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Dear Colleague

**THE HOUSING GRANTS, CONSTRUCTION AND
REGENERATION ACT 1996: PART II**

**THE SCHEME FOR CONSTRUCTION CONTRACTS
(SCOTLAND) REGULATIONS 1998**

Summary

1. This letter alerts colleagues to the fact that Part II of the above Act and the above Scheme come into effect on 1 May 1998. Part II of the Act applies to practically all contracts for construction works and those for associated professional services awarded after that date.

Action

2. It is recommended that legal advice should be sought on questions of appropriate contract provision, particularly where non-compliant standard forms of contract are in use.

Further Information

3. Attached at Annex A is some further information about the Act and the Scheme.

4. It is understood that those bodies responsible for the provision of standard forms of contract, eg the Joint Contracts Tribunal and the Scottish Building Contract Committee, aim to have revised standard forms available by 1 May. Related guidance will be incorporated into SCOTCONCODE in due course by the Estates Environment Forum.

Yours sincerely

Peter Collings

Dr Peter Collings
Director of Finance

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**THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996
THE SCHEME FOR CONSTRUCTION CONTRACTS (SCOTLAND) REGULATIONS 1998**

Background

1. The Housing Grants, Construction and Regeneration Act received Royal Assent on 24 July 1996. Part II of the Act, Construction Contracts, provides a framework for fairer contractual arrangements and better working relationships within the construction industry. It concentrates on encouraging the use of adjudication in cases of dispute and improving payment procedures - two areas examined by Sir Michael Latham in his 1994 review of procurement and contractual arrangements in the UK construction industry. It applies to practically all construction contracts, in writing, including professional services agreements in relation to construction operations, but not contracts with a residential occupier. PFI contracts and certain other arrangements are to be excluded from the provisions of the Act (see paragraph 4 below).
2. With regard to adjudication, the Act gives a party to a construction contract the right to refer a dispute to rapid and impartial adjudication. For payment, the Act includes provisions covering entitlement to periodic payments on longer contracts; the requirement in all contracts for a payment mechanism, dates for payment, and certain notices; suspension of performance for non payment, and the prohibition of conditional payment provisions. When the contractual provisions for adjudication or payment do not comply with the Act, the provisions in the Scheme for Construction Contracts will apply.
3. In Scotland, the characteristics and features of the systems of dispute resolution are different from those in England and Wales. The Scottish tradition has been to rely more on contractual or conventional arrangements than on arrangements regulated by statute. The Act therefore contains provisions enabling a separate Scheme for Construction Contracts to take account of Scottish law, practice and procedure and apply to construction contracts in Scotland. The Scheme for Construction Contracts (Scotland) Regulations 1998 were approved by Parliament in February 1998, along with an Order which excludes PFI and certain other financial arrangements from the provisions of the Act.
4. The Order excludes from the definition of construction contracts, agreements made under statutory provisions relating to roads, planning obligations, sewerage works and externally financed NHS Trust agreements; agreements entered into by specified public bodies under the Private Finance Initiative (or a project applying similar principles); agreements which relate primarily to the financing of works; and development agreements, which contain provision for the disposal of an interest in land.
5. Copies of Part II of the Act, the Scheme and the Exclusion Order are attached. Equivalent Regulations, and an equivalent Exclusion Order, for England and Wales have also been approved by Parliament.

Part II of the Housing Grants, Construction and Regeneration Act

6. The provisions of Part II of the Act fall into four main groups. The following is a brief summary; for a fuller understanding of the provisions, reference should be made to the text of the Act:

- *Definitions:* Sections 104-107 and 117 define construction contracts and construction operations to which the Act's provisions apply; this includes agreements to carry out professional services in relation to construction operations. The definition of "construction operations" is very broad and includes the construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures relating to building and civil engineering works. Operations not covered by the Act include extraction of gas, oil and minerals, installation of plant or machinery relating to the process engineering industries, and the manufacture of materials and building and engineering components or equipment. Contracts entered into by or on behalf of the Crown must comply with the Act.
- *Adjudication:* Section 108 gives a party to a construction contract the right to refer a dispute to rapid and impartial adjudication, and sets out the provisions which must be included in contracts in respect of adjudication. These provisions include matters such as giving notice of intention to refer a dispute to adjudication, the timescales for appointing an adjudicator and delivering a decision, a duty on the adjudicator to act impartially, and immunity covering the adjudicator and his employees/agents. An adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement between the parties.
- *Payment:* Sections 109-111 provide a payment framework for construction contracts. The Act provides an entitlement to periodic payments on contracts of at least 45 days duration, and requires every contract to include provision for a payment mechanism for determining the amounts and timing of payments due, and a final date for payment in relation to any sum due. A notice specifying the amount of any payment and the basis of calculation must be given not later than five days after the date a payment is due, and a payment may not be withheld unless prior notice has been given before the final date for payment. Section 112 gives the right to suspend performance for non-payment in certain circumstances, and section 113 renders conditional payment provisions (eg pay-when-paid clauses) ineffective, except in the case of third party insolvency.
- *Supplementary:* Sections 114-116 deal with certain procedural matters including service of notices and documents.

The Scheme for Construction Contracts (Scotland)

7. The purpose of the Scheme is to remedy deficiencies in construction contracts relating to adjudication (section 108(5) of the Act), and payment (sections 109(3), 110(3), 111(3) and 113(6)). Where any of the Scheme's provisions apply they shall have effect as implied terms of contract between the parties, thus operating as contractual provisions constituting obligations under the contract.

8. With regard to adjudication, unless a construction contract contains adjudication provisions which satisfy *all* the requirements of section 108(1)-(4), then Part I of the Scheme shall apply in its entirety.

9. On payment the situation is different. Where a construction contract does not meet the individual requirements of the payment provisions in the Act then only the *relevant* provisions of Part II of the Scheme shall apply.

10. The Scheme's provisions are free-standing and because they have been drafted to operate across a broad range of types of construction contracts, they may not, therefore, meet the detailed requirements of the parties to any particular contract. The Act, on the other hand, allows parties a considerable degree of discretion and flexibility in their contractual arrangements; for example, in relation to periodic payments, the parties are free to agree the amounts of payments and the intervals at which, or the circumstances in which, they become due. They are also allowed to decide on the period between the date on which a payment becomes due and the final date for that payment, and on the timing of the notice of intention to withhold payment before the final date for payment.

11. Consequently, when drafting contracts, the objective should be to ensure that they meet the requirements of the Act thus avoiding the possibility of having the Scheme imposed on the contract arrangements.



Housing Grants, Construction and Regeneration Act 1996

CHAPTER 53

Part II only

LONDON: HMSO

PART I
CHAPTER V

PART II

CONSTRUCTION CONTRACTS

*Introductory provisions*Construction
contracts.

104.—(1) In this Part a “construction contract” means an agreement with a person for any of the following—

- (a) the carrying out of construction operations;
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement—

- (a) to do architectural, design, or surveying work, or
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

1996 c. 18.

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

(6) This Part applies only to construction contracts which—

- (a) are entered into after the commencement of this Part, and
- (b) relate to the carrying out of construction operations in England, Wales or Scotland.

(7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

Meaning of
“construction
operations”.

105.—(1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions—

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland

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waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
- (f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Part—

- (a) drilling for, or extraction of, oil or natural gas;
- (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—
 - (i) nuclear processing, power generation, or water or effluent treatment, or
 - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
- (d) manufacture or delivery to site of—
 - (i) building or engineering components or equipment,
 - (ii) materials, plant or machinery, or
 - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,except under a contract which also provides for their installation;
- (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

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(b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

(4) References in the following sections to a payment under the contract include a payment by virtue of this section.

Dates for payment.

110.—(1) Every construction contract shall—

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if—

(a) the other party had carried out his obligations under the contract, and

(b) 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.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

Notice of intention to withhold payment.

111.—(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify—

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

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(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than—

- (a) seven days from the date of the decision, or
- (b) the date which apart from the notice would have been the final date for payment,

whichever is the later.

112.—(1) 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 has 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 (“the party in default”).

Right to suspend performance for non-payment.

(2) The right may not be exercised without first giving to 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.

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

(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113.—(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

Prohibition of conditional payment provisions.

(2) For the purposes of this section a company becomes insolvent—

- (a) on the making of an administration order against it under Part II of the Insolvency Act 1986,
- (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,
- (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
- (d) on the making of a winding-up order under Part IV or V of that Act.

1986 c. 45.

(3) For the purposes of this section a partnership becomes insolvent—

- (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or

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1985 c. 66.

- (b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.

1986 c. 45.

- (4) For the purposes of this section an individual becomes insolvent—
- (a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986, or
- (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.

(5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

Supplementary provisions

The Scheme for
Construction
Contracts.

114.—(1) The Minister shall by regulations make a scheme (“the Scheme for Construction Contracts”) containing provision about the matters referred to in the preceding provisions of this Part.

(2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.

(3) In this section “the Minister” means—

- (a) for England and Wales, the Secretary of State, and
- (b) for Scotland, the Lord Advocate.

(4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

(5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

Service of notices,
&c.

115.—(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post—

- (a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

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(b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

116.—(1) For the purposes of this Part periods of time shall be reckoned as follows. Reckoning periods of time.

(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded. 1971 c. 80.

117.—(1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity. Crown application.

(2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.

(3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.

(4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.