Update on the August 2017 Editions of the RIAI Yellow and Blue Forms of Construction Contracts

In August of this year, the RIAI released new editions of the Yellow and Blue Forms of Construction Contracts (“the 2017 Editions”). The RIAI also produced a Practice Note for contract users to explain the background and rationale for the changes to the 2017 Editions.

The revised 2017 Editions update the 2012 Yellow and Blue Forms in order to address the enactment of both the Building Control (Amendment) Regulations 2014 (BCAR) and the Construction Contracts Act 2013 (CCA).

The 2017 Editions have been reviewed to ensure they respect the provisions of BCAR and the CCA. They have also been reviewed to ensure consistency with the CCA (rather than incorporating all its provisions). The 2017 Editions contain five main changes to that of the 2012 Editions. The changes have been kept simplified and to a minimum on account of the automatic application of the provisions of the CCA to construction contracts.

The main changes are as follows:

1. The identity of the parties

   This change can be found at the signing and sealing section on page 4 of the 2017 Editions. New replacement text has been added to assist those persons completing the forms to identify the contracting parties with greater clarity. A contractor and employer signing up to the 2017 Editions will now have to furnish the company registration number and registration address (if a company) or the equivalent if registered in another country.
It is advised that two copies of the contract are completed identically. One executed copy should be retained by the employer and one retained by the contractor. The architect should also keep a copy of the completed, executed contract so to have own access to the contract particularly given his/her role as contractor administrator under the RIAI contracts. In carrying out that role, he/she must be capable of advising the contracting parties on their contractual rights and obligations and must also be capable of implementing the administrative procedures set out in the particular contract. Therefore, whilst the architect as contract administrator is not a party to the RIAI contract per se, he/she nevertheless regulates considerable areas of it and on that basis it is important that a copy of the executed contract is kept close to hand.

2. New definition of “The Works” on page 5 of the 2017 Editions

In the definitions section of the 2017 Editions there is a new Clause 1(d) to provide for the definition of “The Works”. This expands on the description of the Works in the Articles of Agreement. This new definition gives specific recognition to BCAR which has implications for the allocation of contractual responsibilities and duties between the contracting parties and the contractor’s team of specialists and suppliers in terms of quality control, certificates etc.

The new definition means that any references in the 2017 Editions to execution and completion of the Works by the contractor shall be deemed to include compliance with the requirements of BCAR and the Building Control Regulations (where applicable) and with the Code of Practice for Inspecting and Certifying Buildings and Works (2016).

3. Amendments to Condition 38, Avoiding and Resolving Disputes

There have been a few changes to Clause 38 in the 2017 Editions. The revised clause is also easier to read.

The title of Clause 38 has been changed from ‘Disputes Resolution’ to ‘Avoiding and Resolving Disputes’. This change is to reflect the importance and growing support for parties to resolve disputes through early resolution or negotiation and to avoid the escalation of disputes if possible.

The wording of Clause 38(a) providing for conciliation has changed. The word “shall” is replaced with “should” to reflect a more consensual process. Furthermore, words have been added to this clause to support an attempt by the parties to first seek to resolve a dispute by negotiation.
and thereafter to consider conciliation before recourse to statutory
Adjudication (under the CCA) or arbitration.

The RIAI have published Conciliation Guidelines and Procedures 2016 (CGP) which sets out the process for conciliation and the provisions contained in this document shall apply to the conciliation as set out in this Clause. The Clause states that the CGP shall apply. These Guidelines focus essentially on a consensual mediation type process for the resolution of disputes. The CGP makes it clear that Clause 38 does not in any way interfere with a party’s right to proceed to statutory adjudication under the CCA, arbitration or the courts if there is no arbitration clause. The CGP also state that the CCA does not inhibit the right of the parties to agree to avail of conciliation.

A review of the CGP is planned in light of the Mediation Act 2017. The CGP is available free of charge from the RIAI and can be used with any construction form of contract where the parties agree. It can be used in disputes arising under the Conditions of Engagement of Consultants.

The wording of Clause 38(b) providing for arbitration has been simplified to reflect best practice under the Arbitration Act 2010. Clause 38(b) is shortened and easier to read in light of this revised wording.

Clause 38 does not expressly provide for statutory adjudication under the CCA as this was not seen as necessary. As this is a statutory scheme already covered in the CCA it applies to all construction contracts entered into after 25 July 2016 irrespective as to whether or not the parties limit or exclude its application. Parties have the statutory right to refer any dispute relating to payment under the CCA to adjudication or indeed parties may prefer try to first resolve payment disputes and/or otherwise through conciliation as arising under the 2017 Editions.

4. Amendments to address the CCA

Parties to a construction contract may not limit or exclude the application of the CCA – it applies regardless. In light of this, the amendments to the 2017 Editions have been kept to a minimum. However, amendments have been made to the 2017 Editions to ensure consistency with the terms of the CCA (particularly notices and payment claim notices) which include:

**Notices:** The CCA provides for the delivery of a number of statutory notices such as payment claim notices, response notices, suspension notices, notices of intention to refer the payment dispute to adjudication etc. The CCA states that parties to a construction contract can agree on
the manner of delivery of such notices. The purposes of the changes in the 2017 Editions are to distinguish the importance of a notice under the CCA from other written communications and notices in the ordinary sense under the contract.

In the Articles of Agreement there is a new Article 5 (Notices under the CCA) which serves to provide for clarity and agreement on the manner of effective delivery of a statutory notice as provided for in the CCA. The Articles state that all notices arising under the CCA are to be delivered by registered post. This new Article 5 further states that a payment claim notice issued under section 4 of the CCA can also be delivered by email (to the email address as stated in the Appendix) They are delivered by the contractor to the architect. This change is to bring the delivery of notices in line with the CCA provisions.

There is also an added footnote to state that as a matter of good practice any notice delivered under the CCA should clearly state what type of notice it is (e.g. a payment claim notice) and to what section of the CCA under which it is being issued.

The delivery of any other notices under the contract (not being notices under the CCA) or documents are delivered as normal under the provisions of the contract.

**Payment:** The principal function of the CCA is the regulate payments under construction contracts by imposing a requirement that such contracts expressly provide for the amounts of all interim and final payments (or adequate mechanisms to determine them).

As a result, Articles 1 and 2 and mainly Clause 35 of the 2017 Editions relating to certificates and payments have been revised to ensure consistency with the CCA (alongside entries in the Appendices, which will be bespoke to each contract). The Articles and Clause 35 provide for the amount of each interim payment, the amount of the final payment and an adequate mechanism for determining these amounts to be consistent with section 3 of the CCA. The new entries in the Appendix coupled with Clause 35 provide for payment claim dates, the period between the payment claim date and the payment due date.

The Appendix has been amended to provide that the period for interim certificates is now as a default “one calendar month” as opposed to 4 weeks which is to convenience and to be consistent with the CCA.

Architects, employers and contractors are advised to arrange for the exchange of a record of the actual date of possession of the site (or part where it is sectional) and to keep this safe on the project file.
where it is sectional) and to keep this safe on the project file. Such dates are important as regard the later dates which kick off thereafter.

Clause 35(b) now states that the progress statement may also include the payment claim notice at the contractor’s election. An added footnote states that as a matter of good practice if such notice is included it should clearly state it is a payment claim notice as issued under section 4 of the CCA.

Explanations related to payment differences: There is also a further change to reflect the requirements of the CCA which has an important consequence on those administering the contract (for example, architects).

Condition 35(b) has been further amended to the effect that a contractor is now automatically entitled to an explanation from the architect where a certified payment differs from the amount sought by the contractor in a progress statement. Previously the contractor had to request this first before an obligation fell on the architect. The net effect of this new change means that explanations will now in turn be required from QS’s and other design team consultants who make recommendations to the architect on quality and compliance with drawings, design etc.

The architect will have to collate these explanations in good time if payments are not going to be as the contractor expected because the obligation will automatically fall due on the architect. This is an important change for architects.

It is stated in the Practice Note that the reason for this change is to reflect the influence of the CCA on the contract administration in that basic information will be required from employer to contractor and vice versa when payments are claimed or withheld. The contractor is entitled to an explanation from the employer if an amount in a certificate for payment is different to that which is sought in the payment claim notice – hence the introduction to this automatic entitlement for the contractor in Clause 35(b).
Conclusion

The above key changes may not be many but they are important in terms of ensuring compliance with the terms of the contract and related legislation now in force. The changes will require the contracting parties and indeed the architect to make some tweaks to the manner in which they apply the contract on a practical level.

If you are a contracting party or a consultant undertaking a project under the 2017 Editions then you should have a look at how these changes will apply in practice as this may assist in minimising the potential for claims down the line.

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