

Guide to the Construction Act changes

The Local Democracy, Economic Development and Construction Act 2009 (the LDEDCA) came into force in England and Wales on 1 October 2011 and in Scotland on 1 November 2011.

The LDEDCA amends the Housing Grants Construction and Regeneration Act 1996 (commonly known as the Construction Act).

The changes apply to construction contracts entered into on or after 1 October 2011 (or 1 November in Scotland). They do not apply retrospectively.

This guide takes you through the key changes to the Act.

1 Removal of the requirement for construction contracts to be in writing

1.1 The Act now applies to all construction contracts whether they are in writing or verbal.

2 Payment provisions

2.1 Stage payments

There is no change to the right to stage payments. The receiving party will still be entitled to stage payments unless the duration of the work is less than 45 days. The parties are still free to agree the amounts of the stage payments, the intervals between them and the circumstances in which they are due. If the construction contract is silent as to the right to stage payments then it will be implied by the Scheme for Construction Contracts 1998 (which has also been amended) ("the Scheme").

2.2 Notices

The key amendments to the payment provisions are the changes to the notices that may need to be given.

2.2.1 Payment Notice

The new Payment Notice must be given no later than five days after the "payment due date". The information to be included in the Payment Notice has not changed. The paying party will still need to set out the amount due and the basis of the calculation.

The amendments also require that the construction contract must now state who is to give the Payment Notice. Under the old Act only the paying party could give the Payment Notice but the amendments provide that the paying party or a specified person on its behalf, or the receiving party, can give the Payment Notice.

Even if the sum due is zero a Payment Notice must still be given.

If the contract is silent on the giving of a Payment Notice, the Scheme will apply.

2.2.2 Default Notice

If the paying party fails to give a Payment Notice within five days after the payment due date the receiving party can issue its own Payment Notice, which has been dubbed the Default Notice, stating how much they believe is due and the basis for their calculation.

If the receiving party has made an application for payment this can take effect as the Payment Notice, if the contract provides that it can (the JCT 2011 contract provides for this).

The final date for payment will be postponed by the number of days after the expiry of the timeframe for the service of a Payment Notice that the Default Notice is given. If the application for payment is the default notice then it will be deemed to have been given immediately after the expiry of the timeframe for service of the Payment Notice.

2.2.3 Notified Sum

The Paying Party must pay the “notified sum” by the final date for payment unless it serves a Pay Less Notice (see 2.2.4 below).

The notified sum is the sum set out in the Payment Notice or the Default Notice.

2.2.4 Pay Less Notice

The Pay Less Notice replaces the old Withholding Notice. The Pay Less Notice must specify the sum that the paying party considers is due and the basis on which they calculated that sum. Please note that this is very different from a withholding notice, which requires the amount to be withheld and the ground(s) for withholding to be stated.

The Pay Less Notice should be given no later than the “prescribed period” before the final date for payment.

The parties to the contract are free to agree the prescribed period. If it is not agreed the Scheme will apply. The Scheme provides that the prescribed period is not later than seven days before the

final date for payment. If the contract does not set out a final date for payment then it will be deemed to be 17 days after the payment due date.

2.3 Suspension

If the paying party has failed to pay the notified sum by the final date for payment and has not served a pay less notice, then the receiving party (whether that be the contractor, sub-contractor or consultant) can, on giving seven days notice suspend performance of “any or all” of its obligations under the contract.

The old provisions only allowed an all-or-nothing approach. The receiving party was only entitled to suspend performance of all of its obligations under the contract. Now it can suspend just some of its performance, so for instance a consultant might decide not to attend site meetings.

The party suspending its performance is now also entitled to a reasonable amount in respect of the costs and expenses which it incurs in exercising its right to suspend.

Since the introduction of the original Act, the period of suspension is ignored in terms of calculating when the party who has suspended its works was due to complete them. This has been extended. It is no longer just the period of suspension but includes the time lost as a result of the suspension, for instance the time taken to remobilise.

Suspension is now a considerably more attractive option for an unpaid contractor, sub contractor or consultant, than it was.

3 Prohibition of “pay-when-certified” clauses

The original Act abolished pay-when-paid clauses (except in up stream insolvency). That remains the position.

The changes abolish pay-when-certified clauses as well. This is something for contractors and sub contractors to pay particular attention to. The JCT 2005 sub contract provides that the final tranche of retention is not paid to the sub contractor until the Certificate of Making Good Defects under the main contract has been issued. Such a clause is no longer allowed. The JCT 2011 sub contract reflects this.

There are a couple of exceptions to the abolition of paid-when-certified clauses. These are:

- PFI sub-contracts.
- Management contracts (but not works contracts). Be careful as the wording of the Act is rather vague so it is necessary to check that each particular management contract falls within the Act’s definition.

4 Adjudication

4.1 No need for the construction contract to be in writing for adjudication provisions to apply

The requirement that construction contracts needed to be in writing in order for the parties to have the right to refer a dispute to adjudication has been removed. However the Act says that adjudication provisions themselves will still need to be in writing. If the adjudication provisions are not in writing then the adjudication provisions of the Scheme will apply.

4.2 Tolent clauses

Before the changes to the Construction Act, the Act was silent on whether the parties could agree which one of them was to pay the legal costs of adjudication (whatever the outcome).

Please note that legal costs are to be distinguished from the fees and expenses of the adjudicator.

What has become known as a Tolent clause was included in some construction contracts. This provided that one party would pay both parties' cost of the adjudication regardless of which party had referred the matter to adjudication and regardless of the outcome of the adjudication. These clauses had been criticised as fettering a party's right to adjudicate.

The amendments to the Construction Act aim to limit such clauses. The amendments provide that any attempt to allocate the costs of the adjudication will be ineffective, except in two situations:

4.2.1 Where the agreement is in writing and is made after the notice of intention to refer the dispute to adjudication has been served. It is unlikely that both parties are likely to agree at this stage.

4.2.2 Where there is agreement in writing in the construction contract which confers power on the adjudicator to allocate his fees and expenses between the parties. This exception has been hotly debated. On one reading it seems to say that provided there is an agreement in the contract that the adjudicator can allocate his fees and expenses then the parties can agree a Tolent clause. The Government has stated that that was not its intention and it does not believe that is what the clause says. We shall have to wait and see what the courts decide.

4.3 Statutory slip rule

The changes introduced a statutory slip rule. Construction contracts must include a written slip rule provision, which gives the adjudicator the power to amend clerical or typographical errors in his/her decision. If the contract does not contain such a provision, then the Scheme will apply.

The Act does not prescribe a period in which the correction should be made.

The Scheme provides that any correction of the decision must be made within five days of the delivery of the decision to the parties.

4.4 The date on which the decision is due

In the past there has been some difficulty in determining when the date for the adjudicator's decision is due.

Unless otherwise agreed by the parties the adjudicator has to give his/her decision within 28 days of the Referral Notice.

However, there was some debate as to whether this time period started running from the date the Referral Notice was sent to the adjudicator or the date on which it was received.

The Act is silent on this but the amended Scheme makes it clear that the time period is to be calculated from the date the Referral Notice is received.

5 Transitional provisions

- 5.1 Because the changes do not apply retrospectively there will be two systems in place for a while. Which system applies will depend (in England and Wales) on whether the construction contract was entered into before 1 October or after 30 September 2011. Please beware the date that a contract is entered into and the date that the contract is signed and dated are often not the same.

Further information

For information on how the standard forms of contracts have been amended in line with the Construction Act changes, please see our latest issue of [Building Blocks](#) and our new construction blog, [Practical completion](#).



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