

Amendments to the Model Form of General Conditions of Contract MF/1 (revision 5) resulting from The Local Democracy, Economic Development and Construction Act 2009

The UK's Local Democracy, Economic Development and Construction Act 2009 has introduced amendments to the Housing Grants, Construction and Regeneration Act 1996 (the 'Construction Act'), requiring changes to the MF/1 (revision 5) contract. The changes are published on the IET Model Forms web site for free download by users.

The amendments to the Construction Act apply to all construction contracts in England and Wales from 1 October 2011 and those in Scotland from 1 November 2011. They are likely to apply to contracts in Northern Ireland in the future.

The resulting changes to MF/1 (revision 5) principally relate to payment, because revision 5 already allows for adjudication compliant with the Construction Act. Under MF/1, following an application by the Contractor a payment certificate is issued by the Engineer with details of how the certified sum is calculated. If the Engineer fails to give a certificate, the Contractor may give a Contractor's Notification of the amount he considers to have been due. The sum certified or notified must be paid by a final date 30 days from certification unless a Pay Less Notice is issued not later than 5 days before the final date. The Pay Less Notice mechanism is superficially similar to the withholding notice.

Notes for Guidance

These amendments are prepared solely for use on contracts which are subject to the Construction Act. In other circumstances these amendments should not be used.

The amendments apply to all construction contracts entered into in England and Wales from 1 October and those in Scotland from 1 November. They do not apply to contracts entered into before those dates.

SUGGESTED SPECIAL PAYMENT CONDITIONS FOR USE IN CONTRACTS WHICH ARE SUBJECT TO THE UK CONSTRUCTION ACT

The sub-clause numbers used below relate to the sub-clause numbers used in the general conditions.

Foreword

Where the Contract is a Construction Contract within the meaning of the UK Construction Act (as defined in the general conditions) the terms of payment will need to address the provisions of the act, otherwise scheme provisions imposed by Regulations made by Statutory Instrument will apply. The following suggested clauses address the provisions of the UK Construction Act and they should be adapted to take into account the actual terms of payment.

Certificates and Payment

1. SUB-CLAUSE 39.1 – APPLICATION FOR PAYMENT

Add the following:-

"Unless otherwise provided, applications for interim certificates of payment may be made by the Contractor to the Engineer [insert here the event or interval entitling the Contractor to make applications where appropriate by reference to a separate schedule or Special Conditions] and the due dates for each interim payment shall be 9 days after receipt by the Engineer of the relevant application."

2. **SUB-CLAUSE 39.3**

Add the following:-

"If an interim certificate of payment is not issued in accordance with this subclause 39.3, then:

- (a) where the Contractor has made an application in accordance with clause 39.1, that application is for the purposes of sub-clause 40.1 a Contractor's Notification, or
- (b) where no such application has been made, the Contractor may at any time after the 14 day period referred to in this sub-clause 39.3 give a Contractor's Notification to the Engineer stating the sum that the Contractor considers to be or have been due to him at the relevant date in accordance with clause 39.4 and the basis on which that sum has been calculated."

3. **SUB-CLAUSE 39.4**

Replace the first paragraph by the following:-

"Every interim certificate of payment shall certify the total sum (stating the basis upon which the certified sum is calculated) that the Engineer considers to be or have been due at the due date after taking into account adjustments under sub-clause 39.5 to the Contractor from the Purchaser in respect of:"

4. **SUB-CLAUSE 39.9**

Insert after "full details of" at the end of the third line of the second paragraph (45) "the sum which the Contractor considers will become due under the final certificate of payment, the basis upon which the final account sum is calculated,"

5. SUB-CLAUSE 39.10

Insert after "total amount" in the first line "(stating the basis upon which the certified sum is calculated) that the Engineer considers to be"

Add the following:-

"The due date for the final payment shall be the date of issue of the final certificate of payment."

6. SUB-CLAUSE 39.11

Add the following:-

"If a final certificate of payment is not issued in accordance with this sub-clause 39.11, then the Contractor's application under 39.9, is for the purposes of sub-clause 40.1 a Contractor's Notification."

7. SUB-CLAUSE 40.1

Replace by:

"40.1.

- (a) Subject to sub-clauses 40.1.(d) and 40.1.(f), the final date for payment of any sum certified as due to the Contractor in a certificate of payment shall be 30 days after the date of issue thereof.
- (b) Subject to any Pay Less notice given by the Purchaser under sub-clause 40.1 (e) the sum to be paid by the Purchaser on or before the final date for payment shall be the sum stated as due in any certificate of payment.
- (c) If any certificate of payment is not issued in accordance with clause 39 but there is a Contractor's Notification, the sum to be paid by the Purchaser shall, subject to any Pay Less Notice given by the Purchaser under sub-clause 40.1.(e), be the sum stated as due in the Contractor's Notification.
- (d) Where sub-clause 40.1.(c) applies, the final date for payment of the sum specified in the Contractor's Notification shall for all purposes be regarded as postponed by the same number of days as the number of days (if any) after expiry of the 14 day period referred to in sub-clause 39.3 that the Contractor's Notification is given.
- (e) If the Purchaser intends to pay less than the sum stated as due from him in a certificate of payment or Contractor's Notification, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with subclause 40.4 (a "Pay Less Notice"). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall be not less than the amount stated as due in the notice."
- (f) Any payment made before delivery of Plant otherwise than a payment in respect of Plant in the course of manufacture or work done shall be subject to the Contractor first having furnished to the Purchaser a bond or guarantee of a bank or insurance company approved by the Purchaser, if so required by the Special Conditions and the final date for payment of any such payment shall be regarded as postponed to the extent required to give effect to this sub-clause.

8. **SUB-CLAUSE 40.4**

Insert new sub-clause which reads:

"A Pay Less Notice shall specify both the sum that the Purchaser considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated, and may be given on behalf of the Purchaser by the Engineer or by any other person who the Purchaser notifies the Contractor as being authorised to do so."