



Taking Control of the Payment Process

Guidance on the Construction Act for Specialist Contractors

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JCT 2011 – 10% Discount for NSCC Members

The JCT 2011 Edition contracts have been updated to comply with the new Construction Act from 1 October 2011.

As well as changes to the payment provisions, the 2011 contracts include:

- A revised Insolvency definition in the Termination section
- Revised Terrorism Cover provisions
- Extension of the provision for appointment of the principal contractor under CDM Regulations to cover Site Waste Management Plans Regulations 2008
- Reference to the Bribery Act 2010
- Revised retention provisions in the sub-contracts.



NSCC members can purchase JCT 2011 contracts at a 10% discount from Construction Industry Publications (CIP) Ltd.



Why the New Construction Act?

The 'new' Construction Act is not actually new at all; it is a number of changes to the existing Housing Grants, Construction and Regeneration Act 1996. The changes apply to all contracts formed on or after **1 October 2011** in England and Wales and on or after **1 November 2011** in Scotland.

The Construction Act gives parties to a construction contract certain rights and obligations which can't be taken away regardless of what their contract might say. The changes generally work to close 'loopholes' in the original Act and there is now a lot more certainty for Specialist Contractors about how much money they are due for payment and when it should be received.

Under the new payment rules, the parties have to agree whether it is the Contractor or the Specialist Contractor that is responsible for notifying the amount due for payment. If the Contractor is responsible but he doesn't do it when he is supposed to, the Specialist Contractor can issue an application for what he is owed, which will become the amount due unless the Contractor issues a 'Pay Less Notice' stating otherwise. Being able to step in and take control of the payment process is a huge advantage for Specialist Contractors – but only if they use it!



Beware

One basic rule hasn't changed and that is that the Act is not a contract; it just tells you what your contract should say. If you don't have a contract, there is a 'fall back' called the Scheme for Construction Contracts but, if you get to the point where you need to use it, you are already facing an uphill struggle. Never treat the Act as a substitute for a clear contract for your works.

This guidance is designed to help Specialist Contractors take control. It is specific to the Contractor/ Specialist Contractor relationship and NSCC has adopted these easy to understand terms rather than 'Payer' and 'Payee' which are used in the Act. The information is presented in the order that the payment process unfolds with each step explained in plain English rather than the technical jargon of the Act.

If you follow these simple steps, you can put yourself in a position where you know for every payment how much you are due and when. This means that if you don't receive it, it will be easier to suspend your works or go to adjudication.

NSCC is committed to fair payment and there is a wide range of guidance and tools for getting paid on the NSCC Fair Payment Campaign website at www.fairpaymentcampaign.co.uk. NSCC members also have access to the NSCC legal and contractual helpline in England and Wales on **0844 249 9871 and in Scotland on **0844 249 9872**.**

The Payment Rules

1. When is a payment due and payable?

The language used in the new Construction Act hasn't changed from the original one. The 'Due Date' is not the date when payment is actually made; it is the date that you start counting the days to the 'Final Date for Payment' which is when you actually get your hands on the money.



Beware

The Due Date is absolutely critical because all of the stages in the payment process are determined by reference to this date. If you don't know your Due Date, you will be guessing at everything else.

The new Act still requires the contract to contain an 'adequate mechanism' for working out when payments become due. However, it now expressly prevents the Specialist Contractor's Due Date from being dependent on something happening under the Main Contract such as the issue of a certificate from the (Contractor's) Employer. Under the new Act, you must be able to determine the Due Date(s) for your payment(s) by reference to the provisions of *your contract only*. The easiest way of doing this is to write a series of calendar dates into the contract.

This change also has a benefit in terms of retention. The contract must now contain a specific date for the release of your retention; it can no longer be dependent on the issue of Practical Completion and/or Making Good Defects Certificates under the Main Contract.

Pay when paid is still prohibited with one exception which has not changed from the original Act. If your contract allows it, the Contractor can withhold payment in the event that he doesn't get paid because his Client has become insolvent.

Take Control...

- Insist on a series of calendar dates for payment in your contract. Make sure there are dates for every month – some Contractors leave out December and even June to improve their cash flow figures!
- Check the length of time between the dates in the payment process. Ideally, there should be no more than 7 days between the valuation or application date and the Due Date, and the Final Date for Payment should be within 28 days of the valuation or application date.
- If you can't agree a series of dates, make sure that the first Due Date can be calculated by reference to something that you have direct knowledge of such as your start date on site or, if you have agreed payment for pre-construction works, the date when you start off site. Ideally, the first Due Date should not be more than 30 days after commencement of your works.
- Watch out for complicated ways of calculating the Due Date. As a rule of thumb, if it takes you more than a few minutes to work out when your payments become due, then the mechanism is too complicated! A complicated mechanism will not be designed for your benefit, so don't accept it.
- Make sure your contract contains specific calendar dates for the release of the first and second half of your retention.



Beware

There is no limit on how long you can be made to wait for the first Due Date or on the length of time between the Due Date and the Final Date for Payment so check the dates carefully. For example, if the first Due Date on your list is 60 days after you start or the Final Date for Payment is 90 days after the Due Date that is what you are stuck with!

2. Who decides how much is payable?

The process by which the amount for payment is determined is one of the most important changes in the new Construction Act. Under the original Act, the Contractor was *always* required to decide the value of the works and notify the Specialist Contractor of his valuation. If the Contractor didn't do anything, there was little that could be done about it without getting involved in complicated dispute resolution and the majority of Specialist Contractors would simply wait for their cheque.

There are now three ways in which the amount due can be determined:

1. The Contractor is responsible for notifying the amount due using what is called a 'Payment Notice' which must be issued not later than 5 days after the Due Date **or**
2. The Specialist Contractor is responsible for notifying the amount due using the 'Payment Notice' which must be issued not later than 5 days after the Due Date.
3. If the Contractor is responsible for notifying the amount due **but** does not issue the Payment Notice on time, the Specialist Contractor can issue his own Payment Notice which becomes the amount due unless the Contractor issues a 'Pay Less Notice' before the Final Date for Payment.

The contract must state whether option 1 or 2 applies. Option 3 is a fall back position or 'safety net' for the Specialist Contractor if option 1 is specified and the Contractor does not do what he is supposed to.

Some contracts which require the Contractor to issue the Payment Notice may also allow or require the Specialist Contractor to issue an application for payment before the Due Date. In this case, provided that you have issued your application by the required date, this will automatically become your Payment Notice if the Contractor does not issue his on time.

Take Control...

- In practice, the Contractor generally issues the contract so check which option has been specified and, if applicable, the date when you should receive a Payment Notice from the Contractor.
- If the Contractor is responsible for issuing the Payment Notice and you haven't received it within 5 days of the Due Date, issue your Payment Notice **immediately**. Once the Contractor misses the deadline, the Due Date is changed to the date that you issue your Payment Notice and the Final Date for Payment will go back by one day for every day that your Payment Notice is delayed.
- If you have already issued an application for payment, re-issue it as soon as the Contractor misses the deadline to avoid any arguments about whether it was issued as required by the contract. The application must show the amount due and the basis on which that amount was calculated.
- If you are responsible for issuing the Payment Notice, make sure you issue it on time and in the detail specified by your contract. The level of detail required will vary from contract to contract and before signing a contract you should make sure the requirements are not excessive.
- Look out for clauses which state that, if your Payment Notice is late, it cannot be issued until the next valuation period. You are the only one that can prevent such provisions in the contract by refusing to sign up to them! An example of a fair and sensible clause dealing with late submission is in the JCT/SBCC 2011 Edition sub-contracts, which state that the Due Date is delayed until a compliant Payment Notice is issued and all the corresponding dates are delayed with it.



Beware

If you submit your Payment Notice (application for payment) late or without the required detail, your payment **will** be delayed. Depending on the terms of the contract, it could stop you from getting any payment **at all** for that valuation. Play it safe by using the payment terms from the JCT/SBCC 2011 Edition sub-contracts as a basis for your contract and refuse to accept anything less.

3. Can the amount in the Payment Notice be reduced?

If the Contractor changes his mind about a Payment Notice that he has issued or he disagrees with a Payment Notice issued by the Specialist Contractor, he can reduce the amount for payment but **only** if he issues a 'Pay Less Notice'.

The Pay Less Notice must:

- Specify the sum that the Contractor considers to be due on the date that the Pay Less Notice is served (even if it is nothing at all)
- The basis on which that sum is calculated
- Be issued an agreed number of days before the Final Date for Payment and not before the Payment Notice itself has been issued.



Beware

The Act and most standard contracts, including the JCT/SBCC 2011 Edition contracts, require the Pay Less Notice to be issued a minimum of 7 days before the Final Date for Payment. However, it is not uncommon for Contractors to reduce this to 1 day in their terms and conditions.

The Pay Less Notice is similar to the withholding notice under the original Construction Act. However, the difference is that the Pay Less Notice has to state the amount that *will* be paid as well as what will be withheld. The benefit of this is that you will now know whether an underpayment is because of a dispute over valuation, a claim for contra charges or both. If you disagree, you can go to adjudication knowing what you are arguing about. You can also suspend works if the amount in the Pay Less Notice is not then paid.

This is the only way that anything other than the amount in the Payment Notice, whoever issues it, can be reduced.

Take Control...

- In your contract, insist on a 7-day minimum period before the Final Date for Payment for issuing the Pay Less Notice. If you don't, you can still get a nasty surprise right up until the day before the cash is due.
- Whatever period you agree for the Pay Less Notice, mark it on your calendar. Once the deadline has passed, you will be entitled to the amount in the Payment Notice in full.

4. What can I do if the amount finally determined is not paid?

If you have followed all of the preceding steps, the Final Date for Payment will arrive which is the happy moment when you should receive your money. This will either be the amount in the Payment Notice or, if one has been issued, the Pay Less Notice.

However, if in spite of all of this, the cash doesn't arrive, you have a number of options:

1. Suspend your works
2. Go to adjudication
3. Take legal action such as the Small Claims or County Court in England and Wales or the Small Claims or Sheriff Court in Scotland
4. Do nothing (not recommended).

Suspension is now a much more attractive option because:

- If you have followed the new payment process correctly, you should be confident that an amount was due and that the Final Date for Payment has passed so you are unlikely to be at risk of suspending incorrectly
- The new Construction Act allows you to recover the costs of suspending including demobilisation, down time and remobilisation of labour and plant
- You can still recover the time and you now also have a reasonable time to recommence work after the payment has been made
- You don't have to suspend everything; you can just suspend part of the works if you choose to.



Beware

You can't just down tools the day the cheque doesn't arrive. As with the original Act, you have to give 7 days' notice of your intention to suspend works.

Take Control...

- If you are not paid the amount due when you should be, you can suspend works, go to adjudication or do both. There are no limits but, as a rule of thumb, for small amounts suspension is likely to be sufficient but for larger sums it may be worth doing both.
- Issue notice of your intention to suspend works as soon as the payment is late. In many cases, it may encourage the Contractor to get his cheque book out.
- Don't wait for the payment to be a week or two late. You know when it is due so take action immediately. Being paid on time is your right not a privilege.

The Adjudication Rules

The changes to the adjudication rules are quite technical but in a nutshell they are as set out below.

- Under the new Construction Act, adjudication can also be used for contracts that are wholly or partly oral rather than just those that are in writing. In certain circumstances this might be useful but the golden rule is still the same: always get a written agreement. The cost of proving the existence and content of an oral contract will often be more than the value of the dispute.



Beware

Oral agreements are not worth the paper they're *not* written on. It can be difficult to prove they exist before you can claim the entitlements that they give you.

- Adjudicators can now correct arithmetical or typographical errors thanks to the inclusion of a 'Slip Rule'. They can't change their decision but if they have got their sums wrong or typed an incorrect figure, they now have a legal right to correct the mistake.
- So-called 'Tolent' clauses are now expressly prohibited. Previously, Contractors could include a clause in the contract which stated that, if you started an adjudication, you would have to pay the adjudicator's fees and expenses as well as the legal costs incurred by the Contractor – even if you won! The new Construction Act only allows the parties to a contract to agree on who pays the adjudicator's fees and expenses not any other costs incurred. If you choose to, you can still agree such things after the Notice of Adjudication has been issued but this should almost always be avoided.

Take Control...

- Always get an agreement in writing. Whilst the new Act allows you to go to adjudication on the basis of an oral or partly oral contract, it is likely to be difficult and expensive to prove its existence – let alone what it says!
- If you don't want to be a test case in the Courts, refuse to accept **all** contractual terms which make any reference to who pays the costs associated with an adjudication. If there is no agreement in the contract, the adjudicator will allocate his fees and expenses as part of his decision and, as this is usually in proportion to his findings, the loser will pay most or all of his bill.
- Remember, there is no reason to pre-agree the allocation of costs – it is just a means of discouraging you from pursuing what you think you are entitled to.



Beware

The new Act is not well worded and it is likely that some Contractors will try to insert 'clever' clauses into their contracts which try to get around its intention. The chances are that the Courts will support the intention of the Act but it is not certain.

Summary of the Changes to the Construction Act

Payment Notices

Original

- Although there was a requirement for the Contractor to issue a Payment Notice, there was no penalty if he didn't do so
- Only the Contractor could issue the Payment Notice
- Any application for payment from the Specialist Contractor had no legal standing
- In practice, a Contractor could ignore the requirement to issue a Payment Notice, leaving the Specialist Contractor with no idea as to what he would get paid until the cheque arrived (or didn't)

New

- Both parties have to agree in the contract which one of them is responsible for issuing the Payment Notice
- If the Contractor is responsible but doesn't issue it, the Specialist Contractor can issue his own
- In this situation, if the contract already allowed or required the Specialist Contractor to issue an application for payment, this application automatically becomes the Payment Notice
- If the Specialist Contractor is responsible, he must issue it on time because, if he doesn't, his payment will be delayed

Pay Less Notices

Original

- If the Contractor decided to withhold some or all of the sums that he had notified as being due, he had to issue a 'withholding notice'
- The withholding notice had to contain the amounts withheld with reasons for each
- It did not have to state the amount that would be paid
- If a Payment Notice had not been issued, as was generally the case, the withholding notice gave no indication as to how much, if anything, would actually be paid

New

- Irrespective of who issues the Payment Notice, the Contractor is entitled to withhold some or all of the money by issuing a 'Pay Less Notice'
- The Pay Less Notice must state how much is to be paid as well as what isn't with reasons for what isn't

Adequate Mechanism for Payment (Conditional Payments)

Original

- 'Pay when paid' clauses were prohibited except in certain circumstances
- Contractors got round pay when paid using 'pay when certified', which allowed them to make payment to the Specialist Contractor conditional upon receipt of a certificate for payment from the Employer
- Specialist Contractors had no way of knowing whether a certificate had been issued or, if it had, what it contained

New

- Making payments to Specialist Contractors conditional on 'events' (such as the issue of a certificate) under the Main Contract is prohibited
- A Specialist Contractor must be able to determine when his payments become due by reference to his contract only
- Pay when paid in the event of upstream insolvency is still permitted but only if the contract expressly allows for it

Suspension

Original

- If a payment was not made on time or in full, the Specialist Contractor could suspend works after giving 7 days' notice
- An extension of time equal to the period for which work was suspended was permitted
- Work was required to recommence immediately after the outstanding payment had been made

New

- The Specialist Contractor can still suspend works for late or underpayment after giving 7 days' notice
- The Specialist Contractor can suspend just part of the works if he chooses to
- The Specialist Contractor can claim the costs of suspension, including demobilisation, down time and remobilisation, and an extension of time for the delays resulting from suspension (e.g. remobilising labour or plant)

Adjudication

Original

- Contracts had to be in writing
- There was no express right for an adjudicator to correct an arithmetical or typing error in his decision
- Contractors were not prevented from writing agreements into their contracts which meant that, if a Specialist Contractor took a dispute to adjudication, he would have to pay all the costs of the adjudication including the Contractor's legal costs – even if the adjudicator found in favour of the Specialist Contractor

New

- Wholly or partly oral contracts are also covered
- There is a 'Slip Rule' which allows the adjudicator to correct arithmetical or typing errors in his decision
- Any agreements on costs other than the fees and expenses of the adjudicator are expressly prohibited unless they are made after the Notice of Adjudication

NSCC

National Specialist
Contractors Council

Useful Links

-  [Local Democracy, Economic Development and Construction Act 2009 \(the 'new Construction Act'\)](#)
-  [The new Construction Act – Explanatory Notes](#)
-  [The Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(Amendment\) \(England\) Regulations 2011](#)
-  [NSCC](#)
-  [Fair Payment Campaign](#)
-  [Construction Industry Publications](#)
-  [Anderson Strathern](#)
-  [Wedlake Bell](#)

This guidance is issued by NSCC to give general guidance on best practice; it is not intended to provide legal advice. NSCC and the organisations responsible for its content do not accept any liability arising in any way from relying on this guidance. If you require advice on a specific issue, you should seek your own independent legal advice. NSCC members can contact the NSCC legal and contractual helpline provided by Wedlake Bell in England and Wales on **0844 249 9871** and by Anderson Strathern in Scotland on **0844 249 9872**.

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