

Changes to the Construction Act 1st October 2011 - Are you ready?

The amendments to the Construction Act¹ brought in by LDEDCA² are due to come into force in England on **1st October 2011**.

This means that most construction documents currently used in the UK (such as building contracts, professional appointments and sub-contracts) will need to be amended to comply with the new law. In essence this will entail:

- A modified payment regime (for example the current "withholding notice" is replaced with a "pay less notice" and there is a new default notice)
- Changes to the statutory adjudication process
- An enhanced right for consultants/contractors/sub-contractors to suspend work for non-payment and claim costs/expenses

Although the changes are not enormous in substance they are mandatory (no contracting out is permitted). Construction documents which do not comply will have terms implied into them by the Scheme³ (the default set of payment and adjudication clauses that apply to non-compliant contracts).

The changes do not have retrospective effect. This means that any construction documents currently being negotiated will either need to be signed by **30 September 2011** or amended to comply with the new law after that date.

So what can the construction industry do to achieve a smooth transition?

This could include:

- Review the development pipeline to ascertain which contracts can realistically and sensibly be signed prior to 1st October 2011 and which cannot – start the process now of agreeing the amendments that will be required to comply with the Construction Act from 1st October
- Ensure that those involved in administering contracts are fully up to speed with the new payment regime
- Amend any template construction documents to comply with the new law
- Avoid contracts which are (wholly or partly) oral - it is always good practice to have a carefully written contract, but more important than ever come 1st October: this is because under the new regime the provisions of the Scheme will apply to oral contracts. Accordingly, disputes can be referred to adjudication where there is no written contract. We anticipate that an adjudicator could find it hard to decide what has been agreed where the terms of the deal are not clearly recorded in writing.

The JCT have already published track changes showing the planned amendments made to comply with the new law as between the 2005 documents (revision 2 2009) and the 2011 suite of contracts and we expect other bodies such as the RIBA and NEC to follow suit shortly. We understand that the JCT plan for the 2011 suite to be available for purchase in September 2011.

It remains to be seen if there is a flurry of activity in September (rather like that experienced in the spring of 1998 before the Construction Act first came into force) as parties rush to sign construction documents currently being negotiated in an attempt to avoid spending time and money making and agreeing amendments to comply with the new regime.

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¹ Part II of the Housing Grants, Construction and Regeneration Act 1996 is widely known as the "Construction Act".

² The Local Democracy, Economic Development and Construction Act 2009. Part 8 of the LDEDCA will amend the Construction Act.

³ The Scheme for Construction Contracts (England and Wales) Regulations 1998 will be updated by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment)(England) Regulations 2011.

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