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# Changes to The UK Construction Act - Clarification of the New English Payment Provisions

By Robin Orme

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The new payment provisions in the amended UK Housing Grants, Construction and Regeneration Act 1996 ('the Amended Act') [1] and in Part II of the amended Scheme for Construction Contracts (England and Wales) Regulations 1998 ('the Amended Scheme') [2] have applied in England to all new construction contracts made on or after 1 October 2011.

The basic provisions are simple: under s111 of the Amended Act, where a payment is provided for by a construction contract, the payer must pay:

- The notified sum specified in the relevant payment notice, or
- If the payer gives a valid notice of intention to pay less, the notified sum specified in the payless notice.

The amending legislation putting this into effect, however, is not so simple to understand. If the contract is based on an updated standard form, this will clarify how the new provisions apply and which options have been chosen. If not, what is the effect of the new provisions and what choices are open to the parties?

## What is the effect of the amended payment provisions?

The amended provisions provide a new mechanism for establishing the amount which must be paid. They do not entitle the payee to any new payments.

## What payments do the new provisions apply to?

The new provisions apply only to payments "provided for by a construction contract" or "provided for by the [construction] contract". [3] For contracts with a duration of 45 days or more, [4] these will be instalment, stage or periodic payments and a final payment, all as provided for in the contract or in the relevant provisions in Part II of the Amended Scheme.

[5] For each payment there will be a date for payment and a final date for payment (as agreed by the parties or as provided for in paragraphs 4 and 5 respectively in Part II of the Amended Scheme).

## How much must be paid?

Under s111 (1), "where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment". S111 (10) and (11) make provisions for payee insolvency.

## What is 'the notified sum' which has to be paid?

Unless a valid payless notice has been given, the notified sum which has to be paid is the amount specified in a payment notice:

- Given to the payee either by the payer or by a 'specified person', or
- Given to the payer or to a specified person by the payee. [6]

The parties in their contract must state which option applies. [7]

If a valid payless notice has been given, the obligation is to pay the sum specified in the payless notice. [8]

## When must a payment notice be given to be valid?

The notice must be given not later than 5 days after the payment due date. [9]

## What must the payment notice specify?

The notice must specify the sum which:

- The payer (if the notice is given by the payer) [10], or
- The payer or the specified person (if the notice is given by a specified person) [11], or
- The payee (if the notice is given by the payee) [12]

Considers to be or to have been due at the payment due date, and the basis on which that sum is calculated.

## What is a payless notice?

A payless notice is a notice from or on behalf of the payer that he intends to pay less than the notified sum specified in the payment notice and explaining why.

It must be given by the payer or by a specified person to the payee [13] and (even if the sum considered due is zero) must specify:

- The sum the payer considers to be due on the date the notice is served, and
- The basis on which that sum is calculated. [14]

It must be given within the time limit agreed by the parties [15] or, if no time limit is agreed, not later than 7 days before the final date for payment. [16]

Where the payment notice has been given by the payee, the payless notice may not be given before the payee notice has been given (whether a payee notice under s110A (3) or a default payee notice under s110B). [17]

What if the contract requires the payer or a specified person to give payment notices but the required notice is not given?

If this happens,[18] the payee may give a default payee notice or (in specified circumstances) the payee's application for payment is regarded as a valid default payee notice. The payer must pay the notified sum specified in the default payee notice or, if a valid payless notice is given, the notified sum specified in the payless notice. [19]

If a valid default payee notice is given, the payment due date is deferred by the number of days after the due date of the payer notice that the default payee notice was given. [20]

When can a payee's application for payment be regarded as a default payee notice?

The contract must permit or require the payee to submit an application before the date for the payer notice. [21] The application must be for a payment provided for by the contract and must be made as required in the contract. [22] It must specify the sum which the payee considers to be due on the payment due date, and the basis on which that sum is calculated. [23]

Can the payee submit an application and a later default payee notice?

No, the payee may submit only one default payee notice in relation to any payment. If, because the required payer notice is not given, the payee's application comes to be regarded as a default payee notice, the payee may not give any further default payee notice in relation to the current payment. [24]

What happens if the payee is required or permitted to submit an application for payment but does not do so and the required payer notice is not given?

If this happens, the payee can still give a default payee notice under s110B (2).

Are there any other changes to the payment provisions?

There are new restrictions on conditional payment obligations [25] and enhanced rights of suspension. [26]

What are the most important points to remember?

If your construction contract does not give effect to the new payment provisions, there are three key points to remember:

- The new provisions apply to payments provided for under the contract.
- There are no new entitlements – the new provisions merely set out a mechanism for establishing the amount which has to be paid.
- Provisions governing the period of interim or stage payments, the date for payment and the final date for payment remain unchanged, i.e. as agreed by the parties or as provided for in Part II of the Amended Scheme.

[1] As amended by the Local Democracy, Economic Development and Construction Act 2009.

[2] As amended by The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011.

[3] These wordings are used in s110A (payment notices), s110B (default payee notices) and s111 (requirement to pay the notified sum).

[4] As specified in the contract or if the parties agree that the duration of the work is estimated to be 45 days or more – s109 (1).

[5] Paragraphs 1 and 2 (instalment or stage payments), 3 to 7 (dates for payment), 8 (final date for payment), 9 (payment notices), 10 (payless notices) and 11 (prohibition of conditional payment provisions).

[6 - 8] s111(2), s110A (1), s111 (6)

[9] s110A (1) (a) and (b), and paragraph 9 (2) in Part II of the Amended Scheme.

[10 - 15] s110A (2) (a), s110A (2) (b), s110A (3), s111 (3), s111 (4), s111 (5) (a) and (7) (a)

[16] Paragraph 10 in Part II of the Amended Scheme.

[17] s111(5) (b)

[18] Under s110B (1), the contract must require the payment notice to be given not later than 5 days after the payment due date.

[19- 26] s111(2) (c) and (6), s110B (3), s110B (4) (a), s110B (1) and (4) (b), s110B(4) (a) (i) and (ii), s110B (4), s110, s112

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# The Role of Lead Consultant in Design and Build Procurement

By Bart Kavangh

October 2013

In design and build ("D&B") procurement the Employer engages the D&B contractor as the single point of management and contact for the design and construction of his project. The contractor then, typically, engages a range of separate consultant practices in order to obtain the design services he needs. He may also find it convenient and effective to engage someone who will be a single point of management and contact for this design team – enter the lead consultant.

## The Role

Complex projects frequently entail complex design processes. Effective design management is essential to the delivery of a satisfactory design on time, within budget and to the specified standard of quality; the lead consultant can provide this. His duties may be summarised as: advising, providing leadership and coordination, monitoring and reviewing, managing change, reporting and liaison. [1]

Central to the role is the management of the relationships between individual design disciplines as well as those between the design team, the construction team and any specialist suppliers or subcontractors with design responsibility. Sometimes, the management of the relationship between the contractor's team as a whole and that of the Employer may be equally important.

Traditionally, design management has been carried out by the architect as part of his duties as the designer of the project. In the field of D&B procurement, however, there may be benefits in having the management of the design separated from the production of the design itself, even if an architect carries out both functions.

Although contractors who regularly enter D&B contracts are likely to employ a design manager, he is unlikely to be the appropriate choice to manage the consultant design team. His responsibilities to the contractor may cause conflicts of interest and his workload will probably not allow him sufficient time. Anyway, the contractor is likely to want the responsibility, and liability, for managing the consultant team to lie with another party.

## Potential Benefits

The benefits of separating design management from design production will vary with the circumstances of each project but can include:

- Working in harmony with the contractor's accustomed methods of project management.
- Allowing dedicated designers to concentrate on design.
- Focusing appropriate skills and resources on the management of the design.
- Providing clear and simple routes for communication and approval.
- Reinforcing the professionalism of the contractor's team in its dealings with the employer.

## Potential Problems ...

Things may still go wrong, however, and the problems regarding design in D&B projects that we see in practice typically fall into the following categories.

- Conceptual misunderstandings arising from a failure to recognise what the role entails. These often result from the lead consultant practice being accustomed to managing its own design processes informally in the context of traditional procurement and failing to appreciate fully the broader scope and greater procedural rigour of the lead consultant role.
- Strategic problems caused by inconsistencies between management responsibilities and contractual links. For instance if the lead consultant considers that a design consultant is under-performing, or needs a variation to the scope of its duties it may be more difficult to apply effective sanctions or take effective action without a direct contractual relationship.
- Practical difficulties arising in the same way as in any other form of procurement. Failure to establish clear lines of communication and failure to maintain structured and regular reporting can lead to confusion and the escalation of problems.

## ... And How to Avoid Them

Conceptual misunderstandings should be eliminated by having a clear statement of the required duties set out in the articles of agreement between the lead consultant and the contractor. These should be explicitly re-stated at pre-appointment and pre-start meetings.

Strategic problems will be reduced if the network of managerial responsibility is supported by matching contractual obligations. Having the design team appointed as sub-consultants to the lead

consultant is ideal from the D&B contractor's point of view. This is not always practicable however, often because of PII constraints, and the design consultants may need to be individually appointed by the contractor. In this case all of the consultant appointments must be carefully harmonised with that of the lead consultant. Further, explicit procedures should be adopted to alert the contractor to any issues which need his input as a party to a consultancy agreement.

The incidence of practical difficulties can be reduced as the lead consultant defines clear lines of communication supported by a structured framework of regular meetings, workshops and reports. Identifying key personnel responsible for monitoring the operation and performance of the management systems also helps to ensure that they perform as required.

[1] *Leading the Team, an Architect's Guide to Design Management*. Dale Sinclair. RIBA Publishing, London. 2011

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## BIM Copyright and Licensing

By Frank Newbery

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A recent authoritative survey by NBS indicates that the adoption of BIM (building information modelling) by the construction industry continues to increase in anticipation of 2016, when the UK Government will require all of its own construction projects to be BIM-based. The requirement is for BIM at "Level 2", i.e. formation of a "federated" 3D virtual model by combining distinct models separately produced by different design disciplines, and which remain separable for the purposes of identifying authorship and responsibility.

Even at this Level 2, however, BIM embodies a significantly higher degree of electronic design and data integration between specialisms than is commonly required by conventional pre-BIM technology and procedures. Accordingly a growing interest in "collaborative working" – and concern for its implications – has been developing in parallel with BIM awareness and adoption [1].

In this BIM/collaborative context one area of particular concern is the copyright and licensing of contributing designers' intellectual property. The normal non-BIM position is straightforward and typified by current documents such as the *RIBA Standard Conditions of Appointment for an Architect* (2010 rev. 2012). Agreement to this establishes that:

The Architect shall own all intellectual property rights including the copyright in the original work produced in the performance of the Services...

- 6.1 The Client shall have a license to copy and use [the Architect's] drawings, documents...
- 6.3 Copying or use of the Material by an Other Person shall be deemed to be permitted under a sub-licence...
- 6.3.2 If at any time the Client is in default of payment of any fees or other amounts properly due, the Architect may suspend further use of the licence and any sub-licences...

"Revocable" licensing of this sort is potentially problematic in a BIM context because the relatively high degree of electronic data integration means there will be a correspondingly greater degree of disruption if any Project Team Member's input is withdrawn. Such integration also increases the likelihood in practice that contributed material may be circulated and adapted beyond the knowledge or control of the original provider.

The CIC BIM Protocol was published last year as an annexe to be attached to every building and professional appointment contract for a project, with the purpose of binding all "Project Team Members" into a common framework of obligations necessary for the successful implementation of BIM. It establishes rigorous requirements for licensing and sub-licensing up to and down from the Employer of all material contributing to the BIM model.

In view of the potential problems noted above, there had been serious consideration during the inception of the Protocol that copyright licensing to the Client would be deemed irrevocable [2], whereupon potential problems of disruption by revocation would fall away – of course to Project Team

Members' potential disadvantage. The Protocol as published however retains the principle of revocability in its section "6. USE OF MODELS", stating:

- 6.3 Subject to clause 6.4 and 6.5, the Project Team Member grants to the Employer a nonexclusive licence and, to the extent that the Material and any rights subsisting therein are owned by third parties, a sub-licence...
- 6.4 The licence and sub-licence (if any), granted in clause 6.3 may be suspended or revoked in the event of non-payment to the extent that any licence in the Agreement [3] provides for such suspension or revocation.

So far this seems straightforward, but subsequent paragraphs include the following qualification:

- 6.5 *The licence in clause 6.3 shall not include the right to [...] amend or modify the Material without the Project Team Member's written consent (not to be unreasonably withheld), save where such amendment or modification is [...] made for the Permitted Purpose following the termination of the Project Team Member's employment under the Agreement.*

This amounts to saying that there is a right to amend or modify the contributed Material after the provider's termination, which implies that the Material is still present and has not effectively been revoked. Potentially there are difficulties of interpretation here if the termination's circumstances are disputatious.

The Protocol's introductory guidance raises the possibility that "if the Employer wants to own all Project IPR, then the Protocol will need to be amended". This might indeed be a more attractive option for an Employer given the potential difficulties with the un-amended clauses as outlined above. This aspect of BIM implementation still seems to be in a transitional stage of development, and it may take some years before commonly accepted norms begin to emerge.

[1] A key reference is *Assembling a Collaborative Project Team* by Dale Sinclair, RIBA Publishing, 2013.

[2] See NBS website article *The CIC BIM protocol – a critical analysis* by Koko Udom, NBS Head of Contracts and Law.

[3] "Agreement" in this context means the appointment terms to which the Protocol is attached, such as e.g. the RIBA Standard Conditions cited above.

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