

# **Adjudication**

**for**

# **Contractors**

## **A Commentary**

**By**

**JAMES TORR**

BSc(Eng) CEng FICE FConsE FRSA MAE MaPS

**TORR FORENSIC Partnership**

**7 Lambcroft Way, Chalfont St Peter, Bucks, SL9 9AY**

Tel: 01753 888023 Fax: 01753 888033

E-mail: [mail@TorrForensic.co.uk](mailto:mail@TorrForensic.co.uk)

Web: [www.TorrForensic.co.uk](http://www.TorrForensic.co.uk)

# Housing Grants, Construction and Regeneration Act 1996

## "The Construction Act"

The Construction Act established the right of a Party to a Construction Contract to adjudication when a dispute arises.

### Principal Issues

- Interim assessment of disputes by adjudication;
- Payment by instalments for contracts lasting longer than 45 days;
- The ability to suspend performance if not paid within a specified period;
- The outlawing of "pay when paid" clauses.

The Act states the basic principles that must be included in a Construction Contract; otherwise, the **Scheme for Construction Contracts** will apply.

### Construction Contract

- The carrying out of construction operations;
- 
- Arranging for the carrying out of construction operations by others, whether under a sub contract to him or otherwise;
- Providing his own labour, or labour of others, for the carrying out of construction operations.

These definitions clearly cover contracts for construction work but the Act also includes consultancy contracts in connection with construction work.

### Professional Engagement

Construction contracts also include an agreement:

- To do architectural, design or surveying work, or
- To provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.

## Definitions

Construction operations are widely defined. Definitions include:

- Construction,
- alterations,
- repair,
- maintenance,
- extension,
- demolition or dismantling of buildings,
- structures forming or to form, part of the land including walls,
- roadworks
- power lines
- telecommunication apparatus
- aircraft runways,
- docks and farmers,
- railways,
- inland waterway pipelines,
- reservoirs,
- water mains,
- wells,
- sewers industrial plant,
- installations for purposes of land drainage, coast protection or defence.

## Contract exclusions

- The construction contract must be "evidenced in writing"
- The Act does not apply to a *construction contract with a residential occupier*
- Material and component supply contracts, mineral extraction contracts and process engineering contracts

Note: When the primary operation is exempt, such as process plant, the subsidiary operations such as site preparation, roadworks and office buildings, will not be exempt.

## Set-off

Set off is the right to deduct from monies owed by one party sums of money which that party claims it is owed by the other.

The Act still permits set-off but requires written notice to be given.

*Every construction contract shall provide for the giving of notice by a party not less than five days after the date on which the payment became due from him under the contract, or would have become due if:*

- *The other party had carried out his obligations under the contract, and*

*No set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made and the basis on which that amount was calculated.*

The paying party is therefore required to detail how exactly his payment is made up. It may require him to value the work done in accordance with the contract, or to define what the value of that work is. If he is not paying the full amount, he will have to say why he is not paying that amount.

This only really matters if payment is not made by the final date of payment.

*A party to a construction contract may not withhold payment after the final date of payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.*

The notice given above may suffice provided it contains sufficient information. To be effective such a notice must specify:

- *the amount proposed to be withheld and the ground for withholding payment, or*
- *if there is more than one ground, each ground and the amount attributable to it.*

The notice must also be given a prescribed time before the final date for payment and the parties are free to agree what that period should be.

## **Payment**

The Act requires that:

- For all contracts in excess of 45 days, stage payments should be made;
- All contracts should have an adequate mechanism for deciding what payments are due when;
- If payment is not made within a specified time performance of the contract may be suspended;
- A notice must first be given if it is intended to withhold payment (set-off); and
- "Pay when paid" clauses will be unenforceable.

## **Valuation procedure**

- Valuation by measurement of work done at specified times;
- Lump sums payable when certain activities, operations, milestones or targets have been met;
- Percentage amounts of the contract sum at various times;
- Monthly lump sum increments;
- Payment based on cost expended.

## **Payment dates**

- The last date of each interval;
- A specified number of days after the end of each interval;
- A specified number of days after any milestone or target is reached;
- A specified number of days after the receiving party presents his invoice.

This date must be clearly identifiable as it triggers the procedure for suspension of performance.

## **Right to Suspend Performance**

The Act says:

*"... the contract must provide for a final date for payment in relation to any sum which becomes due."*

The final date is actually the date upon which the receiving party is able to give seven days notice that, unless he is paid in full, he will suspend performance.

*Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment had been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made.*

*This right may not be exercised without first giving the party in default at least seven days notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.*

It is important that this notice should correspond exactly with these requirements because the suspension of performance is a very serious act. A party exercising this right must be very sure of his grounds for so doing because if he is wrong he will have to pay compensation for any loss suffered by the other party.

*The right to suspend performance ceases when the party in default makes payment in full of the amount due.*

## **Adjudication**

A construction contract needs to comply with the Act or the Scheme will apply.

The eight compliance points:

1. *Enable the parties to give notice of adjudication at any time.*
2. *Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice.*
3. *Require the adjudicator to reach a decision within 28 days of referral or such longer periods as it is agreed by the parties after this dispute has been referred.*
4. *Allow the adjudicator to extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred.*
5. *Impose a duty on the adjudicator to act impartially.*
6. *Enable the adjudicator to take the initiative in ascertaining the facts and the law.*
7. *Provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for all the parties otherwise agreed arbitration) or by agreement.*
8. *Provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.*

A party to a construction contract has a right to adjudication on disputes arising **under the contract**.

## **Adjudication**

"... a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under procedure comply with this section [of the Act]... at any time."

Adjudication is a procedure whereby an impartial person is asked to give a quick temporary solution to a perceived wrong. The adjudicator's decision is *binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agreed to arbitration) or by agreement.*

The aim of adjudication is to resolve disputes on a temporary basis so that the work may proceed unimpeded. Certain events, which commonly arise, can cause a serious problem for one of the parties, and if not resolved could be disastrous.

Such events may be:

- failure to pay a sum of money;
- disagreement about a certificate, an instruction; of a quality of the design or workmanship;
- disagreement as to whether an instruction should be given;
- disagreement as to whether the work is physically or legally impossible to perform.

## **Preparedness**

### **Pre-Contract checklist**

- Is the contract a construction contract?
- If it is not do you want it to comply with the Act?
- Does the contract have an adjudication clause that complies with the eight compliance points?
- Is the contract over 45 day's duration?
  - If so: are their provisions for stage payments?
- Is there a mechanism for calculating payments?
- Does the contract state when payments are due and define a final date for payment?

- Is there a provision for giving notice of the amount to be paid?
- Is there a provision for an effective notice for withholding payment?
- Is there a "pay when paid" clause?
- Will you have to rely on the **Scheme**?

## **Contract Stage**

Open "Construction Act File"

Check that the Contract Form complies with the Act.

Ensure that you are aware of the payment provisions in the Contract: -

- Payment by instalments when the work exceeds 45 days.
- The date when payment becomes due is specified. *(Unless agreed otherwise this will be 7 days after the instalment period stated in the Contract.)*
- Check that a final date for payment is specified. *(Unless agreed otherwise this will be 17 days from the date when payment becomes due.)*
- Check that the Payer must give notice of payment. *(Not later than 5 days after the date on which payment became due: specifying the amount of the payment and the basis on which it was calculated.)*
- Check that Payment cannot be withheld without a notice being given. *(Unless agreed otherwise not later than 7 days before the final date for payment: specifying amount to be withheld and the ground for withholding.)*
- Check that there is a right to suspend work for non-payment.
- Check that there is no "Pay when Paid" Clause.

Establish a procedure whereby the agent on site keeps a careful and detailed diary record. This should be accurate and truthful, as it may be needed in evidence. The diary should record: -

- climatic conditions
- deliveries of materials, with particulars of any defects or shortages
- plant, with details of any breakdowns etc.
- labour, with details of any problems
- subcontractors progress and problems
- information received or outstanding

- visitors to the site
- progress in relation to programme

Establish a procedure to ensure that all documentation required by the Contract is issued on time.

## **Grounds for referring a Dispute to adjudication.**

(Where clause numbers are quoted, they apply to JCT. 98.)

Disputes over whether work, materials or goods are in accordance with the contract. Instructions to open up or test. (Clause 8.4)

The issue of an instruction that you consider or suspect is not within the power of the Contract Administrator. (Clause 4.1.1)

Your refusal to accept an instruction from the Employer or Clerk of Works.

Your disagreement with an amended Price Statement issued by the Quantity Surveyor. (Valuation of variations: Alternative A)

Wrongful deductions from the certificate by the Employer.

A situation giving rise to the "Right of suspension". A failure of the Contract Administrator to issue a certificate in accordance with the Conditions of Contract. (Clause 7.5 and/or clause 28.)

Disputes over an extension of time. (Clause 25)

A disputed enforcement of Liquidated and Ascertained Damages. (Clause 24)

A dispute over the consideration of a detailed application for the costs of delay and disruption. (Clause 26)

Refusal of the Contract Administrator to issue a Certificate of Practical Completion. (Clause 16.1 and Clause 17.1)

Failure of the Contract Administrator to issue a Final Certificate. (Clause 30.8)

Possible Determination of the Contract. (Clause 27)

Employers failure to pay on time. (Clause 28.2.1)

Employer making direct payment to a sub-contractor. (Clause 35.13.5.1)

A dispute with a nominated sub-contractor (Clause 35.24.6.1)

## **Referring a Dispute to adjudication**

(The following procedure applies to JCT 98. However, the procedure to be adopted for other contract forms will be similar.)

This can only be done when it can be clearly demonstrated that a dispute has arisen. A "Claim" is not a Dispute until it has been considered and rejected by the Contract Manager or Employer.

If your claim is ignored, despite recorded efforts by you to have it considered, the adjudicator would accept that a Dispute has arisen.

The adjudication process commences when you send a letter, preferably by Special Delivery, to the Employer stating the grounds on which you consider a Dispute has arisen and giving notice, in accordance with Clause 41A.4.1, that you are referring the dispute to adjudication. You should state when, usually within days, you would issue the Referral Notice.

The Referral Notice is addressed to the adjudicator named in the Contract or if there is no named adjudicator, to the nominating body named in the Contract. The Notice should be accompanied by the details noted in Clause 41A.4.1 comprising: -

- A summary of the grounds relied upon
- A statement of the relief and the remedy sought
- Supporting documents, including a copy of the Contract and copies of correspondence relating to the dispute.

The JCT Adjudicator's Agreement should be completed.

You should note that the adjudicator might set his own procedure, with which you must comply.

## **Reacting to a notice of adjudication**

Depending on the Adjudication Protocol specified in the Contract, you may have only 5 days within which to submit your Response to the Referral Document to the adjudicator.

Open an Adjudication File containing: -

- A copy of the Notice of Adjudication.
- Details of the Adjudicator or the Adjudicator Nominating Body.

- A copy of the Contract Conditions.
- Details of the applicable Adjudication Procedure.
- A copy of the Referral Notice and associated documents.
- A brief outline response to the claim: remember that if the dispute ever comes to Trial the files will be "discovered" by the other party so never write anything that you would not want seen by a Judge.
- Copies of all relevant documents.
- A schedule of associated information, giving details of location.
- Comments on the costs involved.
- List of staff involved in the project with particular reference to the dispute.
- Recommendations or otherwise on the need for an Experts Adviser to assist in countering the claim. (James Torr of the Torr Forensic Partnership.)
- A view on whether the Adjudicator will need expert technical or legal advice.
- A view on the need to ask the Adjudicator to visit the site.
- Copies of all correspondence, including Directions made by the Adjudicator.
- A copy of the Adjudicator's Decision.
- A commentary on the Decision with an opinion on whether to accept it or refer the matter to Arbitration or Litigation.

Note: all correspondence with insurers, a solicitor or other professional adviser, written in connection with the Adjudication should be headed: **"Privileged. Prepared in contemplation of litigation."**

**James Torr**

26 July, 2001