

Responding to change - the latest amendments to the JCT and NEC contracts

Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (“the Act”) came into force on 1 October 2011 in England and Wales. It will affect all construction contracts entered into on or after that date. The Act has, amongst other things, introduced important changes to payment provisions and adjudication procedure. Standard form contracts have had to adapt to reflect these changes.

In our October bulletin, ‘Power to the Payee!’, we provided an overview of the new Act. This bulletin will consider how two of the most commonly used standard form contracts – the JCT Design and Build Contract and NEC3 Engineering and Construction Contract - have accommodated the changes.

Payment Provisions

JCT Design and Build Contract 2011

JCT launched their new suite of 2011 contracts in September 2011. The payment mechanism previously used in the JCT contract remains broadly similar, but the notice procedure in particular has been strengthened in line with the new Act.

The payment procedure is still commenced by the Contractor submitting its payment applications. Payments become “due” on the date the Employer receives the Contractor’s application and the final date for payment is 14 days later.

The contract now requires the Employer to give a “Payment Notice” no later than 5 days after the due date for payment. This must specify the sum that the Employer considers to be due at the due date and the basis on which that sum has been calculated. After this point, if the Employer then wishes to make further deductions, it must serve a “Pay Less Notice” not later than 5 days before the final date for payment which specifies both the sum that it considers to be due to the Contractor at the date of the notice and the basis on which that sum is calculated.

The contract also highlights that Payment Notices and Pay Less Notices must be served even if the amount is

nil, and that these notices can be served on the Employer’s behalf by anyone who has been notified to the Contractor as being authorised to do so. However, because there has been a payment application by the Contractor, there is no need for a mechanism for the Contractor to submit its own Payment Notice if the Employer defaults on serving its Payment Notice or serves an invalid Payment Notice. In this situation, the Act provides that the Contractor is entitled to the sum appearing in its original payment application.

Another important change is that the JCT contract now provides for the Contractor to suspend “any or all of his obligations” for non-payment. In addition, the Contractor has the right to recover a reasonable amount in respect of costs and expenses reasonably incurred as a result of the exercise of this right.

NEC3 Engineering and Construction Contract

The NEC have not responded with an ‘NEC4’ suite. Instead, they have updated the NEC3 payment provisions by amending Option Y(UK)2.

The previous NEC3 timescales for payment have been retained (namely, the due date is 7 days after the assessment date and the final date for payment is 14 days after the payment due date). However, Y2.2 has been amended so that the Project Manager’s Certificate now acts as the “Payment Notice” which must specify the amount due at the payment due date (the notified sum) and the basis on which the amount was calculated.

Whilst not expressly provided for in the NEC3 amendments, the Act will allow the Contractor to serve a “default notice” if either (a) the Project Manager fails to serve a Payment Notice, (b) the Payment Notice served is invalid or (c) the payment is made without serving a Payment Notice. The sum due will then be the amount specified in the Contractor’s application or default notice.

Option Y2.3 has been updated to comply with the new “pay less” requirements. The sum claimed in the Contractor’s payment application (or any subsequent Contractor’s default notice) must be paid in the absence of a Payment Notice or Pay Less Notice by the Project Manager.

The NEC3 contract already dealt with the right to suspend as a Compensation Event. Therefore, no extra provision was needed to reflect the Contractor's right to claim for reasonable direct costs and expenses arising from the suspension. The short forms also now include such suspension as a Compensation Event.

Adjudication Provisions

JCT Design and Build Contract 2011

The JCT contract refers to the statutory Scheme for its adjudication procedure. The definition of "Scheme" is automatically updated by clause 1.4.5 of the contract which states that any reference to statute is to such legislation "as amended or in force from time to time".

NEC3 Engineering and Construction Contract

Unlike JCT, the NEC3 contract does not refer to the statutory scheme, but has a bespoke system via Option W2. This has meant that amendments to Option W2 have been necessary, including:

- A new provision that requires the sum awarded by the adjudicator to be paid within 7 days or by the final date for payment of the revised notified sum (if the final date for payment of that sum has not already passed), whichever is latest
- A new slip rule under which any error must be rectified within 5 days (rather than 14 days as it was before) and any typographical errors or clerical mistakes in the decision must be corrected within 5 days of delivery of the decision
- A provision allowing the adjudicator to allocate his fees and expenses between the parties

Conclusion

The new Act has not necessitated a complete overhaul of the payment provisions and adjudication procedures in each of the two contracts reviewed in this bulletin. Nevertheless, the amendments made are important on a practical level and regular users of the contracts should make sure they take the time to properly consider the changes and familiarise themselves with the new provisions. Care should also be taken in reviewing any bespoke Schedules of Amendments as new changes may be introduced to alter time periods for payment, particularly for retention, and mechanisms such as payment to stakeholders pursuant to any payee notice in default being given.

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