

Consultation on Amendments to
the Scheme for Construction
Contracts (England and Wales)
Regulations 1998

MARCH 2010

This public consultation follows those of 2005 and 2007 on proposals drawn from Sir Michael Latham's report on the operation of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act).

The purpose of this consultation is to seek views on the consequential amendments necessary to the Scheme for Construction Contracts (England and Wales) Regulations 1998 following the changes introduced at Part 8 of the Local Democracy Economic Development and Construction Act 2009 (the 2009 Act) to amend the 1996 Act; and on proposals put forward by the Construction Umbrella Bodies Adjudication Task Group (CUBATG) to improve the effectiveness of the Scheme.

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Contents

1. Introduction	1
2. The proposals	2
3. Consequential proposals	3
4. Supplementary proposals	7
5. Impact assessment	9
6. Consultation response form	10
Annex A: Draft Statutory Instrument	14
Annex B: Consultation Code of Practice	17

1. Introduction

1.1 Part 2 of the Housing Grants, Construction and Regeneration Act (the 1996 Act) concerns construction contracts. The legislation:

- gives each party to a construction contract the right to refer a dispute to adjudication and requires parties to include terms in their contract relating to adjudication that comply with section 108 (2) to (4);
- provides that contractors are entitled to stage payments (section 109);
- provides that contracts should have an “adequate mechanism” for determining what should be paid and when (section 110 (1)); and
- requires that the payer should issue a notice in advance of each payment of the sum he proposes to pay (section 110 (2)).

1.2 If construction contracts do not comply with these requirements, the relevant terms of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme) apply.

1.3 Part 8 of the Local Democracy Economic Development and Construction Act 2009 (the 2009 Act) makes a number of changes to the payment and adjudication provisions of the 1996 Act while maintaining its broad principles. Some of these changes require consequential amendments to the Scheme.

2. The proposals

- 2.1 The proposals in this paper are solely focused on the Scheme. The consultation falls into two parts.
- 2.2 The first set of consequential proposals are the amendments which must be introduced as a result of the changes which have been made to the 1996 Act. There is consensus across the industry that the Scheme, generally, has worked well. Given the broad consensus which exists, we have therefore decided to work very closely with the existing Scheme framework. The general approach we have taken is to suggest amendments only where necessary to reflect the changes which are required by the 2009 Act.
- 2.3 However, as part of the wider Review process, the Construction Umbrella Body Adjudication Task Group (CUBATG) (a body representing all the main interests of the construction industry) considered what changes needed to be made to the adjudication provisions in the Scheme, independently to the changes made to the 1996 Act. This exercise resulted in the suggestion of some limited amendments. This paper takes the opportunity to consult on those more widely to establish whether they have broad support. These form the second set of proposals.

3. Consequential proposals

3.1 The consequential proposals fall into 3 main areas – adjudication costs, the “slip rule” (the adjudicator’s power to make corrections) and payment notices.

ADJUDICATION COSTS

What the Act now says

3.2 New section 108A (2) of the Act provides that any contractual provision by the parties concerning the costs of adjudication is ineffective except in two cases. The first is where the contractual provision is in writing and allows the adjudicator to allocate his fees and expenses between the parties. The second is where the provision is made in writing and after the issue of the notice of intention to seek adjudication.

What the Scheme currently says

3.3 The Scheme currently makes provisions relating to the fees and expenses of the adjudicator. These are contained in Part 1 paragraphs 9 (4), 11 (1) and 25. These entitle the adjudicator to payment of reasonable fees and expenses and make the parties jointly and severally liable for any outstanding sum following *any determination* on how the payment shall be apportioned.

How to take that forward

3.4 Under a revised Scheme we propose to:

- provide for the adjudicator to be entitled to his reasonable fees and expenses
- allow the adjudicator to determine how the payment is to be apportioned
- make the parties jointly and severally liable for any sum which remains outstanding following the adjudicator’s determination.

subject to any valid agreement under new section 108A (2) to the contrary.

3.5 Paragraphs 3 (3), (4) and (8) of the draft amending Statutory Instrument at Annex A illustrate how this might be drafted.

Question

Q1. *Do you believe it appropriate and necessary for the Scheme to contain a provision allowing the adjudicator to apportion his fees and expenses between the parties to a dispute?*

THE “SLIP RULE” – (ADJUDICATOR’S POWER TO MAKE CORRECTIONS)

What the Act now says

3.6 New section 108 (3A) of the Act requires parties to a construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision. The provision must be in writing. Where there is no such provision, the contractual adjudication procedure will fall away and the Scheme will apply.

What the Scheme currently says

3.7 The Scheme currently contains no provision allowing the adjudicator to correct errors.

3.8 In the absence of any instructions from the adjudicator to the contrary, paragraph 21 of Part 1 of the Scheme requires that the adjudicator’s decision should be complied with immediately.

How to take that forward

3.9 The Scheme needs to be revised to include a “slip rule”. New section 108 (3A) of the Act clearly defines the scope of any such provision. The adjudicator is permitted to “correct his decision so as to remove a clerical or typographical error arising by accident or omission”.

3.10 Under a revised Scheme we therefore propose to insert a new paragraph which:

- allows an adjudicator to correct errors (as defined by the Act) in his decision on his own initiative or at the request of one of the parties and
- requires him to do so within 7 days of publication of the decision

3.11 Under paragraph 21, the Scheme requires that the adjudicator’s decision should be complied with “immediately on delivery of the decision to the parties”. The introduction of a “slip rule” in the Scheme means that this provision needs to be

relaxed. We are proposing to do this by amending paragraph 21 to allow for an 8 day compliance period.

3.12 Paragraphs 3 (6) and (7) of the draft amending Statutory Instrument at Annex A illustrate how this might be drafted.

Questions

Q2. Do you believe 7 days is an adequate period to allow for the correction of errors? If not, what would you suggest is an appropriate period and why?

Q3. Do you agree it is necessary to amend paragraph 21 of Part 1 of the Scheme to allow for a period of time within which the adjudicator's decision should be complied with?

Q4. Do you agree that 8 days is an adequate period for compliance? If not, what would be an appropriate period?

PAYMENT NOTICES

What the Act says now

3.13 New section 110A of the Act provides that a construction contract must contain a provision to the effect that a "payment notice" setting out the sum considered due must be given by the person as agreed between the parties – i.e. the payer, the payee or a third party (e.g. an architect).

3.14 New section 110B sets out a default mechanism which allows the payee to give the payer a "payment notice" where the payer has omitted to do so.

3.15 New section 111 introduces a requirement to pay the sum set out in the "payment notice". It also makes provision requiring the payer to give notice to the other party if he intends to pay less than that sum.

What the Scheme currently says

3.16 Paragraph 9 of Part 2 of the Scheme requires the payer, within 5 days of a payment becoming due, to give notice to the other party specifying the amount he intends to pay and the basis on which it has been calculated.

3.17 Paragraph 10 of Part 2 of the Scheme requires that any notice to withhold payment shall be given not later than 7 days before the final date for payment.

How to take that forward

3.18 The Scheme needs to be revised to reflect the new “payment notice” framework. We are therefore proposing to delete the existing paragraphs 9 and 10.

3.19 The intention is to replace paragraph 9 with provisions which, in relation to every payment provided for by the contract, require:

- the payer to issue the “payment notice”, not later than 5 days after the payment due date;
- that the notice should set out the sum the payer considers to be due and the basis on which that sum is calculated; and
- that the notice should be issued even if the sum is zero

3.20 And paragraph 10 with provisions which require:

- the notice of intention to pay less is to be given not later than 7 days before the final date for payment.

3.21 Paragraph 4 of the draft amending Statutory Instrument at Annex A illustrates how this might be drafted.

Questions

Q5. Do you agree that, paragraphs 9 and 10 aside, the Scheme requires no further amendment consequent to the changes to the Act’s payment framework? If not, would you set out what further amendments you believe to be necessary and explain why?

Q6. Do you believe it is the right approach to continue with “payer-led” payment notice procedures in the Scheme provisions? Please give the reasons for your answer.

Q7. Do you agree that the Scheme should require the “intention to pay less” notice to be issued 7 days before the final date for payment?

4. Supplementary proposals

- 4.1 Throughout the course of the Review of the 1996 Act, we have maintained close contact with CUBATG and its host, the Construction Industry Council. As part of its deliberations, CUBATG considered what changes it felt should be made to the Scheme independently of the changes which have been made to the primary legislation. These relate only to adjudication and tend to be technical points designed to remove any ongoing uncertainty or lack of clarity.
- 4.2 There is a suggestion that “not later than 7 days from the date of the notice of adjudication” in paragraph 7 (1) of Part 1 of the Scheme lacks clarity. Other industry schemes deal expressly with the point either by reference to receipt of the notice by the adjudicator or by receipt by the adjudicator and the parties.
- Q8. *Do you believe it is necessary to clarify the date of referral in paragraph 7 of the Scheme? Should it be 7 days:*
- a) *from the receipt of the adjudication notice by the adjudicator?*
 - b) *from the appointment of the adjudicator?*
 - c) *from some other event?*
- 4.3 Paragraph 8 of Part 1 of the Scheme (joinder) allows the adjudicator (with the parties consent) to adjudicate one or more disputes under the same contract, or related disputes under different contracts. Thus an adjudicator cannot adjudicate on more than one dispute under the contract at the same time unless both parties agree. Likewise an adjudicator cannot adjudicate on related disputes on different contracts at the same time unless the parties agree.
- Q9. *Are you content with the current position that an adjudicator cannot adjudicate related disputes unless both parties agree?*
- 4.4 Paragraph 18 of Part 1 of the Scheme (confidentiality) requires the adjudicator and any party not to disclose any information which the party supplying it has indicated should be treated confidentially – except in so far as necessary for the adjudication. Some have stated a preference for the Scheme to adopt a presumption in favour of overall confidentiality and to cover the conduct of the adjudication as well.

Q10. How often do you believe parties to an adjudication would wish the adjudication to be confidential on the grounds of:

a) the fact of the adjudication?

b) the matters that arise in it?

How might the Scheme be amended to better take account of this?

4.5 There was a significant amount of discussion around “final and conclusive clauses” in the consultations on the 1996 Act. The issues were complex and it was ultimately concluded that, all things considered, it was undesirable to seek to use primary legislation to limit their use. However, some respondents to those consultations considered the wording in the Scheme unhelpful in this regard.

*Q11. Is there any **practical** problem which prevents the deletion of the words “unless the contract states that the decision or certificate is final and conclusive” from paragraph 20(a) of the Scheme?*

4.6 The interest provision in paragraph 20 (c) of Part 1 of the Scheme has been interpreted as providing the adjudicator with the power to award interest if:

- the issue has been referred to him
- it had been agreed by the parties to be within the scope of the adjudication, or
- it was necessarily connected with the dispute

rather than an inherent power to award interest.

4.7 There is a suggestion from some that the Scheme should make provision for the adjudicator to award interest “as he considers appropriate”. This reflects the wording in the CIC Model Adjudication Procedure.

Q12. Do you consider it appropriate for the Scheme to give the adjudicator a wider power to award interest than that currently conferred by the Scheme?

5. Impact assessment

This consultation document does not include an impact assessment. The proposed changes to the Scheme set out in this document are consequential to the changes introduced to the 1996 Act by Part 8 of the Local Democracy Economic Development and Construction Bill which received Royal Assent in November 2009.

The issues are covered in the impact assessment for that Act. This can be found at:

<http://www.communities.gov.uk/documents/communities/pdf/1088220.pdf>

The changes proposed for the Scheme do not bring any additional costs or deliver any additional benefits beyond those which were included in that Impact Assessment.

6. Consultation response form

We should be very grateful if you would answer these questions on the proposals in this consultation paper. Please give reasons for your answers where you consider it may be helpful. You should also feel free to suggest alternative approaches or make whatever additional comments or suggestions you think are appropriate.

Name

Organisation

Address

Email

CONSEQUENTIAL AMENDMENTS

Adjudication costs

Q1. *Do you believe it appropriate and necessary for the Scheme to contain provision allowing the adjudicator to apportion his fees and expenses between the parties to a dispute?*

The “slip rule” – (Adjudicator’s power to make corrections)

Q2. *Do you believe 7 days is an adequate period to allow for the correction of errors? If not, what would you suggest is an appropriate period and why?*

Q3. *Do you agree it is necessary to amend paragraph 21 of Part 1 of the Scheme to allow for a period of time within which the adjudicator’s decision should be complied with?*

Q4. *Do you agree that 8 days is an adequate period for compliance? If not, what would be an appropriate period?*

Payment notices

Q5. *Do you agree that, paragraphs 9 and 10 aside, the Scheme requires no further amendment consequent to the changes to the Act’s payment framework? If not, would you set out what further amendments you believe to be necessary and explain why?*

Q6. *Do you believe it is the right approach to continue with “payer- led” payment notice procedures in the Scheme provisions? Please give the reasons for your answer.*

Q7. Do you agree that the Scheme should require the “intention to pay less” notice to be issued 7 days before the final date for payment?

SUPPLEMENTARY PROPOSALS

Date of referral for adjudication disputes

Q8. Do you believe it is necessary to clarify the date of referral in paragraph 7 the Scheme? Should it be 7 days:

- a) *from the receipt of the adjudication notice by the adjudicator?*

- b) *from the appointment of the adjudicator?*

- c) *from some other event?*

Joinder

Q9. Are you content with the current position that an adjudicator cannot adjudicate related disputes unless both parties agree?

Confidentiality

Q10. How often do you believe parties to an adjudication would wish the adjudication to be confidential

- a) the fact of the adjudication?
- b) the matters that arise in it?

How might the Scheme be amended to better take account of this?

Final and Conclusive

Question

Q11. Is there any **practical** problem which prevents the deletion of the words “unless the contract states that the decision or certificate is final and conclusive” from paragraph 20(a) of the Scheme?

Award of interest

Question

Q12. Do you consider it appropriate for the Scheme to give the adjudicator a wider power to award interest than that currently conferred by the Scheme?

Annex A: Draft Statutory Instrument

Draft Regulations laid before Parliament under section 114(5) of the Housing Grants, Construction and Regeneration Act 1996, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2010 No. xxxx

CONSTRUCTION, ENGLAND

The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2010

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State, having consulted such persons as the Secretary of State thought fit, makes the following Regulations in exercise of the powers conferred by sections 108(6), 114 and 146(1) and (2) of the Housing Grants, Construction and Regeneration Act 1996⁽¹⁾.

In accordance with section 114(5) of the Housing Grants, Construction and Regeneration Act 1996, a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement, extent, application and interpretation

1.—(1) These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2010 and come into force on [].

(2) These Regulations only apply to construction contracts entered into on or after [].

(3) These Regulations extend to England and Wales only.

(4) These Regulations do not apply to construction contracts relating to the carrying out of construction operations in Wales.

(5) In these Regulations, “the Principal Regulations” means the Scheme for Construction Contracts (England and Wales) Regulations 1998⁽²⁾.

Amendment to regulation 3 of the Principal Regulations

2. In paragraph (b) of regulation 3 of the Principal Regulations, for “section 110”, substitute “respectively section 110 or section 110A of the Act”.

(1) 1996 c. 53.
(2) S.I. 1998/649.

Amendments to Part 1 (Adjudication) of the Schedule to the Principal Regulations

3.—(1) Part 1 (Adjudication) of the Schedule to the Principal Regulations shall be amended as follows.

(2) In paragraph 7(1), for “seven days from the date of the notice of adjudication”, substitute “ten days from the date a copy of the notice of adjudication was sent pursuant to paragraph 3”.

(3) In paragraph 9(4), for the second sentence substitute—

“Subject to any effective, contrary contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties shall be jointly and severally liable for any sum which remains outstanding following the making of any such determination”.

(4) In paragraph 11(1), for the third sentence substitute—

“Subject to any effective, contrary contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties shall be jointly and severally liable for any sum which remains outstanding following the making of any such determination”.

(5) In paragraph 20—

(a) omit the words “unless the contract states that the decision or certificate is final and conclusive” in paragraph (a); and

(b) in paragraph (b), for the words “section 111(4)”, substitute “section 111(9)”.

(6) In paragraph 21, for the words “immediately on delivery of the decision to the parties in accordance with this paragraph”, substitute “within eight days of the delivery of the decision to the parties”.

(7) After paragraph 22 insert—

‘22A.—(1) The adjudicator may on his own initiative or on the application of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(2) Any correction of a decision shall be made within seven days of the date upon which the adjudicator’s decision was delivered to the parties.

(3) Any correction of a decision shall form part of the decision.’

(8) In paragraph 25, for the second sentence substitute—

“Subject to any effective, contrary contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties shall be jointly and severally liable for any sum which remains outstanding following the making of any such determination”.

Amendment to Part 2 (Payment) of the Schedule to the Principal Regulations

4.—(1) Part 2 (Payment) of the Schedule to the Principal Regulations shall be amended as follows.

(2) For paragraph 9, substitute—

‘Payment notice

9.—(1) In relation to every payment provided for by the contract, the payer shall, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (2).

(2) A notice complies with this sub-paragraph if it specifies the sum that the payer considers to be or to have been due at the payment due date and the basis on which that sum is calculated.

(3) For the purposes of this paragraph, it is immaterial that the sum referred to in subparagraph (1) may be zero.

(4) A payment provided for by the contract includes any payment of the kind mentioned in paragraphs 2, 5, 6, or 7 above.'

(3) For paragraph 10, substitute—

'Notice of intention to pay less than the notified sum

10. Any notice of intention to pay less than the notified sum mentioned in section 111(3) of the Act shall be given not later than the prescribed period, which is to say, not later than seven days before the final date of payment determined in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.'

(4) In paragraph 12 (interpretation)—

(a) omit the definition of "claim by the payee"; and

(b) after the definition of "contract price" insert the following definitions—

"making of a claim by the payee" means the giving of a written notice (whether pursuant to section 110B (2) or (4) of the Act or otherwise) by the payee to the payer specifying the sum that the payee considers to be due from the payer and the basis on which that sum is calculated;

"payee" means the person under a construction contract to whom a payment is due;

"payer" means the person under a construction contract from whom a payment is due;

"payment due date" means the date on which a payment is due;"

Date

Name
Parliamentary Under Secretary of State
Department for Business, Innovation and Skills

Annex B: Consultation Code of Practice

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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