GOVERNMENT PUBLISHES NEW SCHEME FOR CONSTRUCTION CONTRACTS

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The Department for Business, Innovation and Skills (“BIS”) has today published its long-awaited amendments to the Scheme for Construction Contracts (England only) (“Scheme“): www.legislation.gov.uk/ukdsi/2011/9780111512975.

The amendments are likely to be debated by Parliament in September and, subject to any last-minute parliamentary changes, will come into force on 1 October 2011 alongside the revisions to the Construction Act¹. There are separate processes for amending the statutory schemes for Wales and Scotland. However, we do not anticipate any material differences or different enforcement dates.

The new Scheme proposed by BIS follows a consultation process last year and contains no great surprises. We summarise the key points below.

It is important to remember that ss108 – 111 and 113 of the Construction Act set out requirements in relation to adjudication and payment that every construction contract must meet. If not, then the Scheme applies by default – in effect, by supplying the missing contractual terms. In the case of non-conformity with an adjudication section, the entire adjudication provisions in the Scheme will apply. In the case of non-conformity with a payment section, the relevant provision of the Scheme will replace the non-conforming section.

Most of the changes to the Scheme are consequential – ie they are designed to bring the Scheme into line with the changes to the Construction Act. The overriding aim is to ensure effective cash flow and facilitate swift resolution of disputes by improving access to adjudication and the payment process.

Adjudication – Part 1

Adjudication costs

As expected, where the Scheme adjudication provisions apply adjudicators will now be allowed to allocate their own fees / expenses, subject to any valid prior agreement between the parties in accordance with the new s108A.

S108A prohibits agreements about adjudication costs (the parties’ own costs and the adjudicator’s fees / expenses) unless they are (a) in writing, in the construction contract and confer power on the adjudicator to allocate their own fees / expenses as between the parties or (b) made after the dispute has been referred to adjudication. We have previously observed that there may be ambiguity with s108A insofar as it may permit Tolent clauses despite Parliament’s intention to the contrary.² BIS does not accept that there is any ambiguity, so it remains to be seen whether this issue will in fact arise and/or come before the courts.

Slip rule

A slip rule has been added to the adjudication provisions under the Scheme. This gives adjudicators the power to correct clerical or typographical errors in their decision within five days. Again, this is to match the changes to the Construction Act.

BIS originally proposed a seven day slip rule and an eight day compliance period. The former has been reduced to five and the latter has been dropped in favour of an obligation on the adjudicator to

¹ Housing, Grants, Construction and Regeneration Act 1996, which will be amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009
² June 2011 and 28 June 2011
deliver his or her corrected decision “as soon as possible”. It seems therefore that an adjudicator's decision under the Scheme will be enforceable upon receipt of a corrected decision or expiry of the five day period if no corrections are made.

**Non-consequential amendments**

The rarely-used power under the Scheme for an adjudicator to order a party to comply peremptorily with his or her decision has, quite sensibly, been abolished by the omission of paragraph 23(1) of the original Scheme.

BIS has also clarified the time period within which an adjudicator must make his or her decision as being 28 days (or up to 42 days by consent) from the date the adjudicator receives the referral notice (rather than from the date of the referral notice under the existing Scheme). In addition, the adjudicator will be required to confirm the date of receipt to avoid any arguments about this.

BIS has not, however, sought to clarify the referral period by amending when the relevant period for issuing the referral notice begins. This remains unchanged – ie the referral notice must be issued not later than seven days from the date of the notice of adjudication.

Many of the other non-consequential changes that BIS were considering have not been included either. These related to multiple disputes, confidentiality, ‘final and conclusive’ certificates and interest. See our [June 2011](#) update for further details about these.

**Payment - Part 2**

The amendments in relation to payment are to bring the Scheme into line with the new regime in the Construction Act.

Under the amended Scheme, if the construction contract fails to provide who is to give the payment notice, it is to be payer (which makes sense). In summary, the payer will need to issue a payment notice within five days after the due date for payment stating the amount that is due (which can be less than the amount claimed or zero) and the basis on which that sum has been calculated. Once issued, the payer must pay the amount specified in the notice (the ‘notified sum’) unless he serves a notice of intention to pay less than the notified sum. The amended Scheme then provides that where the parties fail to agree the period within which the notice of intention to ‘pay less’ must be given, that notice must be served not later than seven days before the final date for payment. Essentially the payer gets two bites of the cherry.

We will report again after the amendments to the Scheme have passed through both Houses.

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