

HGCRA LDED and Construction Act 2009 Amendments TPC2005 (amended 2008)

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 TPC2005, 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 & Hamlins LLP and the Association of Consultant Architects recommend are incorporated into TPC2005 for contracts entered into on or after 1 October 2011 relating to term programmes 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 updater 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 TPC2005 (amended 2008)

1 Clause 7

Delete clause 7 in its entirety and insert the following:

7 Prices and Payment

Price Framework and Consultant Payment Terms	7.1	Task Prices shall be calculated in accordance with the Price Framework and amounts due to Consultants shall be calculated in accordance with the relevant Consultant Payment Terms, subject in each case to adjustment in accordance with the Partnering Documents and addition of VAT (if applicable).
Open-book	7.2	If stated in the Term Partnering Agreement that this clause 7.2 applies, the Service Provider's agreed Profit, Central Office Overheads and Site Overheads shall be identified in the Price Framework and Task Prices shall be calculated on an Open-book basis in accordance with the Price Framework.
Payment applications and due dates for payment	7.3	Subject to any other payment arrangements set out in the Price Framework and the Consultant Payment Terms, applications for payment of amounts due shall be submitted to the Client and the Client Representative by the Service Provider and each Consultant at the end of each calendar month accompanied by the details stated in the Price Framework. Such applications shall state the sum the Service Provider or the Consultant considers to be due to it on the due date and the basis on which that sum is calculated. The due date for each application for payment shall be the date of receipt by the Client of the relevant application, submitted in accordance with this clause 7.3.
Notice of	7.4	Within five (5) days from receipt of each application for payment made by

payments to Service Provider	the Service Provider in accordance with clause 7.3, the Client Representative shall issue to the Service Provider and the Client a notice specifying the sum the Client Representative considers to have been due on the due date, calculated in accordance with the Price Framework to establish the value of the works and/or services provided by the Service Provider less the total of all amounts previously paid under the Partnering Contract and adjusted to reflect any Incentives and any sums due pursuant to clauses 8.3, 8.4 or 8.5 and taking into account sums due pursuant to clause 7.15 and/or clause 7.17. Such notice shall also specify the basis on which that sum is calculated.
Notice of payments to Consultants	7.5 Within five (5) days from receipt of each application for payment made by a Consultant in accordance with clause 7.3, the Client shall issue to the relevant Consultant a notice specifying the sum the Client considers to have been due on the due date, calculated in accordance with the relevant Consultant Payment Terms to establish the value of the services provided by that Consultant less the total of all amounts previously paid under the Partnering Contract and adjusted to reflect any Incentives and taking into account any sums due pursuant to clause 7.15 and/or clause 7.17. Such notice shall also specify the basis on which that sum is calculated.
Payments to Service Provider and Consultants	7.6 Subject to any revised periods stated in the Price Framework and the issue of a notice pursuant to clause 7.8, the Client shall pay to: <ul style="list-style-type: none"> <li data-bbox="512 1061 1449 1272">(i) the Service Provider the sum stated in a notice issued pursuant to clause 7.4 within twenty (20) Working Days from the due date for payment or within fifteen (15) Working Days from the date of receipt by the Client of any required VAT invoice in the same amount as such notice, whichever shall be the later, and the later of such dates shall be the final date for payment; <li data-bbox="512 1317 1449 1529">(ii) each Consultant the respective amount stated in the relevant notice issued pursuant to clause 7.5 within thirty (30) Working Days from the due date for payment or within twenty five (25) Working Days from the date of receipt by the Client of any required VAT invoice in the same sum as such notice, whichever shall be the later, and the later of such dates shall be the final date for payment.
Default notice	7.7 If the Client Representative or the Client does not issue a notice in accordance with clause 7.4 or 7.5 respectively: <ul style="list-style-type: none"> <li data-bbox="512 1677 1449 1742">(i) the Service Provider's or the relevant Consultant's application for payment under clause 7.3 shall be treated as the payment notice; <li data-bbox="512 1787 1449 1888">(ii) subject to any notice issued in accordance with clause 7.8, the Client shall pay the amount stated as due in the application for payment by the final date for payment.
Pay less notice	7.8 Not later than two (2) Working Days before the final date for payment of any amount due, the payer may give notice to the payee pursuant to Section 111(3) of the HGCR, 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 7.8:

- (i) the payer shall pay the amount stated in such notice by the final date for payment;
- (ii) the payee shall reissue any required VAT invoice to reflect the sum stated in the notice.

Adjustment of notices	7.9	No notice, VAT invoice or payment shall: <ul style="list-style-type: none">(i) prevent its later reconsideration and adjustment; or(ii) constitute or imply or be evidence of approval or acceptance of any part of any Task.
Fluctuation	7.10	Amounts payable under the Partnering Contract shall be subject only to such fluctuation provisions, if any, as are stated in the Price Framework and Consultant Payment Terms.
Payments to Specialists	7.11	The Service Provider shall pay to all Specialists the amounts to which they are entitled in accordance with their respective Specialist Payment Terms (with provision for interest equivalent to clause 7.17) and shall maintain full records of all amounts payable and paid to each Specialist.
Inspection of financial records	7.12	Each Partnering Team member shall allow the Client Representative to visit its offices and to inspect its financial records in relation to the Term Programme at any time subject to reasonable notice.
Statutory deduction	7.13	Where the Client is a "contractor" for the purpose of the Finance Act, then not later than fifteen (15) Working Days prior to the Service Provider's first application for payment, and at any other time upon request, the Service Provider shall either provide the Client with evidence that the Service Provider is entitled to be paid without the statutory deduction referred to in the Finance Act or inform the Client that it is not entitled to be paid without such statutory deduction (and in the latter case the Service Provider shall immediately inform the Client if it subsequently becomes entitled to be paid without such statutory deduction) and the Client shall be entitled to receive from the Service Provider evidence supporting the Service Provider's stated entitlement to be paid without such statutory deduction.
Final Account	7.14	The following procedures shall apply in relation to the Final Account: <ul style="list-style-type: none">(i) Within forty (40) Working Days following the end of the Term, the Client Representative shall prepare and issue to the Client and the Service Provider a Final Account calculated in accordance with clause 7.4, for agreement between the Client and the Service Provider.(ii) On or after eighty (80) Working Days from the end of the Term the Service Provider or the Client (as the case may be) shall make an application for payment which shall state the sum the Service

Provider or the Client considers to be due to it, either calculated in accordance with clause 7.4 or as agreed, and the basis on which that sum is calculated. The due date for the Final Account shall be the date of receipt by the payer of the application pursuant to this clause 7.14(ii).

- (iii) Within five (5) days of the due date the payer shall issue to the payee a notice stating the sum the payer considers to have been due on the due date, either calculated in accordance with clause 7.4 or as agreed, and the basis on which that sum is calculated. Subject to any notice issued in accordance with clause 7.8, the payer shall pay the amount stated as due in the notice issued pursuant to this clause 7.14(iii) by the final date for payment.
- (iv) If the payer does not issue a notice in accordance with clause 7.14(iii) the payee's application under clause 7.14(ii) shall be treated as the payment notice. Subject to any notice issued in accordance with clause 7.8, the payer shall pay the amount stated as due in the application for payment by the final date for payment.
- (v) The final date for payment for the Final Account shall be the later of twenty (20) Working Days from the due date and fifteen (15) Working Days from the date of receipt by the payer of any required VAT invoice (in the same amount as the payment notice or the application for payment).
- (vi) On agreement of the Final Account clause 7.9(i) shall not apply.

Suspension of performance	7.15	If the Client fails to make any payment due in accordance with this clause 7 by the stated final date for payment, and if such failure shall continue for seven (7) days after the Service Provider or a Consultant has given the Client written notice of its intention to suspend performance of any or all of its obligations and the grounds for such intended suspension, then the Service Provider or such Consultant may suspend performance of any or all of its obligations under the Partnering Contract until payment is received in full. Where the Service Provider or a Consultant 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.
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Sums due to the Client	7.16	Any sum due to the Client from a Partnering Team member pursuant (other than pursuant to clause 7.14) which the Client does not deduct and/or withhold from sums due or to become due to the relevant Partnering Team member shall be due for payment on receipt of an application from the Client by the relevant Partnering Team member. In such application the Client 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 relevant Partnering Team member 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 relevant Partnering Team member fails to serve such notice the Client's
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application shall be treated as the payment notice. The final date for payment for any such sum applied for by the Client shall be the later of twenty (20) Working Days from the payment due date and fifteen (15) Working Days from the date of receipt by the relevant Partnering Team member of any required VAT invoice from the Client in the same amount as the payment notice.

Interest on late payment 7.17 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 Term Partnering Agreement, and the Partnering Team members confirm that such interest is a substantial remedy for late payment in compliance with Section 9 of the Late Payment Act.

2 **Clause 13.9**

Delete clause 13.9 and insert:

"In the event of termination of any Partnering Team member's appointment (other than the Client's) by reason of its bankruptcy or insolvency under clause 13.5 or by the Client in accordance with clauses 13.6 or 13.7, no further sum shall become due to that Partnering Team member and the Client may complete all Tasks using others in place of that Partnering Team member."

3 **Clause 13.11**

Insert new clause 13.11:

"In the event of a Partnering Team member suffering an event of insolvency as described in Section 113(2) to Section 113(5) of the HGCRA:

- (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 7.8;
- (ii) the payer need not pay any sum that has already become due 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 7.8."

4 **Appendix 1**

In line 1 of the definition of Final Account delete "7.13" and insert "7.14"

5 **Appendix 7 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 any Partnering Team member 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 Partnering Team members in dispute 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 Partnering Team member 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 Partnering Team members in dispute."

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 Partnering Team members in dispute otherwise agree to arbitration) or by agreement."

[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 7 in TPC2005 (amended 2008) showing changes made

	7	Prices and Payment
Price Framework and Consultant Payment Terms	7.1	Task Prices shall be calculated in accordance with the Price Framework and amounts due to Consultants shall be calculated in accordance with the relevant Consultant Payment Terms, subject in each case to adjustment in accordance with the Partnering Documents and addition of VAT (if applicable).
Open-book	7.2	If stated in the Term Partnering Agreement that this clause 7.2 applies, the Service Provider's agreed Profit, Central Office Overheads and Site Overheads shall be identified in the Price Framework and Task Prices shall be calculated on an Open-book basis in accordance with the Price Framework.
Payment applications <u>and due dates for payment</u>	7.3	Subject to any other payment arrangements set out in the Price Framework and the Consultant Payment Terms, applications for payment of amounts due shall be submitted to the Client <u>and the Client Representative</u> by the Service Provider and each Consultant at the end of each calendar month accompanied by the details stated in the Price Framework. <u>Such applications shall state the sum the Service Provider or the Consultant considers to be due to it on the due date and the basis on which that sum is calculated. The due date for each application for payment shall be the date of receipt by the Client of the relevant application, submitted in accordance with this clause 7.3.</u>
<u>Notice Valuation</u> of payments to Service Provider	7.4	Subject to any revised period stated in the Price Framework, w Within five (5) Working D days from receipt of each application for payment made by the Service Provider in accordance with clause 7.3, the Client Representative shall issue to the Service Provider <u>and the Client</u> a <u>notice valuation</u> specifying the <u>sum the Client Representative considers to have been due on the due date</u> proposed payment , calculated in accordance with the Price Framework to establish the value of the works and/or services provided by the Service Provider less the total of all amounts previously paid under the Partnering Contract and adjusted to reflect any Incentives <u>and any sums due pursuant to clauses 8.3, 8.4 or 8.5 and taking into account sums due pursuant to clause 7.15 and/or clause 7.17. Such notice shall also specify the basis on which that sum is calculated.</u> , and each such valuation shall be notice pursuant to Section 110(2) of the HGCR and its date shall be the due date for payment.
Notice of payments to Consultants	7.5	Subject to any revised period stated in the relevant Consultant Payment Terms, w Within five <u>fifteen</u> (15) Working D days from receipt of each application for payment made by a Consultant in accordance with clause 7.3, the Client shall issue to the relevant Consultant a notice specifying the <u>sum the Client considers to have been due on the due date</u> proposed payment , calculated in accordance with the <u>relevant</u> Consultant Payment Terms to establish the value of the services provided by that Consultant less the total of all amounts previously paid under the Partnering Contract

and adjusted to reflect any Incentives and taking into account any sums due pursuant to clause 7.15 and/or clause 7.17. Such notice shall also specify the basis on which the sum is calculated. ~~and each such notice shall be notice pursuant to Section 110(2) of the HGCRA and its date shall be the due date for payment.~~

Payments to
Service Provider
and Consultants

7.6

Subject to any revised periods stated in the Price Framework and the issue of a notice pursuant to clause 7.8, the Client shall pay to:

(i) the Service Provider and each Consultant the respective amounts due to each of them pursuant to clauses 7.4 and 7.5 the sum stated in a notice issued pursuant to clause 7.4 within twenty fifteen (15) Working Days from the due date for payment or within fifteen ten (10) Working Days from the date of receipt by the Client of any required VAT invoice in the same sum as such notice, amount, whichever shall be the later, and the later of such dates shall be the final date for payment;

(ii) each Consultant the respective sum stated in the relevant notice issued pursuant to clause 7.5 within thirty (30) Working Days from the due date for payment or within twenty five (25) Working Days from the date of receipt by the Client of any required VAT invoice in the same sum as such notice, whichever shall be the later, and the later of such dates shall be the final date for payment.

~~Any delay in a due payment beyond such final date for payment shall entitle the payee to be paid interest at the rate stated in the Term Partnering Agreement, and the Service Provider and the Consultants confirm that such interest is a substantial remedy for late payment in compliance with Section 9 of the Late Payment Act.~~

Default notice

7.7

If the Client Representative or the Client does not issue a notice in accordance with clause 7.4 or clause 7.5 respectively:

(i) the Service Provider's or the relevant Consultant's application for payment under clause 7.3 shall be treated as the payment notice;

(ii) subject to any notice issued in accordance with clause 7.8, the Client shall pay the sum stated as due in the application for payment by the final date for payment.

Withholding or
deduction Pay
less notice

7.8

Not later than two (2) Working Days before the final date for payment of any amount due, the payerClient may give notice to the payee pursuant to Section 111(34) of the HGCRA, specifying any 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. ~~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. If a notice is issued under this clause 7.8:~~

(i) the payer shall pay the amount stated in such notice by the final

date for payment;

(ii) the payee shall reissue any required VAT invoice to reflect the sum stated in the notice.

Adjustment of
~~valuations and~~
notices

~~7.107.9~~ No ~~valuation or notice, or~~ VAT invoice or payment shall:-

- (i) prevent its later reconsideration and adjustment; or
- (ii) constitute or imply or be evidence of approval or acceptance of any part of any Task.

Fluctuation

~~7.117.10~~ Amounts payable under the Partnering Contract shall be subject only to such fluctuation provisions, if any, as are stated in the Price Framework and Consultant Payment Terms.

Payments to
Specialists

~~7.127.11~~ The Service Provider shall pay to all Specialists the amounts to which they are entitled in accordance with their respective Specialist Payment Terms (with provision for interest equivalent to clause ~~7.67.17~~) and shall maintain full records of all amounts payable and paid to each Specialist.

Inspection of
financial records

~~7.137.12~~ Each Partnering Team member shall allow the Client Representative to visit its offices and to inspect its financial records in relation to the Term Programme at any time subject to reasonable notice.

Statutory
deduction

~~7.147.13~~ Where the Client is a "contractor" for the purpose of the Finance Act, then not later than fifteen (15) Working Days prior to the Service Provider's first application for payment, and at any other time upon request, the Service Provider shall either provide the Client with evidence that the Service Provider is entitled to be paid without the statutory deduction referred to in the Finance Act or inform the Client that it is not entitled to be paid without such statutory deduction (and in the latter case the Service Provider shall immediately inform the Client if it subsequently becomes entitled to be paid without such statutory deduction) and the Client shall be entitled to receive from the Service Provider evidence supporting the Service Provider's stated entitlement to be paid without such statutory deduction.

Final Account

~~7.157.14~~ The following procedures shall apply in relation to the Final Account:

- (i) Within forty (40) Working Days following the end of the Term, the Client Representative shall prepare and issue to the Client and the Service Provider a Final Account, calculated in accordance with clause 7.4 for agreement between the Client and the Service Provider, which when agreed by them shall be conclusive evidence as to the balance due between them and, upon such agreement, the Client Representative shall issue a Final Account valuation. The Client shall pay in accordance with clause 7.6 the amount stated in the Final Account valuation, and clause 7.8(i) shall not apply to such valuation. If agreement is not reached within forty (40) Working Days from the date of issue of the Final Account, either the Client or the Service Provider may implement the

~~procedures described in clause 14 if appropriate.~~

- ~~(ii) On or after eighty (80) Working Days from the end of the Term the Service Provider or the Client (as the case may be) shall make an application for payment which shall state the sum the Service Provider or the Client considers to be due to it, calculated in accordance with clause 7.4 or as agreed, and the basis on which that sum is calculated. The due date for the Final Account shall be the date of receipt by the payer of the application pursuant to this clause 7.14(ii).~~
- ~~(iii) Within five (5) days of the due date the payer shall issue to the payee a notice stating the sum the payer considers to have been due on the due date, either calculated in accordance with clause 7.4 or as agreed, and the basis on which that sum is calculated. Subject to any notice issued in accordance with clause 7.8, the payer shall pay the amount stated as due in the notice issued pursuant to this clause 7.14(iii) by the final date for payment.~~
- ~~(iv) If the payer does not issue a notice in accordance with clause 7.14(iii) the payee's application under clause 7.14(ii) shall be treated as the payment notice. Subject to any notice issued in accordance with clause 7.8, the payer shall pay the amount stated as due in the application for payment by the final date for payment.~~
- ~~(v) The final date for payment for the Final Account shall be the later of twenty (20) Working Days from the due date and fifteen (15) Working Days from the date of receipt by the payer of any required VAT invoice (in the same sum as the payment notice or the application for payment).~~
- ~~(vi) On agreement of the Final Account clause 7.9(i) shall not apply.~~

Suspension of performance

~~7.16~~7.15 If the Client fails to make any payment due in accordance with this clause 7 by the stated final date for payment, and if such failure shall continue for seven (7) days after the Service Provider or a Consultant has given the Client written notice of its intention to suspend performance of any or all of its obligations and the grounds for such intended suspension, then the Service Provider or such Consultant may suspend performance of any or all of its obligations under the Partnering Contract until payment is received in full. Where the Service Provider or a Consultant 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 the Client

7.16 Any sum due to the Client from a Partnering Team member pursuant (other than pursuant to clause 7.14) which the Client does not deduct and/or withhold from sums due or to become due to the relevant Partnering Team member shall be due for payment on receipt of an application from the Client by the relevant Partnering Team member. In such application the Client 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 relevant Partnering Team member 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 relevant Partnering Team member fails to serve such notice the Client's application shall be treated as the payment notice. The final date for payment for any such sum applied for by the Client shall be the later of twenty (20) Working Days from the payment due date and fifteen (15) Working Days from the date of receipt by the relevant Partnering Team member of any required VAT invoice from the Client in the same amount as the payment notice.

Interest on late payment

7.17

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 Term Partnering Agreement, and the Partnering Team members confirm that such interest is a substantial remedy for late payment in compliance with Section 9 of the Late Payment Act.