

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009

On the 1st October 2011, the long awaited Local Democracy, Economic Development and Construction Act 2009 came into force. The act contains a host of changes to the operation of construction contracts; perhaps the most important of which concern amendments to the payment provisions set out in sections 110 and 111 of the Housing Grants, Construction and Regeneration Act 1996.

The amended sections 110 and 111 are likely to have a huge impact on construction contract payments, potentially imposing significant costs on any company that fails to understand or take heed of their effects, which can be summarised as follows:

1. Each and every pay period under a construction contract will require a payment notice to be issued within 5 days of the due date, specifying the sum due for that period (Notified Sum).
2. It will be impossible for a Payer to avoid making a payment by failing to value or certify completed work, as the Payee will be entitled to serve a payment notice in such circumstances.
3. Payment notices are required to contain the basis upon which Notified Sums are calculated.
4. A Payer must pay the Notified Sum as contained in the relevant payment notice unless it serves a notice to pay less.
5. A notice to pay less than the Notified Sum must value the work at the date the notice is served, rather than the Payment Due Date.
6. It is possible for either the Notified Sum or the sum given in a notice to pay less to be zero; however, the basis upon which the sum is calculated must be included.

Definitions:-

Before the changes can be properly understood, it is necessary to become familiar with a number of important terms:-

Payment Due Date - the date provided for by the contract as the date on which payment is due;

Payer - the person from whom the payment is due;

Payee - the person to whom the payment is due;

Specified Person - a person specified in or determined in accordance with the contract;

Payer Notice - Notice given by or on behalf of the Payer, in accordance with section **110(2) (a) or (b)**;

Payee Notice - Notice given by or on behalf of the Payee, in accordance with section **110(3) (a) or (b)**.

Notified Sum - The sum detailed within an applicable Payer or Payee notice.

Prescribed Period - Such period as the parties agree or, in the absence of agreement, as provided for by the Scheme for Construction Contracts.



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The existing provisions of section 110 and 111 are amended, as follows:-

New sections 110 1A, 1B, 1C and 1D

1A confirms that it is not an adequate mechanism for determining payments due under a contract if it is conditional upon:

- a) the performance of obligations (not including payments **(1B)**) under another contract, or
- b) a decision by any person as to whether obligations under another contract have been performed.

Unless the contract is an agreement for the carrying out of construction operations by another person **(1C)**.

1D confirms that it is not an adequate mechanism for determining payments due under a contract if it is to be determined by reference to a notice to the Payee of what payments are due.

Replacement of sections 110 (2) and 111

The following changes are likely to materially alter the way that payments are made in respect of construction contracts.

Section 110(2) is replaced by new sections 110 A and 110 B.

Section 110 A requires that all construction contracts will have to provide for either the Payer **(1)(a)**, Payee **(1)(b)** or a Specified Person **(1)(a)** to give a notice to the other party,
NOT LATER THAN 5 DAYS AFTER THE PAYMENT DUE DATE
containing the following information:

- the sum that the party considers to be or to have been due at the Payment Due Date **(2)(a)(i)** or **(2)(b)(i)** or **(3)(a)**; and
- the basis upon which the sum is calculated **(2)(a)(ii)** or **(2)(b)(ii)** or **(3)(b)**.

The sum specified in the notice can be zero **(4)**.

If the contract does not comply with subsection (1), the Scheme for Construction Contracts applies **(5)**.

Section 110 B applies where the Payer fails to provide a notice required by the contract **((1)(a) and (b))** and confirms that the Payee may give the Payer a section 110 A (3) compliant notice, at any time after the Payer Notice was due (subsection **(2)**).

The final date for payment is adjusted; by the number of days after the Payer Notice was due the Payee Notice was given **(3)**.

The Payee is not required, or permitted, to give two 110A (3) compliant notices in respect of the same pay period.

Section 111 (Notice of Intention to Withhold Payment) is replaced by a new **Section 111 (Requirement to Pay Notified Sum)**.

The Payer must pay the Notified Sum (defined in subsection (2)), to the extent not already paid, on or before the final date for payment (1), unless

The Payer or Specified Person gives the Payee a notice of the Payer's intention to pay less than the Notified Sum **(3)**.
The notice must specify **(4)**:

- a) the sum that the Payer considers to be due **on the date the notice is served**, and
- b) the basis on which that sum is calculated.

The sum specified in the notice can be zero.

A subsection (3) notice **(5)**:

- a) must not be given later than the Prescribed Period (defined in subsection **(7)**) before the final date for payment, and
- b) may not be given before an applicable Payee Notice.

The Payer need only pay the sum specified in the subsection (3) notice **(6)**.



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Conclusion

Whether you are Payer or Payee, changes to construction contract payment provisions will almost certainly necessitate new processes and procedures, which should be strictly adhered to.

Our points to remember /
recommendations when
considering new processes
and procedures are:

Payer:-

1. DON'T IGNORE NOTICE REQUIREMENTS:
Payees will be entitled to full payment of Notified Sums, unless a compliant notice to pay less has been given.
2. BE AWARE OF, AND PAY ATTENTION TO, DEFAULT CONTRACT TIMINGS:
 - a) The default pay period under the Scheme for Construction Contracts is 28 days, therefore, a valuation, notice and payment will be required on a monthly basis unless an alternative period is agreed;
 - b) The default Payment Due Date under the Scheme for Construction Contracts is 7 days from the end of the pay period. The relevant Notice must be given within 5 days of the Payment Due Date.
 - c) The default final date for payment under the Scheme for Construction Contracts is 17 days from the Payment Due Date. The default Prescribed Period is 7 days.
3. IF DEFAULT CONTRACT TIMINGS LEAD TO AN UNMANAGEABLE ADMINISTRATION BURDEN, ENSURE THAT THEY ARE EXPRESSLY ALTERED.
4. CONSIDER WHETHER THE CONTRACT SHOULD PROVIDE FOR NOTICES TO BE PROVIDED BY THE PAYER OR PAYEE:
It is not necessary for the contract to require notices to be provided by the Payer; therefore, it may be appropriate in some circumstances for the Payee to be required to do so. Alternatively, the Payee can be required to provide a notification of the sum it considers to be due, prior to the date the Payer Notice must be given.
5. DON'T GET CAUGHT OUT BY THE NOTICE TO PAY LESS REQUIREMENTS:
A notice to pay less must value completed work at the date the notice is served, rather than the Payment Due Date. It will be invalid if the wrong period of works is valued.



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Payee:-

1. ALWAYS ISSUE A SECTION 110A (3)

COMPLIANT NOTICE:

Unless the contract prevents it, the issue of a section 110A (3) compliant notice prior to the date the Payer Notice must be given, will ensure that the Payer is required to make a payment by the final date, regardless of whether a Payer Notice is provided.

2. BE AWARE OF, AND PAY ATTENTION TO, DEFAULT CONTRACT TIMINGS:

- a. The default pay period under the Scheme for Construction Contracts is 28 days, therefore, a valuation, notice and payment will be required on a monthly basis unless an alternative period is agreed;
- b. The default Payment Due Date under the Scheme for Construction Contracts is 7 days from the end of the pay period. The relevant Notice must be given within 5 days of the Payment Due Date.
- c. The default final date for payment under the Scheme for Construction Contracts is 17 days from the Payment Due Date. The default Prescribed Period is 7 days.

3. UNDERSTAND THE NOTICE TO PAY

LESS REQUIREMENTS:

If a notice to pay less is received, ensure that it values the completed works at the date the notice is served, not the Payment Due Date.



If you wish to speak to our Construction Law expert, please contact Michael Smyth on 01785 223440 or at Mike.Smyth@orj.co.uk.

