

EXPERT COMMENT: OPERATING IN IGNORANCE

Despite being over 12 months since they came into force, many contractors are operating in ignorance of the provisions of the Local Democracy, Economic Development & Construction Act 2009 ("the New Construction Act") which changed the operation of the Housing Grants Construction & Regeneration Act 1996 ("the Construction Act").

There were a number of changes but:

- 1 oral contracts are now affected by the provisions;
- 2 the provisions impact on payment of and by employers, contractors, sub contractors and sub sub contractors;
- 3 adjudication has changed;
- 4 the right to suspend is enhanced for non-payment;
- 5 pay when paid and pay when certified are outlawed as are provisions requiring those seeking adjudication to pay all costs.

Under the Construction Act, all contracts had to have all terms in writing. From 1 October 2011 all and any contracts - written, oral or a mixture of both - are brought under the provisions of the New Construction Act.



Payment

If the contract terms are silent or do not comply with the New Construction Act, the Act and Scheme's provisions are implied. In terms of money, it will pay to say what your subcontractors get and when.

If you use no terms, old terms or otherwise non-compliant terms, the Act and the Scheme apply, so instalments are due to be paid 52 days after the start of the works (the pay period is every 28 days, the due date is 7 days after the pay period and the final date for payment, 17 days after the due date), then every 28 days (end of second period + 7 + 17). If you have your own standard compliant terms, these periods can be varied so you pay when you choose.

Notices

There is an obligation to provide a notice saying what will be paid by the payer (Payment Notice) and if there are to be reductions (a Pay Less Notice). In the event that no payment notice is issued/ issued in time, the payee may issue one or its application for payment may stand as one and the payer is to meet the sum claimed.

A Pay Less Notice will be ineffective if it is not served before the contractual deadline (or that in the Scheme) and if it does not state the sum the payer THEN says is due and how he calculates that.

Pay When Paid

Pay when paid provisions were outlawed under the Construction Act. The New Construction Act outlaws payment by reference to another contract, for example the main contract, so payment when the employer's surveyor authorises cannot impact on the payment provisions of a sub contractor or sub sub contractor.

Adjudication

Whilst there is now opportunity for all involved in construction contracts to adjudicate, irrespective of the manner in which the contract has been formulated, it is clearly better to protect your own position and have your own contractual terms apply. Evidentially that will help your chances of winning.

An ounce of prevention is worth a pound of cure. Have a contract in writing, have terms & conditions and use the correct payment process & documents.

We can help with contract evaluation and drafting terms & conditions, notices and certificates warranties and other documents as well as adjudication.

If you would like a copy of my suggested standard Payment Notice and Pay Less Notice, please get in touch.

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Further information

For more information and to discuss how Taylors can add value to your project, contact:

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Key Construction Industry Services:

- Procurement
- Contract drafting and approval
- Project planning and tendering
- Dispute resolution, including mediation and expert determination
- Adjudication
- Arbitration and litigation
- Professional terms of engagement
- Bonds
- Warranties
- Guarantees and sureties
- Letters of intent
- Claims avoidance
- Infrastructure projects
- Project funding
- Liability issues

About Taylors:

Taylors Solicitors is a dynamic and highly experienced commercial law firm with offices in Manchester and Blackburn, Lancashire.

We provide a range of commercial legal services and are committed to providing the highest quality service through a real understanding of our clients' business priorities and requirements and a common sense and commercial approach.

