



Welcome to the October edition of *Insight*, Fenwick Elliott's latest newsletter, which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out what you need to know about amendments to the JCT and NEC forms following implementation of the New Construction Act.

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Amendments to the JCT and NEC forms following implementation of the New Construction Act

The implementation of Part 8 of the Local Democracy, Economic Development and Construction Act ("the New Act") has necessitated various changes to the treatment of payment and adjudication in most standard form contracts.

The purpose of this note is to consider those amendments having regard to the two most commonly used design and build forms, the JCT Design and Build Contract, Revision 2, 2005 ("DB 2005") and NEC3.

Application of the amendments

The amendments apply to all construction contracts entered into in England and Wales from 1 October 2011 and in Scotland from 1 November 2011. Equivalent legislation is expected to come into force in Northern Ireland in late 2012, at which point the amendments might also apply to construction contracts in Northern Ireland.

The JCT and NEC response to the New Act

JCT published the new 2011 main contracts and corresponding sub-contracts as the successor suite to JCT 2005 on 9 September 2011. As would be expected, the JCT amendments are fairly comprehensive and focused and probably go beyond what is strictly necessary to make DB 2005 New Act compliant.

In contrast, the amendments made by NEC are rather more minimalist, but this is, of course, reflective of NEC's overall approach to drafting. The NEC changes were published on 16 September 2011 and appear in the Engineering and Construction Contract; Engineering and Construction Sub-Contract; Professional Services Contract; and Term Service Contract. The amendments are made through revisions to Option Y(UK)2 in relation to payment and Option W2 with regard to adjudication.

The Engineering and Construction Short Contract, Engineering and Construction Short Subcontract and Term Service Short Contract have all been amended by the use of additional conditions to make them New Act compliant. The amendments are available on a no-charge basis through the following [link](#) on NEC's website. At this stage, NEC have not incorporated the amendments into a new NEC4

but the amendments will be fully incorporated at such time as the new NEC4 is published.

Key payment changes

JCT Design and Build Contract, 2011 ("DB 2011")

The payment mechanism has been broadly retained by DB 2011. The starting point is an interim application by the contractor, followed by service of any necessary notices, and finally, payment by the employer.

JCT goes out of its way to highlight the changes to payment that arise from the New Act. It emphasises the requirement to serve Payment Notices and Payless Notices by the authorised person, even if the sum due is zero. Oddly, no reference is made to the contractor's entitlement to serve a Default Notice.

As regards suspension, JCT makes it clear that a contractor can suspend "any or all" of its obligations under the contract and adds that reasonable costs and expenses can be recovered in relation to any valid period of suspension.

NEC3

The approach taken by NEC with regard to payment is much more subtle in that the payment amendments are subsumed within the amendments to Option Y(UK)2.

Option Y2.2 has been amended such that the Project Manager's Certificate stands as the Payment Notice and it should contain the elements of the Payment Notice as stipulated by the New Act. If (i) the Project Manager fails to serve a Payment Notice or (ii) the Payment Notice served is invalid or (ii) payment is remitted without also serving a Payment Notice, the contractor may serve a Payment Notice. The sum due will then be that



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appearing in the Contractor's Payment Notice.

Unlike JCT, NEC has not made provision for any scenario in which the Payment Notice is alleged to be invalid. You should be aware that this omission is however of little consequence as section 110B of the New Act provides that in the absence of any (or any valid) Payment Notice, the contractor (or sub-contractor as the case may be) will be entitled to payment of the sum appearing in his payment application. The net result is therefore as for DB 2011.

The timescales for payment remain unchanged in that the payment due date is 7 days after the assessment date and the final date for payment is 14 days after the payment due date. The payment period can be amended by the contract provided that equivalent provision is made in the sub-contract data.

Option Y 2.3 (which previously dealt with withholding notices) has been substituted for the Payless Notice requirements and timescales for service required by the New Act. In accordance with the New Act, the contractor's payment application must be paid in full in default of service of a Payment Notice and / or Payless Notice by the Project Manager.

Finally, a right to suspend already exists in the main NEC3 contracts as a compensation event. NEC3 did not therefore have to be amended to reflect the fact that the suspending party is entitled to recover the reasonable direct costs and expenses arising from any valid period of suspension.

The improved suspension rights under the New Act will only impact the short contracts, where no right to suspend previously existed. A new clause has been added to the short forms confirming that any suspension will be classed as a compensation event to ensure assessment is carried out as for other events. No reference is made to the entitlement to claim reasonable costs and expenses incurred in validly suspending, albeit an entitlement will still be available pursuant to the provisions of the New Act.

Materially identical amendments to those mentioned above have been made to the NEC3 Engineering and Construction Sub-Contract, save that the Contractor's certificate is the Payment Notice and payment falls due 14 days after the assessment date. Again, if a Payment Notice and / or Payless Notice are not served by the Contractor then the Sub-Contractor's payment application will be payable in full.

In the Engineering and Construction Short Contract, Engineering and Construction Short Subcontract and Term Service Short Contract, the Contractor's or Subcontractor's application for payment will stand as the Payment Notice. This is because these contracts contain no certification procedure.

Key adjudication changes

DB 2011

It was not necessary for DB 2011 to change the way it deals with adjudication because DB 2005 applies the "Scheme". The definition of "Scheme" (at clause 1.4.5) includes the amended Scheme.

NEC3

Unlike JCT, NEC3 does not incorporate the Scheme and amendment is therefore required.

The NEC3 amendments include a revised slip rule whereby errors must be amended within 5 days (as opposed to 14 days as was previously the case under Option W2), and any typographical errors or clerical mistakes in the Adjudicator's decision must be corrected within 5 days of delivery of the original decision. If the Adjudicator's decision changes the amount notified as being due, the notified sum under any Payment Notice will be increased by the amount of the Adjudicator's decision. Payment of the new amount will be due no later than 7 days from the date of the decision or final date for payment of the notified sum, whichever is later.

Provision has also been made for the Adjudicator to allocate his fees and expenses of the adjudication and Option W2 has been amended accordingly.

Conclusion

The government has suggested that it will review the New Act in three years' time and therefore the DB 2011 and NEC3 amendments might only be a temporary measure. In the interim, the changes that have been made in response to the New Act by JCT and NEC are neither substantial nor unexpected and it is likely that employers and contractors will continue to make use of the usual schedules of amendments which have traditionally accompanied the JCT and NEC forms.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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