The Construction Act: Changes to consultants' payment processes

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Lindy Patterson’s article looked at two forms of contractors’ contracts which had been revised following the amendments to the Construction Act. This article considers how the consultant side of the industry is dealing with the new payment provisions.

Consultants’ payment processes are not like those of contractors, whose practices more closely fit the requirements of the amended act. Contractors generally issue applications for payment and then the certificate doubles as the payer’s payment notice.

Under the old regime, consultants issued their invoices and if clients had any queries on these or wished to offset any monies, they could issue a notice of withholding. The obligation on clients to serve a payment notice was mostly ignored.

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Further, there was not the same problem for consultants as to what was “due” - consultants’ fees often being on an agreed lump sum instalment basis or on a time basis.

The ACE, RIBA, CIC and NEC (in the NEC PSC3 contract) have adopted a similar approach when revising their standard forms for consultants and one which most closely follows consultants’ payment procedures.

First, by stipulating that the consultant’s invoice must contain the information required for a payment notice by the amended act, these bodies effectively require the consultant (as payee) to give the payment notice.

The payment due date is then fixed by reference to the issue or receipt of the consultant’s invoice, thus ensuring that the payee’s payment notice cannot be given any later than five days after the payment due date, again as required by the amended act.

The new notice of intention to pay less replaces the notice of withholding provisions in the original legislation and the client has to give this notice a prescribed number of days before the final date for payment. The client then has to pay the amount in the consultant’s invoice or the amount, if any, in the notice of intention to pay less, if served.

The advantage for the consultant is that, provided he includes the necessary information in his invoice, he will be entitled to be paid the amount in that invoice by the final date for payment unless the client serves the notice of intention to pay less. As for the client, he does not have to give a payment notice and can use the notice of intention to pay less procedure in the same way as he used the withholding notice if he wishes to retain any monies.

There are some differences in the detail of the amendments produced by the four bodies. For example, the RIBA, the CIC and the NEC in the PSC3 amendments all stipulate more information is to be included in the consultant’s invoice than is required by the amended act. The RIBA provides that the client must include the grounds for withholding any sum and the amount attributable to it in any notice of intention to pay less, in addition to the new requirement to state the sum the payer considers due on the date the notice is served and the basis on which that sum is calculated.

The most significant variation between them, however, is the length of time between the due date and the final date for payment. The CIC and ACE have 28 days and the PSC3 has 21 days, but this can be altered in the contract data. The RIBA, however, has reduced this period from 28 days to 14 days, making a tight timetable for clients who may wish to serve a notice of intention to pay less.
While the ACE, RIBA, CIC and NEC are to be commended for adopting a logical and easily understood process, there is little indication at the moment as to how clients will introduce these new provisions into their bespoke appointments. Some, however, are seeking to impose tight payment schedules on the consultant. For example, they make the payment due date a specified day of each month or the end of each stage. If the consultant is then to give the payee payment notice he would have to serve it on the client no more than five days after the stipulated date - which could be difficult to meet. The consequences of giving such a notice late are not clear - it may mean the client will not have to pay anything by the final date for payment or it may amount to a breach of contract. We shall have to wait for the courts to decide this. Some clients are stipulating that in such circumstances the amount in the consultant’s payee payment notice will be deemed to be zero.

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