

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

2011 No. XXXX

CONSTRUCTION, ENGLAND

**The Scheme for Construction Contracts (England and Wales)
Regulations 1998 (Amendment) (England) Regulations 2011**

Made - - - - *xxx*
Coming into force - - *1st October 2011*

The Secretary of State 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) (“the Act”).

Before making these Regulations, the Secretary of State has consulted in accordance with section 114(2) of the Act.

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

Citation, commencement, application and interpretation

1.—(1) These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 and come into force on 1st October 2011.

(2) These Regulations only apply to construction contracts entered into after the coming into force of these Regulations.

(3) These Regulations do not apply to construction contracts to the extent that they relate to the carrying out of construction operations in Wales.

(4) In these Regulations—

“the Act” means the Housing Grants, Construction and Regeneration Act 1996; and

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

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

Amendment to regulation 3 of the Principal Regulations

2. In paragraph (b) of regulation 3 of the Principal Regulations, after “section 110”, insert “or by section 110A”(3).

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

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

(2) In paragraph 1(1), before the words “of his intention”, insert the words “at any time”.

(3) After paragraph 7(3) insert—

“Upon receipt of the referral notice, the adjudicator must inform every party to the dispute of the date that it was received”.

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

“Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination”(4).

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

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

(6) In paragraph 15(b)—

(a) insert the word “the” after the word “as”; and

(b) for the words “be justified”, substitute “justify”.

(7) In paragraph 19(1)—

(a) in paragraphs (a) and (b), for the words “the date”, substitute “receipt”; and

(b) in paragraph (c), insert the words “receipt of” after the word “after”.

(8) In paragraph 20(b), for the words “section 111(4)”, substitute “section 111(9)”(5).

(9) In paragraph 21, omit the words “in accordance with this paragraph”.

(10) 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 must be made within five days of the delivery of the decision to the parties.

(3) As soon as possible after correcting a decision in accordance with this paragraph, the adjudicator must deliver a copy of the corrected decision to each of the parties to the contract.

(4) Any correction of a decision forms part of the decision.”

(11) Omit paragraph 23(1).

(12) Omit paragraph 24.

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

(3) Section 110A was inserted by section 143(3) of the Local Democracy, Economic Development and Construction Act 2009 (c.20).

(4) Section 108A was inserted by section 141 of the Local Democracy, Economic Development and Construction Act 2009.

(5) Section 111 was substituted by section 144 of the Local Democracy, Economic Development and Construction Act 2009.

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

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

- 4.—(1) Part 2 (Payment) of the Schedule to the Principal Regulations is amended as follows.
- (2) In paragraph 5—
- (a) omit the words “the expiry of”; and
 - (b) insert the words “the expiry of” before the words “30 days following completion of the work”.
- (3) For paragraph 9, substitute—

“Payment notice

9.—(1) Where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to section 110A(1) of the Act, the provisions of this paragraph apply.

(2) The payer must, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (3).

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

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

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

- (4) For paragraph 10, substitute—

“Notice of intention to pay less than the notified sum

10. Where, in relation to a notice of intention to pay less than the notified sum mentioned in section 111(3) of the Act, the parties fail to agree the prescribed period mentioned in section 111(5), that notice must be given not later than seven days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.”

Date

Name
Minister of State for Business and Enterprise
Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”), in part to reflect changes made to the relevant primary legislation, the Housing Grants, Construction and Regeneration Act 1996 (c.53) (“the 1996 Act”), by the Local Democracy, Economic Development and Construction Act 2009 (c.20).

Regulation 1(3) has the effect of ensuring that the amendments to the Scheme made by these Regulations do not apply in relation to construction contracts in so far as they are for construction operations in Wales.

Where the parties to a construction contract fail to make provision in their contract for one or more of various terms relating to “adjudication” (a dispute resolution procedure which the 1996 Act introduced as regards disputes under construction contracts), the provisions of Part 1 of the Schedule to the Scheme have effect (as implied terms of the parties’ contract).

Regulation 3(3) inserts a new provision into the Scheme with the effect that, upon a dispute being referred to an adjudicator, the adjudicator is to inform the parties to the contract of the date of the referral.

Broadly similar provisions relating to the fees and expenses of an adjudicator are amended by Regulation 3(4), (5) and (13). The effect of these amendments is to ensure that the adjudicator’s ability to look to both parties to the construction contract for the payment of the adjudicator’s fees and expenses is subject to any valid (express) contractual provision to the contrary. (See section 108A of the Act which, though it provides that most express contractual provision as regards the allocation of adjudication costs will be ineffective, exempts provision whereby the parties agree that the adjudicator can allocate his or her costs between the parties.)

Regulation 3(7) amends paragraph 19(1) of the Scheme to clarify that the period within which an adjudicator must reach a decision regarding a dispute begins when the adjudicator receives the referral.

Regulation 3(10) introduces a new provision into the Scheme to the effect that adjudicators have the power to correct (in various circumstances) minor errors in their decisions. Any such corrections must be made within five days of the relevant decision.

Regulation 3(11) and (12) repeal provisions allowing for peremptory decisions on the part of adjudicators.

Regulation 4 amends Part 2 of the Schedule to the Scheme. Part 2 of the Schedule to the Scheme concerns “payments” and implies into the contract provisions relating to payments to the extent that express terms are absent or deficient.

Section 110A of the 1996 Act as amended provides that a construction contract must contain a provision to the effect that a “payment notice” (setting out, in relation to every payment, the sum considered due) must be given by the person whom the parties have agreed - the payer, the payee or certain other persons. Where the parties have failed to make express provision in their contract as to who is to give such notices, regulation 4(3) substitutes a new paragraph 9 of Part 2 of the Schedule to the Scheme with the effect that this is the payer’s responsibility.

Section 111 of the 1996 Act as amended introduces a requirement to pay the sum set out in such “payment notices” (whether given pursuant to express terms in the parties’ contract or by virtue of new paragraph 9 of Part 2 of the Schedule to the Scheme). It also makes provision for the sum in

such a notice to be challenged or revised by the giving of a type of counter-notice – a notice of intention to pay less than the notified sum. Regulation 4(4) substitutes a new paragraph 10 of Part 2 of the Schedule and thereby makes provision for the timing of such a counter-notice where the parties have failed to agree on this.

A full regulatory impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Construction Sector Unit, Department for Business, Innovation and Skills, 1 Victoria Street, London SW1H 0ET, and is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk.