5 to Model Form MF/1, which is accompanied by a commentary.

For more information go to: www.theiet.org



the Construction Act: an employer's perspective

The amendments to the Housing Grants, Construction and Regeneration Act 1996 has changed the payment regime. Employers may want to check their construction contracts to make sure that they address the issues.

The beginning: the contractor's application for payment

It is now possible for the contractor's application for payment to be deemed to be the payment notice. The JCT 2011 contracts allow this. Some employers are unwilling to permit the application to stand as the payment notice, because it establishes the notified sum and that sum will have to be paid in full unless the employer serves a pay less notice. Employers are concerned that this gives the contractor too much influence in the payment process. Employers are amending construction contracts and professional appointments to make it clear that the application for payment shall not be regarded as the payment notice.

The middle: the payment notice and default payment notice

For most construction projects, the payment notice is likely to be the most important notice in the payment cycle, as the employer will be able to take into account matters such as contra charges and LADs when determining the notified sum. Employers should also be aware that for each payment notice they will have to set out the basis on which the notified sum is calculated. Therefore the employer and its professional team will

have to spend more time working out the notified sum. However, under the Act the employer must issue an effective payment notice within five days of the due date. Consequently, employers are building in more time within the payment cycle by stating that the due date shall be deemed to be 14 or 28 days after receipt of a valid application for payment. If the employer does not issue an effective payment notice in time, the contractor is entitled to issue a default payment notice and that notice will establish the notified sum. Employers should be wary of those construction contracts that state that the application for payment will be regarded as the default payment notice.

Consequently, employers are amending construction contracts to confirm that if the employer does not issue an effective payment notice within five days of the due date, the contractor must issue a separate default payment notice. Some employers are also attaching a pro forma default notice to the contract and insisting that contractors use that form. They are also insisting that the default notice is served at a particular address. Finally, the amendments we have seen also make it clear that the contractor's default notified sum cannot exceed the value of the relevant application for payment.

The end: the pay less notice and suspension

If the employer wishes to pay less than the notified sum, it must serve an effective pay less notice before the final date for payment. Under the Act, employers are

free to set their own time periods and most state that the final date shall be 28 days after the due date and that the pay less notice should be served no later than two days before the final date. Other contracts are not as generous – eg, JCT 2011 contracts have a 14 day time period. Employers should also note that the pay less notice is very different from a withholding notice. Therefore they should not use out of date precedents.

Under the Act, if the employer does not pay the relevant sum by the final date for payment the contractor can suspend some or all of its obligations. The contractor is entitled to receive an extension of time and its reasonable costs and expenses incurred as a result of the suspension. Therefore, this is a far more effective right for contractors and consultants (eg, a consultant may choose to suspend attending site meetings). Consequently, employers are amending contracts to make it clear that the right to suspend arises only after the contractor or consultant has given the employer at least 21 days' notice and, as with the default payment notice, employers are also insisting that the suspension notice is served at a particular address.

Conclusion

The changes to the Act require the employer to be more organised. Also, some standard form contracts favour the contractor and the employer may wish to amend those contracts so that they are fairer and easier to administer for both parties.

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the Construction Act: the contractor's perspective

The changes to the Construction Act will, like most main contractors in the construction industry, affect our day to day operations.

Many commentators have focused on the substantive changes embodied within the Local Democracy and Economic Development Act, namely verbal contracts, outlawing pay-when-certified and the new payment regime.

The immediate key issue for us is the transitional period when both the original Construction Act and the changes to the Act are both in force. This is relatively straightforward to determine when dealing with contracts between us and our clients but when it comes to the vast number of sub-contracts (governed in part by the pre and post 1 October 2011 regime) this is more of a challenge.

It will be important for us to check when contracts are entered into, particularly during the early stages of the new legislation, so that we know whether it is a pre or post October contract and whether or not the changes to the Act therefore apply, and where the changes to the Act do apply, how they are dealt with within the contract. Obviously where newly published standard forms of contract are adopted without amendment this is relatively straightforward. The difficulty we perceive is when these newly published standard forms (or pre existing standard forms) have bespoke amendments.

We always try to avoid verbal contracts, and hence the changes to the Act should not affect us too much. With our clients this is usually fairly easy to avoid. So far as our sub-contractors are concerned, we will, as a result of the changes to the Act, be even more vigorous in ensuring that all our contracts are in writing.

We think we have a very good relationship with our supply chain but it is important for us to ensure that we also have in place an adequate and clear procedure for payment and that our sub-contract complies with the new Act. In the interim we decided to review and amend our standard forms of sub-contract (based on JCT 2005 sub-contract) to ensure compliance with the new legislation. This is now being used for sub-contracts post October 2011 while we formulate a new sub-contract around the most up-to date published forms.

The objective of the Construction Act was to improve cash-flow and the availability and efficiency of dispute resolution. Its operation has been clarified by the courts and in many cases we sort of, more or less, know what the answer is. The problem now is the changes to the Act could create uncertainty, potentially with it bring its own problems and/or open up some of these previously understood propositions.

Time will tell.

R G Carter, founded in 1921, is a family owned building contractor servicing national and regional clients (both private and public) from a network of offices based throughout Central and Eastern England. The business is founded on traditional values of honesty, trust and the development of long term relationships with its clients and suppliers.





the Construction Act: a consultant's perspective



It has not been widely publicised, but the Local Democracy, Economic Development & Construction Act 2009 (new Construction Act for short), which came into force on 1 October 2011 has altered the landscape for consultants. There will be plenty of people who disagree with that statement, who believe things, in the main, remain the same.

Let me try and support my suggestion.

So what am I on about? Let's take two issues (1) the involvement of the "specified person" and (2) suspension.

Specified person

The specified person, a creature spawned by section 110A of the new Construction Act, is a third party who may give or receive payment notices on behalf of the paying party and who may also give a pay less notice on behalf of the paying party.

The specified person is either specified or determined in accordance with the provisions of the contract. Where a consultant is specified then that is straightforward, but it may be possible for a consultant to unwittingly become a specified person, by being determined as the specified person in accordance with the contract. That is the position architects and contract administrators may find themselves in under JCT 2011.

Hang on you may say, so what?
Well, turn to the payment notice that

sets out the amount the payer or payee considers to be, or to have been due, at the payment due date and the basis on which this is calculated. If not issued, a "Default Notice" becomes the payment notice and the initial application for payment or invoice submitted may be treated as the "Default Notice".

In the "real world" contractors work with the employer's quantity surveyor/valuer to value the worth of their work. An application is assessed by the quantity surveyor and that feeds through to the contract administrator, who issues the appropriate certificate which triggers the obligation to pay.

Will the contractor now insist its application to the quantity surveyor/valuer cannot be altered so the clock is ticking? And what if the specified person fails to serve, or at the very least fails to advise the employer, to serve a payment notice? Are they negligent? I hear you say "that can't be right, he's talking rubbish". All I would do is caution you to make it clear in the preliminaries or specification who is to issue or receive a payment notice, and who the specified person is (if anyone).

Suspension

Previously suspension was an all or nothing type arrangement. You only suspended your services if you were feeling brave and had given a seven day warning notice. We used to advise consultants to tread very carefully

before suspending their services; suspension was rarely evoked.

Now a consultant (or indeed a contractor) can suspend any or all of its obligations.

Here is the dilemma – does a consultant really want to suspend part of its services or works? If it suspends part, and has not got the justification for doing so is it going to be in worse trouble than if it suspended the lot? If a consultant runs a "go slow" campaign until the payment problem has been sorted out, refuses to attend meetings or provide information, the project could be put in jeopardy. As a consultant you may feel that you will never suspend your services unless the position is clear cut, but then when it is going to be so clear cut that it is easy to justify suspension?

You should not forget that apart from the employer/consultant relationship, suspension applies down the food chain between consultant/sub-consultant. This could be particularly awkward if you are a lead consultant employing other consultants who may want to be paid irrespective of your own position.

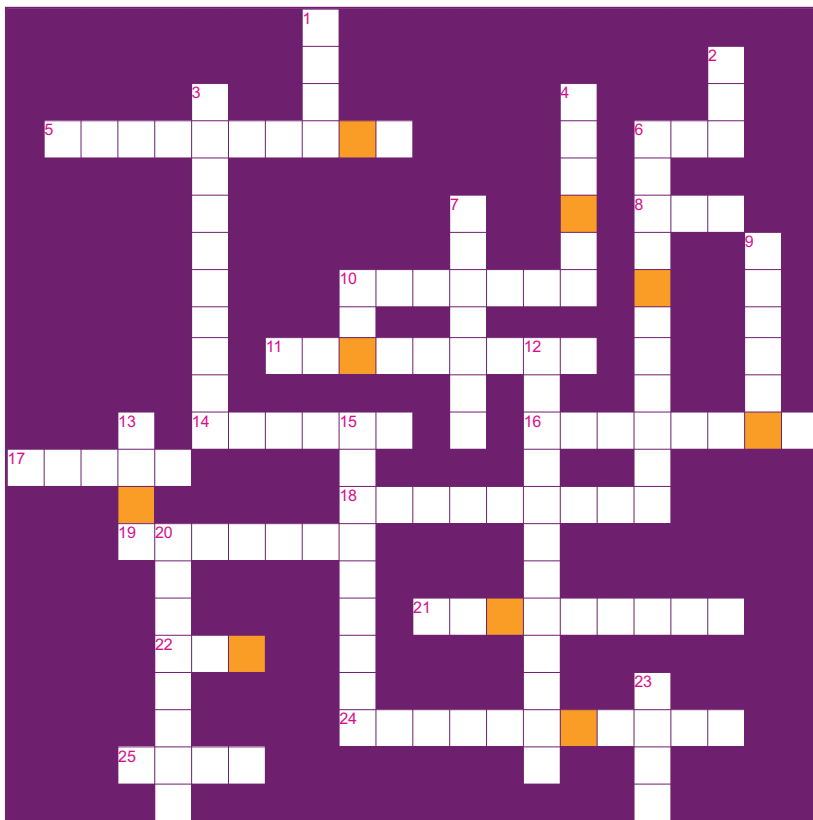
I leave it to you and your insurers to judge if the new Construction Act has made life more risky!



festive crossword

For your chance to win a New Year hamper just complete the crossword and find the hidden Christmas-related words by rearranging the letters in the orange squares. The answers to the crossword can all be found in the *Building Blocks* articles. Email the hidden words and your contact details to Rachel Snow at rachel.snow@mills-reeve.com by Friday 6 January 2012.

Hidden words: _ _ _ _ _



Across

5. Any one of a group of people who may be more affected by this Act than they might think (10)
6. One of the main divisions of a play or opera (3)
8. Discharge a debt (3)
10. [.....]110 A, 110B and 111 (7)
11. Government by all the people and part of the official name of the legislation that recently introduced the changes to payment provisions in the construction industry (9)
14. A payless [...]? (6)
16. (and 10. down) What the amount set out in the payment notice becomes (8) (3)
17. Informal word for a pub close to home. Also part of the official name of the legislation that recently introduced the changes to payment provisions in the construction industry (5)

18. A sum of money held until defects are rectified (9)
19. The type of notice a receiving party can serve if the paying party fails to serve a payment notice (7)
21. The person, who can serve a payment notice in place of the paying party (9)
22. The acronym for the organisation whose suite of contracts include a Short Contract, a Short Sub Contract and a Professional Services Contract (3)
24. A significant event, occurrence or change. Also part of the official name of the legislation that recently introduced the changes to payment provisions in the construction industry (11)
25. Tick tock? (4)

Down

1. The acronym for a professional body whose members are involved in the construction industry (4)
2. The acronym for the organisation which issued a complete new suite of contracts to take into account the recent legislative changes to the construction industry (3)
3. This applies down the food chain (10)
4. An individual human being (6)
6. A contractor's [.....] for payment (11)
7. The changes to payment provisions apply to all contracts [.....] into on or after 1 October 2011 (7)
9. The procedure that applies if there is no provision in the contract for compliance with either adjudication and/or payment provisions (6)
10. See 16 across (3)
12. The industry that *Building Blocks* is aimed at (12)
13. Pay-when- [.....] clauses were abolished by the Housing Grants Construction and Regeneration Act 1996 (4)
15. Pay-when- [.....] clauses were abolished by recent amendments to the Housing Grants Construction and Regeneration Act (9)
20. Adequate to pay or recoup expenditure with some profit. Also part of the official name of the legislation that recently introduced the changes to payment provisions in the construction industry (8)
23. The opposite of more (4)

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the Construction Act: a subcontractor's perspective

With the amended Construction Act now in force, how does the future look for subcontractors entering into contracts on or after 1 October 2011?

The main change concerns section 110 of the Construction Act, which relates to payment and introduces provisions restricting conditional payment clauses.

With the exception of insolvency, the original Construction Act ("the Act") provided that a contractor, while awaiting payment from an employer, could not withhold payment to a subcontractor (ie pay-when-paid).

However, pay-when-certified clauses were still legal. This resulted in an array of cash flow issues for subcontractors.

Under the amended Act, a contractor is now also prohibited from imposing a pay-when-certified clause upon a subcontractor.

JCT has issued a 2011 sub contract form that supersedes the 2005 form. The 2005 version contained a pay-when-certified provision in relation to the payment of the last tranche of retention. In order to comply with the

changes to the Act, the new 2011 sub contract provides that the final tranche of retention will be issued to the subcontractor six months after the end of the Rectification Period, as opposed to when the Certificate of Making Good Defects has been issued under the main contract (which was the case under the 2005 version).

The burden of ensuring that the final tranche is released subsequent to the issuing of the certificate therefore transfers from the subcontractor to the contractor. Contractors will inevitably have to fund more payments; subcontractors should anticipate that contractors may propose to extend the payment period from 6 months to 12 months to allow for payment under its contract with the employer to be received.

These long awaited amendments aim to address some of the issues faced by subcontractors, such as improving the delays and difficulties some experience in receiving payment.

