

The New Construction Act - Practical Consequences for Subcontractors

As a result of industry concerns about continuing payment delays and problems with access to adjudication, the Local Democracy, Economic Development & Construction Act 2009 was enacted to amend the provisions thought to be failing in the Housing Grants, Construction & Regeneration Act 1996, the legislation designed to improve cash flow for subcontractors.

These amendments come into force in England on 1 October 2011 and in Scotland on 1st November 2011.

Arguably the most significant amendments concern the payment provisions, namely:

- New payer/default payment notice provision (Section 110A/B);
- New pay less notice provision (Section 111);
- Enhanced right to suspend (Section 112); and
- Outlawing certain conditional payment provisions (Section 113)

From a subcontractor's perspective these changes have significant practical consequences.

Payment/Pay-Less Notices

The 2009 Act introduces the requirement for a payer/specified person notice or a payee notice not later than 5 days after the due date. The notice must specify the sum considered due and basis of calculation even if the sum is zero.

If the payer fails to issue this notice the payee may issue its own notice or, where the contract provides for an application for payment, that application will be treated as the payee's notice. This is linked with a positive obligation on the payer to pay the notified sum by the final date for payment, absent a "pay-less" notice.

The practical effect of this is that there is now an effective sanction for a contractor's failure to issue a payment notice. A subcontractor/payee can rely on his own notice or application for payment (given formal status for the first time) as determining his entitlement. In the absence of a pay-less notice the sum the subcontractor considers due will be the sum that requires to be paid.

Right to Suspend

The statutory right to suspend previously kicked in when a contractor failed to pay a sum due to its subcontractor. A subcontractor would have to be very sure that a sum was due before downing tools. The right now arises where there has been a failure to pay the notified sum before the final date for payment. There is therefore a clearer documented trigger for the right to suspend.

The unpaid party can also suspend "any or all" of its obligations and they have been given entitlement to (i) payment of a reasonable amount of costs and expenses reasonably incurred in consequence of suspension and (ii) an extension of time for the period of suspension and consequential delay (e.g. remobilisation). A subcontractor can therefore suspend the elements of works that suit him, and, despite scope for arguing what costs are included and how concurrent/culpable delay

is dealt with, a subcontractor exercising this right has been afforded a greater level of financial protection.

Together these amendments act as a real disincentive to non-payment and may result in significantly greater use of the right to suspend.

Conditional Payments

A ban on certain conditional payments has been introduced which should bring an end to the practice of using "pay when certified" clauses which became prevalent when the old "pay when paid" clauses were outlawed by the 1996 Act.

This should benefit subcontractors, who should see less delays in payments reaching them, however, contractors may extend payment periods to compensate given that parties remain free to determine the gap between the due and final dates for payment.

Conclusion

The changes to payment provisions introduced by the 2009 Act go some way towards addressing the 1996 Act deficiencies complained of. That having been said the amended provisions are not straightforward and if subcontractors are to get the most out of the changes the amended provisions should be read with care, staff should be trained in what will be required of them and their procedures should be updated sooner rather than later.

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This article appeared in October 2011 edition of CABLEtalk.

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