



# Local Democracy, Economic Development and Construction Act 2009

## 2009 CHAPTER 20

### PART 8

#### CONSTRUCTION CONTRACTS

#### 138 Application of construction contracts legislation

- (1) The [Housing Grants, Construction and Regeneration Act 1996 \(c. 53\)](#) is amended as follows.
- (2) In section 106 (provisions not applicable to contract with residential occupiers), in subsection (1), omit paragraph (b) and the preceding “or”.
- (3) After that section insert—

#### “106A Power to disapply provisions of this Part

- (1) The Secretary of State may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations (not being operations in Wales) which is specified in the order.
- (2) The Welsh Ministers may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations in Wales which is specified in the order.
- (3) The Scottish Ministers may by order provide that any or all of the provisions of this Part, so far as extending to Scotland, shall not apply to any description of construction contract which is specified in the order.
- (4) An order under this section shall not be made unless a draft of it has been laid before and approved by resolution of—

- (a) in the case of an order under subsection (1), each House of Parliament;
  - (b) in the case of an order under subsection (2), the National Assembly for Wales;
  - (c) in the case of an order under subsection (3), the Scottish Parliament.”
- (4) In section 146 (orders etc)—
- (a) in subsection (2), for “Secretary of State” substitute “the authority making them”;
  - (b) in subsection (3)(a), after “106(4)” insert “, 106A”.

### **139 Requirement for construction contracts to be in writing**

- (1) In the [Housing Grants, Construction and Regeneration Act 1996](#), section 107 (provisions applicable only to contracts in writing) is repealed.
- (2) In section 108 of that Act (right to refer disputes to adjudication)—
- (a) in subsection (2), after “The contract shall” insert “include provision in writing so as to”;
  - (b) in subsections (3) and (4), after “provide” insert “in writing”.

### **140 Adjudicator’s power to make corrections**

In the [Housing Grants, Construction and Regeneration Act 1996 \(c. 53\)](#), in section 108 (right to refer disputes to adjudication), after subsection (3) insert—

“(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.”

### **141 Adjudication costs**

In the [Housing Grants, Construction and Regeneration Act 1996](#), after section 108 insert—

#### **“108A Adjudication costs: effectiveness of provision**

- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
- (2) The contractual provision referred to in subsection (1) is ineffective unless—
- (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
  - (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.”

### **142 Determination of payments due**

- (1) In the [Housing Grants, Construction and Regeneration Act 1996](#), section 110 (dates for payment) is amended as follows.

(2) After subsection (1) insert—

“(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.

(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where—

- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
- (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.”

(3) After subsection (1C) (as inserted by subsection (2) above) insert—

“(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.”

## **143 Notices relating to payment**

(1) In the [Housing Grants, Construction and Regeneration Act 1996 \(c. 53\)](#), in section 109 (entitlement to stage payments), in subsection (4), for “under the contract” substitute “provided for by the contract”.

(2) In section 110 of that Act (dates for payment), omit the following—

- (a) subsection (2), and
- (b) in subsection (3), “or (2)”.

(3) After section 110 of that Act insert—

### **“110A Payment notices: contractual requirements**

(1) A construction contract shall, in relation to every payment provided for by the contract—

- (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
- (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies—

- (a) in a case where the notice is given by the payer—

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- (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated;
  - (b) in a case where the notice is given by a specified person—
    - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies—
- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
  - (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (6) In this and the following sections, in relation to any payment provided for by a construction contract—
- “payee” means the person to whom the payment is due;
  - “payer” means the person from whom the payment is due;
  - “payment due date” means the date provided for by the contract as the date on which the payment is due;
  - “specified person” means a person specified in or determined in accordance with the provisions of the contract.

### **110B Payment notices: payee’s notice in default of payer’s notice**

- (1) This section applies in a case where, in relation to any payment provided for by a construction contract—
- (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
  - (b) notice is not given as so required.
- (2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
- (3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
- (4) If—
- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—

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- (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
  - (ii) the basis on which that sum is calculated, and
- (b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).”

#### **144 Requirement to pay notified sum**

- (1) In the [Housing Grants, Construction and Regeneration Act 1996 \(c. 53\)](#), for section 111 (notice of intention to withhold payment) substitute—

##### **“111 Requirement to pay notified sum**

- (1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
- (2) For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means—
- (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
- (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.
- (4) A notice under subsection (3) must specify—
- (a) the sum that the payer considers to be due on the date the notice is served, and
  - (b) the basis on which that sum is calculated.
- It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
- (5) A notice under subsection (3)—
- (a) must be given not later than the prescribed period before the final date for payment, and
  - (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
- (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
- (7) In subsection (5), “prescribed period” means—
- (a) such period as the parties may agree, or

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- (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
- (8) Subsection (9) applies where in respect of a payment—
  - (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
  - (b) a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
- (9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
  - (a) seven days from the date of the decision, or
  - (b) the date which apart from the notice would have been the final date for payment,
 whichever is the later.
- (10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where—
  - (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
  - (b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
- (11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.”
- (2) In section 112 of that Act (right to suspend performance for non-payment)—
  - (a) in subsection (1), for the words from “Where” to “given” substitute “Where the requirement in section 111(1) applies in relation to any sum but is not complied with,”;
  - (b) in subsection (3), for “the amount due” substitute “the sum referred to in subsection (1)”.

## 145 Suspension of performance for non-payment

- (1) In the [Housing Grants, Construction and Regeneration Act 1996 \(c. 53\)](#), section 112 (right to suspend performance for non-payment) is amended as follows.
- (2) In subsection (1), after “performance of” insert “any or all of”.
- (3) After subsection (3) insert—
  - “(3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.”
- (4) In subsection (4), after “pursuance of” insert “, or in consequence of the exercise of,”.