

## The New Payment Regime under the Construction Act 1996 – Post 1 October 2011

**The amendments to the Construction Act 1996 (“the Act”) brought in by the Local Democracy, Economic Development and Construction Act 2009 (“LDEDCA”) take effect on 1 October 2011 in England and Wales, and 1 November 2011 in Scotland.**

In brief, the LDEDCA amends the Act by (i) introducing a new payment regime (ii) bolstering a payee’s right to suspend for late payment, (iii) removing existing barriers to adjudication and (iv), by making written and oral contracts subject to the Act.

The purpose of this note is to focus on the new payment regime only and in particular, the process for requesting and receiving payments under construction contracts entered into after 1 October 2011. For a more expansive explanation of the amendments to the Act introduced by the LDEDCA, please view [IBB’s free webinar](#)

### Example 1

Under the standard terms of the JCT Design and Build Contract (2011 version), the Payee shall make an Interim Application to the Payer at (i) monthly intervals or (ii) on the completion of certain stages (as will be agreed in the contract).

The “due date” is (i) the later of the monthly date specified in the contract and the date the Payer receives the Payee’s Interim Application for payment or (ii) the later of completion of the stage and the date the Payer receives the Payee’s Interim Application for payment.

The “final date” for payment of an Interim Payment is 14 days from the due date.

### Payment Process

1. **Interim Application**

The Payee issues an Interim Application for payment in accordance with the contract, which crystallises the “due date”



## 2. Payment Notice

Within 5 days after the Due date, the Payer (or the specified third person) must give a Payment Notice to the Payee specifying the amount the payer (or the specified third person) considers to be due on the due date and the basis for that sum.

The sum stated in the Payment Notice is the “notified sum”.

Please note the following:

- 2.1 If a specified third person is giving the Payment Notice, then the Payer must have previously notified the Payee that the specified third person is authorised to give the notice. This notification is likely to be contained in the Building Contract.
- 2.2 A Payment Notice must also be issued if the Payer or specified third person considers that nothing is due.



## 3. Pay-Less Notice

If the Payer intends to pay less than the “notified sum” contained in the Payment Notice then the Payer or specified third person may give a “Pay-Less Notice”.

Please note the following:

- 3.1 The Pay-Less Notice must be given no later than the agreed period stated in the contract before the final date for payment (the JCT Design and Build Contract (2011 version) provides for a period of 5 days);
- 3.2 The Pay-Less Notice must specify the sum the Payer or specified third person considers as being due on the date the Pay-Less Notice is served and the basis on which that sum has been calculated;
- 3.3 If a Payer considers that nothing is due on the date the Pay-Less Notice is served, a Pay-Less notice must still be served specifying that no sum is due and the basis on which this has been calculated; and
- 3.4 Stages two and three (the Payment Notice and the Pay-Less Notice) cannot be combined.
- 3.5 The Pay-Less Notice will be appropriate for Payers where:
  - 3.5.1 a defect is found after the Payment Notice was issued; or
  - 3.5.2 when the Payer or specified third person has failed to serve a Payment Notice in time, or at all.



4. **Sum to be Paid**

The Payee should receive the sum specified in the Payment Notice or Pay-Less Notice by the final date for payment.

If this sum is not received, the Payee would be entitled to:

- 4.1 suspend all or part of its obligations under the Building Contract, subject to giving the Payer 7 days notice of its intention to suspend.

The Payee will be entitled to (i) his reasonable costs and expenses incurred as a result of suspending performance and (ii) an extension of time for completing the works equal to the period of the suspension (which includes the time taken to demobilise after the right to suspend arises, and the time taken to remobilise the works once the outstanding sum is paid); or

- 4.2 commence proceedings.

## Example 2:

Take the same facts as in Example 1 above, but the Payer (or specified third person) fails to issue a compliant Payment Notice, or at all.

## Payment Process

### 1. Interim Application

The payee issues an Interim Application for payment in accordance with the contract, which crystallises the “due date”



### 2. Payment Notice served by the Payee

If the Payer (or specified third person) fails to serve a Payment Notice within **5 days** after the due date, the Payee can issue a Payment Notice. This is more commonly known as the “default payment notice”

The sum stated in the “default payment notice” is the “notified sum”.

Please note the following points:

- 2.1 If the Payee’s Interim Application for payment complies with the requirements of a Payment Notice, that Interim Application will stand as the Payee’s Payment Notice. The Payee need not give a second notice. In this case, the final date for payment will not change.
- 2.2 If, however, the Payee’s Interim Application does not comply with the requirements of a Payment Notice, then the Payee can issue a Default Payment Notice. In this case, the final date for payment is postponed by the same number of days between the date the Payer’s or specified third person’s Payment Notice was due, and the date the Payee’s Default Payment Notice is served.



### 3. Pay-Less Notice

If the Payer intends to pay less than the “notified sum” contained in the Payment Notice then the Payer or specified third person may give a “Pay-Less Notice”.

Please note the following:

- 3.1 The Pay-Less Notice must be given no later than the agreed period stated in the contract before the final date for payment (the JCT Design and Build Contract (2011 version) provides for a period of 5 days);
- 3.2 The Pay-Less Notice must specify the sum the Payer or specified third person considers as being due on the date the Pay-Less Notice is served and the basis on which that sum has been calculated;
- 3.3 If a Payer considers that nothing is due on the date the Pay-Less Notice is served, a Pay-Less notice must still be served specifying that no sum is due and the basis on which this has been calculated; and
- 3.4 Stages two and three (the Payment Notice and the Pay-Less Notice) cannot be combined.
- 3.5 The Pay-Less Notice will be appropriate for Payers where:
  - 3.5.1 a defect is found after the Payment Notice was issued; or
  - 3.5.2 when the Payer or specified third person has failed to serve a Payment Notice in time, or at all



### 4. Sum to be Paid

The Payee should receive the sum specified in the Payment Notice or Pay-Less Notice by the final date for payment.

If this sum is not received, the Payee would be entitled to:

- 4.1 suspend all or part of its obligations under the Building Contract, subject to giving the Payer 7 days notice of its intention to suspend.

The Payee will be entitled to (i) his reasonable costs and expenses incurred as a result of suspending performance and (ii) an extension of time for completing the works equal to the period of the suspension (which includes the time taken to demobilise after the right to suspend arises, and the time taken to remobilise the works once the outstanding sum is paid); or

- 4.2 commence proceedings.

The parties have entered into a written contract but the contract provisions do not provide an adequate mechanism for determining what payments become due under a contract, or when they become due.

In this case, the payment provisions contained in the Scheme for Construction Contracts<sup>1</sup> will apply (“the Scheme”).

## 1. What sum will be due?

Before discussing the payment process, how is the sum due to be calculated. The Scheme provides that interim payments are calculated as:

(an amount equal to the value of the work performed from the commencement of the works to the end of the “relevant period” PLUS where the contract provides for payment of materials, and amount equal to the value of materials PLUS any other sum the contract provides as being payable to the Payee) LESS the total of all sums paid by the Payer to the Payee under the contract.

The “relevant period” means a period which is specified in the construction contract, or where no such period is so specified or calculable, a period of **28 days**.

In this example, the final payment payable under a relevant construction contract will be the difference between the contract price and the total of any interim or stage payments.

## 2. When is the “due date”?

For interim payments, the above sum shall be due on whichever of the following dates occurs the latest:

- 2.1 7 days after the “relevant period” expires; or
- 2.2 the making of a claim by the payee.  
The final payment payable under a relevant construction contract will be due on:
- 2.3 the expiry of 30 days following completion of the work, or
- 2.4 the making of a claim by the Payee

whichever is the later.

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<sup>1</sup> The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) 2011. This Article does not consider the Scheme rules applying in Wales and Scotland.

### 3. When is the “Final date for Payment”

17 days from the due date.

#### Payment Process

##### 1. Payment Notice

Within 5 days after the due date, the Payer (or the specified third person) must give a Payment Notice to the Payee specifying the amount the payer (or the specified third person) considers to be due on the due date and the basis for that sum.

The sum stated in the Payment Notice is the “notified sum”.

Please note the following:

- 1.1 If a specified third person is giving the Payment Notice, then the Payer must have previously notified the Payee that the specified third person is authorised to give the notice. It would be preferable for notification to be given in the Building Contract.
- 1.2 A Payment Notice must also be issued if the Payer or specified third person considers that nothing is due.



##### 2. Payment Notice served by the Payee

If the Payer (or specified third person) fails to serve a Payment Notice within **5 days** after the due date, the Payee can issue a Payment Notice. This is more commonly known as a “default payment notice”

In this case, the final date for payment is postponed by the same number of days between the date the Payer’s (or specified third person’s) Payment notice was due, and the date the Payee’s default payment notice is served. If the Payer does fail to provide a Payment Notice, then the sum claimed in the Payee’s Notice is the “notified sum”.



### 3. Pay-Less Notice

If the Payer intends to pay less than the notified sum then the Payer (or specified third party) may serve a “Pay-Less Notice”.

Please note the following points:

- 3.1 The Pay-Less Notice must be given no later than 7 days before the final date for payment; and
- 3.2 The Pay-Less Notice must specify the sum the Payer or specified third person considers as being due on the date the Pay-Less Notice is served and the basis on which that sum has been calculated;
- 3.3 If a Payer considers that nothing is due on the date the Pay-Less Notice is served, a Pay-Less notice must still be served specifying that no sum is due and the basis on which this has been calculated; and
- 3.4 Stages two and three (the Payment Notice and the Pay-Less Notice) cannot be combined.
- 3.5 The Pay-Less Notice will be appropriate for Payers where:
  - 3.5.1 a defect is found after the Payment Notice was issued; or
  - 3.5.2 when the Payer or specified third person has failed to serve a Payment Notice in time, or at all.



### 4. Sum to be Paid

The Payee should receive the sum specified in the Payment Notice or Pay-Less Notice by the final date for payment.

If this sum is not received, the Payee would be entitled to:

- 4.1 suspend all or part of its obligations under the Building Contract, subject to giving the Payer 7 days notice of its intention to suspend.

The Payee will be entitled to his reasonable costs and expenses incurred as a result of suspending performance; or
- 4.2 commence proceedings.

**If you would like to talk to us about the issues raised by this note, please contact:**

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