

HGCRA LDED and Construction Act 2009 Amendments

SPC2000 Short Form (Issued 2010)

The Housing Grants Construction and Regeneration Act 1996 (**HGCRA**) is being changed by the Local Democracy Economic Development and Construction Act 2009 with effect from 1 October 2011 in England and Wales. Contracts for 'construction operations', including SPC2000 Short Form, should be amended to comply with the updated HGCRA and take into account the revised payment and adjudication provisions and the expanded right of suspension.

This loose leaf updater contains a set of amendments to the published form which Trowers & Hamblins LLP and the Association of Consultant Architects recommend are incorporated into SPC2000 Short Form for contracts entered into on or after 1 October 2011 relating to sub contract works to be carried out in England and Wales. These amendments will be incorporated into the published form when it is next updated and republished.

A marked up version of the payment clause is included at the end of this loose leaf so that users can easily see the changes made to the payment clause. This is for information only and should not be incorporated into the published form.

Amendments to the published form of SPC2000 Short Form (issued 2010)

1 **Clause 6**

Delete clause 6 in its entirety and insert the following:

6 **Payment**

Specialist Price	6.1	The Specialist Price shall cover all aspects of the Specialist Works and shall be as set out in the Specialist Agreement and the Specialist Payment Terms subject only to such increases and decreases as are in accordance with these Specialist Terms. If so stated in the Specialist Payment Terms the Specialist's Profit, Central Office Overheads and Site Overheads, and any agreed risk contingencies for the Specialist Works, shall be fixed at the agreed amounts set out in the Specialist Payment Terms, subject only to such variations as the Constructor and the Specialist may agree, and shall form part of the Specialist Price.
Payment obligations	6.2	The Constructor shall be responsible for payment to the Specialist of all agreed amounts comprising the Specialist Price, plus VAT (if applicable), subject to and adjusted in accordance with these Specialist Terms and in accordance with the Specialist Payment Terms.
Payment applications	6.3	Applications for payment of amounts due to the Specialist shall be submitted by the Specialist to the Constructor at the intervals stated in the Specialist Payment Terms or (if no intervals are stated) at intervals of one calendar month, the first application being made not later than the relevant interval after the Specialist Commencement Date. Each application for payment shall state the sum the Specialist considers to be due to it on the due date for payment and the basis on which that sum is calculated and shall be accompanied by such details as are stated in the Specialist Works Brief and such further information as the Constructor may reasonably require. The

due date in respect of each application for payment shall be the date of receipt by the Constructor of the relevant application, submitted in accordance with this clause 6.3.

Notices and payments to Specialist	6.4	Within five (5) days from receipt of each application for payment made by the Specialist in accordance with clause 6.3 the Constructor shall issue to the Specialist a payment notice, calculated in accordance with clause 6.5, specifying the sum the Constructor considers to have been due on the due date for payment and the basis on which that sum is calculated. Subject to any notice issued in accordance with clause 6.7, the Constructor shall pay to the Specialist the sum stated as due in the payment notice by the final date for payment which shall be the later of twenty five (25) Working Days from the due date for payment and twenty (20) Working Days from the date of receipt by the Constructor of any required VAT invoice from the Specialist in the same amount as the payment notice (or such other date as is stated in the Specialist Agreement).
Content of Specialist valuations	6.5	The amount payable under each application for payment by the Specialist shall be calculated in accordance with the Specialist Payment Terms to establish the value of that part of the Specialist Works properly progressed, including the value of any unfixed materials, goods and equipment on and off Site intended for the Specialist Works (subject to clause 5.4(vi) and if and to the extent provided in the Specialist Payment Terms), less the total of all amounts previously paid and adjusted to reflect any sums due pursuant to clauses 5.5, 5.6 or 5.7 and taking into account sums due pursuant to clauses 6.10 and/or 6.12.
Default notice	6.6	<p>If the Constructor does not issue a payment notice in accordance with clause 6.4:</p> <ul style="list-style-type: none">(i) the Specialist's application for payment under clause 6.3 shall be treated as the payment notice;(ii) subject to any notice issued in accordance with clause 6.7, the Constructor shall pay the amount stated as due in the application for payment by the final date for payment.
Pay less notice	6.7	Not later than two (2) Working Days before the final date for payment of any sum due, the payer may give notice to the payee pursuant to Section 111(3) of the HGCRA, specifying the sum that the payer considers to be due on the date the notice is served and the basis on which that sum is calculated. If a notice is issued under this clause 6.7 the payer shall pay the amount stated in such notice by the final date for payment and the payee shall reissue any required VAT invoice the reflect the sum stated in such notice.
Adjustment of notices	6.8	<p>The issue of any notice, VAT invoice or the payment of any amount by the Constructor shall not:</p> <ul style="list-style-type: none">(i) in any way affect the right of the Constructor or the Specialist to contend that the Specialist Works have not been properly valued, that any amount has been improperly paid or withheld and, in calculating any notice, the Constructor shall be entitled to reconsider

and, if necessary, adjust any assessment made in arriving at any previous valuation;

- (ii) constitute or imply or be evidence of the Constructor's approval or acceptance of any part of the Specialist Works or in any way affect the responsibilities of the Specialist under the Specialist Contract.

Statutory Deduction	6.9	Not later than fifteen (15) Working Days prior to the Specialist's first application for payment, and at any other time upon request, the Specialist shall either provide the Constructor with evidence that the Specialist is entitled to be paid without the statutory deduction referred to in the Finance Ace or inform the Constructor that it is not entitled to be paid without such statutory deduction (and in the latter case, the Specialist shall immediately inform the Constructor if it subsequently becomes entitled to be paid without such statutory deduction) and the Constructor shall be entitled to receive from the Specialist evidence supporting the Specialist's stated entitlement to be paid without such statutory deduction.
Suspension of Performance	6.10	If the Constructor fails to make any payment due in accordance with this clause 6 by the stated final date for payment, and if such failure shall continue for seven (7) days after the Specialist has given written notice of its intention to suspend performance of all or any of its obligations and the grounds for such intended suspension, then the Specialist may suspend performance of all or any of its obligations under the Specialist Contract until payment is received in full. Where the Specialist exercises such right of suspension it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of the right.
Sums due to Constructor	6.11	Any sum due to the Constructor which the Constructor does not deduct and/or withhold from sums due or to become due to the Specialist shall be due for payment on receipt of an application from the Constructor by the Specialist. In such application the Constructor shall specify the sum it considers to be due on the payment due date and the basis on which that sum is calculated. Within 5 days of the payment due date the Specialist shall issue a notice confirming the sum that it considers to have been due on the payment due date and the basis on which that sum is calculated. If the Specialist fails to serve such notice the Constructor's application shall be treated as the payment notice. The final date for payment for any such sum applied for by the Constructor shall be the later of twenty five (25) Working Days from the payment due date and twenty (20) Working Days from the date of receipt by the Specialist of any required VAT invoice from the Constructor in the same amount as the payment notice.
Interest on late payment	6.12	Any delay in a due payment beyond its final date for payment shall entitle the payee to be paid interest at the rate stated in the Specialist Agreement and the Specialist and the Constructor confirm that such interest is a substantial remedy for late payment in compliance with section 9 of the Late Payment Act.

2 **Clause 10.3(i)**

In lines 1 – 2 delete "shall not be bound to make any further payment" and insert "no further sum shall become due"

In line 5 delete "prior to the date of termination"

3 **Clause 10.7**

Insert new clause 10.7:

"In the event of the Specialist or the Constructor suffering an event of insolvency as described in Section 113(2) to Section 113(5) of the HCGRA:

- (i) the payer need not pay any sum that has already become due to the payee insofar as the payer has given or gives a notice in accordance with clause 6.7;
- (ii) the payer need not pay any sum that has already become to the payee if the event occurs after the date on which the notice in relation to that sum is due in accordance with clause 6.7."

4 **Appendix 2 Part 2**

Renumber existing paragraphs 4 and 5 as paragraphs 9 and 10 respectively.

Insert new paragraph 4:

"The Adjudicator shall be appointed and the dispute or difference referred to him/her within seven (7) days following the giving of a notice by either the Constructor or the Specialist requiring a dispute or difference to be so referred."

Insert new paragraph 5:

"The Adjudicator shall reach his/her decision within twenty eight (28) days of the date of referral, or such longer period as is agreed by the Constructor and the Specialist after the dispute has been referred. The Adjudicator may extend the period of twenty eight (28) days by up to fourteen (14) days with the consent of the party who referred the dispute or difference."

Insert new paragraph 6:

"The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law."

Insert new paragraph 7:

"The Adjudicator may correct his/her decision so as to remove a clerical or typographical error arising by accident or omission within five (5) days of communicating his/her decision to the Constructor and the Specialist."

Insert new paragraph 8:

"The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the Partnering Contract provides for arbitration or the Constructor and the Specialist otherwise agree to arbitration) or by agreement."

¹[Insert new paragraph 11:

"If the Model Adjudication Procedure fourth edition is the edition current at the date of the relevant notice:

- (i) delete paragraph 29 and insert "Not used."
- (ii) delete paragraph 30 and insert "Not used."
- (iii) insert "as amended" at the end of the definition of 'Act'"]

¹ The CIC have advised that they are reviewing the Model Adjudication Procedure in light of the revised Construction Act and that a fifth edition should be available during early October 2011. If this is the case these amendments will not be required although users should check that the new edition satisfies the requirements of the revised Construction Act and amend if required.

Mark up of clause 6 in SPC2000 Short Form (issued 2010) showing changes made

6 Payment

Specialist Price	6.1	The Specialist Price shall cover all aspects of the Specialist Works and shall be as set out in the Specialist Agreement and the Specialist Payment Terms subject only to such increases and decreases as are in accordance with these Specialist Terms. If so stated in the Specialist Payment Terms the Specialist's Profit, Central Office Overheads and Site Overheads, and any agreed risk contingencies for the Specialist Works, shall be fixed at the agreed amounts set out in the Specialist Payment Terms, subject only to such variations as the Constructor and the Specialist may agree, and shall form part of the Specialist Price.
Payment obligations	6.2	The Constructor shall be responsible for payment to the Specialist of all agreed amounts comprising the Specialist Price, plus VAT (if applicable), subject to and adjusted in accordance with these Specialist Terms and in accordance with the Specialist Payment Terms.
Payment applications	6.3	Applications for payment of amounts due to the Specialist shall be submitted by the Specialist to the Constructor at the intervals stated in the Specialist Payment Terms or (if no intervals are stated) at intervals of one calendar month, the first application being made not later than the relevant interval after the Specialist Commencement Date. Each application for payment shall <u>state the sum the Specialist considers to be due to it on the due date for payment and the basis on which that sum is calculated and shall</u> be accompanied by such details as are stated in the Specialist Works Brief and such further information as the Constructor may reasonably require. <u>The due date in respect of each application for payment shall be the date of receipt by the Constructor of the relevant application, submitted in accordance with this clause 6.3.</u>
<u>Notices Valuations</u> and payments to Specialist	6.4	Within <u>five ten-(510) Working Days</u> from receipt of each application for payment made by the Specialist in accordance with clause 6.3 the Constructor shall issue to the Specialist a <u>payment notice, valuation</u> calculated in accordance with clause 6.5, specifying the <u>sum amount of the Constructor considers to have been due on the due date for payment proposed to be made, to what that amount relates</u> and the basis on which that <u>sum amount</u> is calculated. <u>The date of such valuation shall be the due date for payment to the Specialist and such valuation shall be notice pursuant to Section 110(2) of the HGCRA. Subject to any notice issued in accordance with clause 6.7, t</u> The Constructor shall pay to the Specialist the <u>sum amount</u> stated as due in <u>the payment notice each such valuation by the final date for payment which shall be the later of within twenty five fifteen (2515) Working Days from the due date for payment of issue of such valuation and or twenty ten-(2010) Working Days</u> from the date of receipt by the Constructor of any required VAT invoice <u>from the Specialist</u> in the same amount <u>as the payment notice from the Specialist, whichever shall be the later, and the later of such dates</u> (or such other date as is stated in the Specialist Agreement) <u>shall be the final date for payment. Any delay in a due payment beyond such final date for payment shall entitle the Specialist</u>

~~to be paid interest at the rate stated in the Specialist Agreement and the Specialist confirms that such interest is a substantial remedy for late payment in compliance with section 9 of the Late Payment Act.~~

Content of Specialist valuations

6.5 The amount payable under each application for payment by the Specialist shall be calculated in accordance with the Specialist Payment Terms to establish the value of that part of the Specialist Works properly progressed, including the value of any unfixed materials, goods and equipment on and off Site intended for the Specialist Works (subject to clause 5.4(vi) and if and to the extent provided in the Specialist Payment Terms), less the total of all amounts previously paid and adjusted to reflect any sums due pursuant to clauses 5.5, 5.6 or 5.7 and taking into account sums due pursuant to clauses 6.10 and/or 6.12.

Default notice

6.6 If the Constructor does not issue a payment notice in accordance with clause 6.4:

(i) the Specialist's application for payment under clause 6.3 shall be treated as the payment notice;

(ii) subject to any notice issued in accordance with clause 6.7, the Constructor shall pay the amount stated as due in the application for payment by the final date for payment.

Withholding or deduction Pay less notice

~~6.6.7~~ Not later than two (2) Working Days before the final date for payment of any sum amount due, the payer Constructor may give notice to the payee Specialist pursuant to Section 111(34) of the HGCRA, specifying any amount proposed to be withheld or deducted from the amount otherwise due together with the ground or grounds for such withholding or deduction and the amount attributable to each such ground to the extent that any of these differ from the relevant valuation issued pursuant to clause 6.4, the sum that the payer considers to be due on the date the notice is served and the basis on which that sum is calculated. If a notice is issued under this clause 6.7 the payer shall pay the amount stated in such notice by the final date for payment and the payee shall reissue any required VAT invoice the reflect the sum stated in such notice.

Adjustment of notices valuations

~~6.7.8~~ None of the issue by the Constructor of any notice, valuation or by the Specialist of a VAT invoice or the payment of any amount by the Constructor shall not:

(i) in any way affect the right of the Constructor or the Specialist to contend that the Specialist Works have not been properly valued, and that any amount has been improperly paid or withheld and, in calculating any notice valuation, the Constructor shall be entitled to reconsider and, if necessary, adjust any assessment made in arriving at any previous valuation;

(ii) constitute or imply or be evidence of the Constructor's approval or acceptance of any part of the Specialist Works or in any way affect the responsibilities of the Specialist under the Specialist Contract.

Statutory Deduction	6.86.9	Not later than fifteen (15) Working Days prior to the Specialist's first application for payment, and at any other time upon request, the Specialist shall either provide the Constructor with evidence that the Specialist is entitled to be paid without the statutory deduction referred to in the Finance Ace or inform the Constructor that it is not entitled to be paid without such statutory deduction (and in the latter case, the Specialist shall immediately inform the Constructor if it subsequently becomes entitled to be paid without such statutory deduction) and the Constructor shall be entitled to receive from the Specialist evidence supporting the Specialist's stated entitlement to be paid without such statutory deduction.
Suspension of Performance	6.96.10	If the Constructor fails to make any payment due in accordance with this clause 6 by the stated final date for payment, and if such failure shall continue for seven (7) days after the Specialist has given written notice of its intention to suspend performance <u>of all or any of its obligations</u> and the grounds for such intended suspension, then the Specialist may suspend performance of <u>all or any of its obligations</u> under the Specialist Contract until payment is received in full. <u>Where the Specialist exercises such right of suspension it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of the right.</u>
<u>Sums due to the Constructor</u>	6.11	<u>Any sum due to the Constructor which the Constructor does not deduct and/or withhold from sums due or to become due to the Specialist shall be due for payment on receipt of an application from the Constructor by the Specialist. In such application the Constructor shall specify the sum it considers to be due on the payment due date and the basis on which that sum is calculated. Within 5 days of the payment due date the Specialist shall issue a notice confirming the sum that it considers to have been due on the payment due date and the basis on which that sum is calculated. If the Specialist fails to serve such notice the Constructor's application shall be treated as the payment notice. The final date for payment for any such sum applied for by the Constructor shall be the later of twenty five (25) Working Days from the payment due date and twenty (20) Working Days from the date of receipt by the Specialist of any required VAT invoice from the Constructor in the same amount as the payment notice.</u>
<u>Interest on late payment</u>	6.12	<u>Any delay in a due payment beyond its final date for payment shall entitle the payee to be paid interest at the rate stated in the Specialist Agreement and the Specialist and the Constructor confirm that such interest is a substantial remedy for late payment in compliance with section 9 of the Late Payment Act.</u>