

Draft Regulations laid before the Scottish Parliament under section 114(5) of the Housing Grants, Construction and Regeneration Act 1996, for approval by the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2011 No. 000

CONSTRUCTION CONTRACTS

**The Scheme for Construction Contracts
(Scotland) Amendment Regulations 2011**

Made - - - - *2011*

Coming into force - - *1st November 2011*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 114 and 146(1) of the Housing Grants, Construction and Regeneration Act 1996⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 114(2) of the Housing Grants, Construction and Regeneration Act 1996 they have consulted such persons as they think fit.

In accordance with section 114(5)(2) of that Act, a draft of the instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement, extent, application and interpretation

1.—(1) These regulations may be cited as the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 and come into force on 1st November 2011.

(2) These Regulations only apply to construction contracts entered into on or after 1st November 2011.

(3) These Regulations extend to Scotland only.

(4) In these Regulations, “the Scheme” means the Scheme contained in the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998⁽³⁾.

(1) 1996 c.53. The function conferred upon the Lord Advocate was transferred to the Secretary of State by the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (S.I. 1999/678). The function of the Secretary of State was transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).
(2) Section 114(5) has been modified by paragraph 5 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).
(3) S.I. 1998/687.

Amendment of regulation 4 of the Scheme Regulations

2. Regulation 4(b) of the Scheme for Construction Contracts (Scotland) Regulations 1998, for “by section 110 of the Act” substitute “by section 110 or 110A of the Act”.

Amendment of Part I of the Scheme

3.—(1) Part I (adjudication) of the Scheme is amended as follows.

(2) In paragraph 20(2)(b) for “section 111(4)” substitute “section 111(9)”.

(3) After paragraph 22 insert—

“**22A.**—(1) The adjudicator may on his own initiative or on the request of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(2) Any correction of a decision shall be made within 5 days of the date upon which the adjudicator’s decision was delivered to the parties.

(3) Any correction of a decision shall form part of the decision.”.

(4) For paragraph 25(2) substitute—

“(2) Without prejudice to the right of the adjudicator to effect recovery from any party in accordance with sub-paragraph (1), the adjudicator may determine the apportionment between the parties of liability for the payment of his fees and expenses and such determination shall be binding upon the parties unless any effective contractual provision in terms of section 108A(2)(4) of the Act applies.”.

Amendment of Part II of the Scheme

4.—(1) Part II (payment) of the Scheme is amended as follows.

(2) For paragraph 9, substitute—

“Payment notice

9.—(1) In relation to every payment provided for by the contract, the payer shall, not later than 5 days after the payment due date, give a notice to the payee complying with sub-paragraph (2).

(2) A notice complies with this sub-paragraph if it specifies—

(a) the sum that the payer considers to be or to have been due at the payment due date;

(b) the work to which the payment relates; and

(c) the basis on which that sum is calculated.

(3) For the purposes of this paragraph, it is immaterial that the sum referred to in sub-paragraph (2) may be zero.

(4) A payment provided for by the contract includes any payment of the kind mentioned in paragraphs 2, 5, 6, or 7.”.

(3) For paragraph 10, substitute—

(4) Section 108A was inserted by section 141 of the Local Democracy, Economic Development and Construction Act 2009 (c.20) (“the 2009 Act”).

“Notice of intention to pay less than the notified sum

10. Any notice of intention to pay less than the notified sum mentioned in section 111(3)(5) of the Act shall be given not later than 7 days before the final date for payment determined—

- (a) in accordance with the construction contract, or
- (b) where no such provision is made in the contract, in accordance with paragraph 8.”.

(4) In paragraph 12 (interpretation)—

- (a) omit the definition of “claim by the payee”; and
- (b) after the definition of “contract price” insert the following definitions—

““making of a claim by the payee” means the giving of a written notice by the payee to the payer specifying—

- (a) the sum that the payee considers to be due from the payer;
- (b) the work to which the sum relates; and
- (c) the basis on which that sum is calculated;

“payee” means the person under a construction contract to whom a payment is due;

“payer” means the person under a construction contract from whom a payment is due;”.

St Andrew’s House,
Edinburgh
Date

A member of the Scottish Executive

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Scheme for Construction Contracts (Scotland) Regulations 1998 (“the Scheme”), in part to reflect changes made to the relevant primary legislation, the Housing Grants, Construction and Regeneration Act 1996 (c.53) (“the 1996 Act”), by the Local Democracy, Economic Development and Construction Act 2009 (c.20) (“the 2009 Act”)

Where the parties to a construction contract fail to make provision in their contract for one or more of the various terms relating to “adjudication” (a dispute resolution procedure which the 1996 Act introduced as regards disputes under construction contracts) the provisions of Part I of the Schedule to the Scheme have effect (as implied terms of the parties’ contract).

Regulation 3 updates and amends Part I of the Schedule to the Scheme. Regulation 3(3), in particular, introduces provision to the effect that clerical or typographical errors of the adjudicator’s decision may be corrected, colloquially referred to as the ‘slip rule’. Regulation 3(4) amends paragraph 25 of the Scheme to provide that the adjudicator may apportion liability for payment of the fees and expenses unless the contract contains an effective provision for that purpose.

Regulation 4 amends Part II of the Schedule to the Scheme. Part II of the Schedule to the Scheme concerns “payments” and implies into the contract provisions relating to payments to the effect that express terms are absent or deficient.

Section 110A of the 1996 Act as amended provides that a construction contract must contain a provision to the effect that a “payment notice” (setting out, in relation to every payment, the sum considered due) must be given by the person whom the parties have agreed – the payer, the payee or certain other persons. Where the parties have failed to make express provision in the contract as to who is to give such notices, regulation 4(2) substitutes a new paragraph 9 of Part II of the Schedule to the Scheme to the effect that this is the payer’s responsibility.

Section 111 of the 1996 Act as amended introduces a requirement to pay the sum set out in such “payment notices” (whether given pursuant to express terms in the parties’ contract or by virtue of new paragraph 9 of Part II of the Schedule to the Scheme). It also makes provision for the sum in such a notice to be challenged or revised by the giving of a type of counter-notice – a notice of intention to pay less than the notified sum. Regulation 4(3) substitutes a new paragraph 10 of Part II of the Schedule to the Scheme and thereby makes provision for the timing of such a counter notice where the parties have failed to agree on this.

A Business and Regulatory Impact Assessment of the effect which these Regulations are likely to have on business costs has been carried out and is available on the Scottish Procurement and Commercial Directorate’s website at www.scotland.gov.uk/procurement.