

# THE NEW CONSTRUCTION ACT

## *What you need to know*

### **When does it come into force?**

The new Act will come into force on the 1 October 2011 (1 November 2011 in Scotland). Changes to The Housing Grants Construction & Regeneration Act 1996 (The Construction Act) will be made by way of part 8 of The Local Democracy, Economic Development and Construction Act 2009.

The new Act will not affect contracts entered into prior to the 1 October 2011 but all contracts entered into after this date will be governed by the 2009 Act. This will cause some practical difficulties because for many main contractors they will have subcontracts where the payment regimes and procedures will be under different sets of rules.

We will be issuing guidance on the changes to the JCT and NEC suites of contracts in the coming weeks and will be reviewing these changes in our 10<sup>th</sup> Annual Seminar which will be held at Pride Park, Derby on the 10 November 2011. In this article we review some of the key changes introduced by this new Act.

### **Contracts need not be in writing**

One of the frustrations of the HGCR Act is that it only applies to contracts that are wholly in writing. In the construction industry often some aspects of the contract are agreed at a meeting or in a telephone conversation and are not recorded in writing (perhaps a start date agreed at the last minute for example). This may mean that the contract is not caught by the present Act and very often a lot of time and money is wasted arguing about whether or not a contract is wholly in writing.

The abolition of the requirement for the contract to be in writing will still mean that there will be arguments about whether there is a contract at all but more contracts will be caught by the new Act. There will also be more arguments about the terms of construction contracts.

### **Costs of Adjudication**

It was intended that the new construction Act should abolish what became referred to as Tolent clauses. Such clauses meant that parties could agree that, for example, a party referring a dispute to Adjudication should be responsible for all the costs of the Adjudication including both parties' costs and Adjudicator's fees. The practical effect of such clauses was that for many disputes there was no point in pursuing an Adjudication because the costs may well be more than the amount that might be recovered in the Adjudication.

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While the intention of Parliament is clear (it intended to abolish such clauses) unfortunately the wording of the Act is less clear and there are differing views as to whether this intention has, in fact, been achieved.

### **Abolition of Pay when Certified clauses**

Under the new Act pay when certified clauses will no longer be an *adequate mechanism* for establishing what and when payments become due. Practically this usually occurs when the mechanism for payment is dependent upon an event under another contract or for example the decision by an Architect or Engineer under a main contract which affects payment between the main contractor and subcontractor. Such mechanisms will now be outlawed. This will mean that the current requirements for the release of retentions to subcontractors where there is reliance on a certificate under the main contract will have to be redrafted.

The current position whereby 'paid when paid' clauses are outlawed will continue.

### **Payment Notices and Withholding Notices**

In our view the most important change brought about by the new construction Act will prove to be the new regime for payment.

The current provisions for payer notices (Section 110 Notices) have been ignored to a great extent because there is no sanction if the paying party refuses or fails to issue such a notice. This mechanism has, therefore, been substantially revised together with the mechanism for withholding notices (commonly referred to as Section 111 Notices).

A contract will have to provide for the giving of payment notices by the payer or the payee and this notice must set out the sum due and how it has been calculated. If under the terms of the contract it is for the payer to issue a payment notice and he fails to do so then the payee can then issue a payment notice. The payer can now issue a *pay less* notice which in effect replaces the withholding notices (Section 111) now used. If the payer has not issued a payment notice or a pay less notice, then the amount to be paid will be the sum notified by the payee.

There will no doubt be some confusion when the new regime is initially implemented and there will be arguments about what qualifies as payer, payee and pay less notices. The intention is that the requirement to pay a notified sum will result in more certainty and assist with cash flow. In our view it is not at all clear that the new Act will have this effect but what is certain is that the new regime will cause some confusion and some paying parties will be caught out by the new provisions.

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### Suspension

The right to suspend has been retained and the suspending party will now be able to suspend all or part of its obligations. The party suspending will also be entitled to an extension of time and its costs arising out of the suspension. Some of the published contracts already include this provision but this did not follow as a matter of course from the HGCR Act.

### The Local Democracy, Economic Development and Construction Act 2009

Often new Acts are given a name by the industry. The best we have come up with for the new Act is **LoaDED**. Let us know if you can think of anything that might be more appropriate.

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