
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

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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.