

2012 No. 365

CONSTRUCTION

**The Scheme for Construction Contracts in Northern Ireland
(Amendment) Regulations (Northern Ireland) 2012**

Made - - - - - *20th September 2012*

Affirmed by resolution of the Assembly on *23rd October 2012*

Coming into operation - - - - - *14th November 2012*

The Department of Finance and Personnel, in exercise of the powers conferred by Articles 7(6), 13 and 16(1) of the Construction Contracts (Northern Ireland) Order 1997(a)(“the 1997 Order”) and now vested in it (b) makes the following Regulations.

Before making these Regulations, the Department of Finance and Personnel has consulted in accordance with Article 13(2) of the 1997 Order.

Citation, commencement, application and interpretation

1.—(1) These Regulations may be cited as the Scheme for Construction Contracts in Northern Ireland (Amendment) Regulations (Northern Ireland) 2012 and come into operation on 14th November 2012.

(2) These Regulations only apply to construction contracts entered into after the coming into operation of these Regulations.

(3) In these Regulations, “the Principal Regulations” means the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999(c).

Amendment to regulation 3 of the Principal Regulations

2. In paragraph (b) of regulation 3 of the Principal Regulations, for “Article 9”, substitute “Article 9 or Article 9A”(d).

(a) SI 1997/274 (N.I. 1) amended by the Construction Contracts (Amendment) Act (Northern Ireland) 2011 c.4

(b) By Article 6(b) of, and Schedule 4, Part 2 to SR 1999/481

(c) SR 1999 No. 32

(d) Article 9A was inserted by section 6(4) of the Construction Contracts (Amendment) Act (Northern Ireland) 2011 c.4

Amendments to Part 1 (Adjudication) of the Schedule to the Principal Regulations

3.—(1) Part 1 (Adjudication) of the Schedule to the Principal Regulations is amended as follows.

- (2) In paragraph 1(1), before the words “of his intention”, insert the words “at any time”.
- (3) After paragraph 7(3) insert—
 - “(4) Upon receipt of the referral notice, the adjudicator must inform every party to the dispute of the date that it was received”.
- (4) In paragraph 9(4), for the second sentence substitute—

“Subject to any contractual provision pursuant to Article 7A(2) of the 1997 Order, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination”(a).
- (5) In paragraph 11(1), for the third sentence substitute—

“Subject to any contractual provision pursuant to Article 7A(2) of the 1997 Order, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination”.
- (6) In paragraph 15(b)—
 - (a) insert the word “the” after the word “as”; and
 - (b) for the words “be justified”, substitute “justify”.
- (7) In paragraph 19(1)—
 - (a) in sub-paragraphs (a) and (b), for the words “the date”, substitute “receipt”; and
 - (b) in sub-paragraph (c), insert the words “receipt of” after the word “after”.
- (8) In paragraph 20(b), for the words “Article 10(4)”, substitute “Article 10(9)”(b).
- (9) In paragraph 21, omit the words “in accordance with this paragraph”.
- (10) After paragraph 22 insert—
 - “**22A.**—(1) The adjudicator may on his own initiative or on the application of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
 - (2) Any correction of a decision must be made within five days of the delivery of the decision to the parties.
 - (3) As soon as possible after correcting a decision in accordance with this paragraph, the adjudicator must deliver a copy of the corrected decision to each of the parties.
 - (4) Any correction of a decision forms part of the decision.”
- (11) Omit paragraph 23(1).
- (12) Omit paragraph 24.
- (13) In paragraph 25, for the second sentence substitute—

“Subject to any contractual provision pursuant to Article 7A(2) of the 1997 Order, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination”.

(a) Article 7A was inserted by section 4 of the Construction Contracts (Amendment) Act (Northern Ireland) 2011 c.4

(b) Article 10 was substituted by section 7 of the Construction Contracts (Amendment) Act (Northern Ireland) 2011 c.4

Amendments to Part 2 (Payment) of the Schedule to the Principal Regulations

- 4.—(1) Part 2 (Payment) of the Schedule to the Principal Regulations is amended as follows.
- (2) In paragraph 5—
- (a) omit the words “the expiry of”; and
 - (b) insert the words “the expiry of” before the words “30 days following the completion of the work”.
- (3) For paragraph 9, substitute—

“Payment notice

9.—(1) Where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to Article 9A(1) of the 1997 Order, the provisions of this paragraph apply.

(2) The payer must, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (3).

(3) A notice complies with this sub-paragraph if it specifies the sum that the payer considers to be due or to have been due at the payment due date and the basis on which that sum is calculated.

(4) For the purposes of this paragraph, it is immaterial that the sum referred to in sub-paragraph (3) may be zero.

(5) A payment provided for by the contract includes any payment of the kind mentioned in paragraphs 2, 5, 6, or 7 above.”

- (4) For paragraph 10, substitute—

“Notice of intention to pay less than the notified sum

10. Where, in relation to a notice of intention to pay less than the notified sum mentioned in Article 10(3) of the 1997 Order, the parties fail to agree the prescribed period mentioned in Article 10(5), that notice must be given not later than seven days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.”

Sealed with the Official Seal of the Department of Finance and Personnel on 20th September 2012

David Carson

A senior officer of the Department of Finance and Personnel

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (“the Scheme”), in part to reflect changes made to the relevant primary legislation, the Construction Contracts (Northern Ireland) Order 1997: SI 1997 No 274 (N.I. 1) (“the 1997 Order”), by the Construction Contracts (Amendment) Act (Northern Ireland) 2011 c.4.

Where the parties to a construction contract fail to make provision in their contract for one or more of various terms relating to “adjudication” (a dispute resolution procedure which the 1997 Order introduced as regards disputes under construction contracts), the provisions of Part 1 of the Schedule to the Scheme have effect (as implied terms of the parties’ contract).

Regulation 3(3) inserts a new provision into the Scheme with the effect that, upon a dispute being referred to an adjudicator, the adjudicator is to inform the parties to the contract of the date of the referral.

Broadly similar provisions relating to the fees and expenses of an adjudicator are amended by Regulation 3(4), (5) and (13). The effect of these amendments is to ensure that the adjudicator’s ability to look to both parties to the construction contract for the payment of the adjudicator’s fees and expenses is subject to any valid (express) contractual provision to the contrary. (See Article 7A of the 1997 Order as amended which, though it provides that most express contractual provision as regards the allocation of adjudication costs will be ineffective, exempts provision whereby the parties agree that the adjudicator can allocate his or her costs between the parties.)

Regulation 3(7) amends paragraph 19(1) of the Scheme to clarify that the period within which an adjudicator must reach a decision regarding a dispute begins when the adjudicator receives the referral.

Regulation 3(10) introduces a new provision into the Scheme to the effect that adjudicators have the power to correct (in various circumstances) minor errors in their decisions. Any such corrections must be made within five days of the relevant decision.

Regulation 3(11) and (12) repeals provisions allowing for peremptory decisions on the part of adjudicators.

Regulation 4 amends Part 2 of the Schedule to the Scheme. Part 2 of the Schedule to the Scheme concerns “payments” and implies into the contract provisions relating to payments to the extent that express terms are absent or deficient.

Article 9A of the 1997 Order as amended provides that a construction contract must contain a provision to the effect that a “payment notice” (setting out, in relation to every payment, the sum considered due) must be given by the person whom the parties have agreed - the payer, the payee or certain other persons. Where the parties have failed to make express provision in their contract as to who is to give such notices, regulation 4(3) substitutes a new paragraph 9 of Part 2 of the Schedule to the Scheme with the effect that this is the payer’s responsibility.

Article 10 of the 1997 Order as amended introduces a requirement to pay the sum set out in such “payment notices” (whether given pursuant to express terms in the parties’ contract or by virtue of new paragraph 9 of Part 2 of the Schedule to the Scheme). It also makes provision for the sum in such a notice to be challenged or revised by the giving of a type of counter-notice – a notice of intention to pay less than the notified sum. Regulation 4(4) substitutes a new paragraph 10 of Part 2 of the Schedule and thereby makes provision for the timing of such a counter-notice where the parties have failed to agree on this.

A full regulatory impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector was included in the Department of Finance and Personnel consultation document on its proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern

Ireland) 1999: Improving Payment Practices in the Construction Industry in Northern Ireland
April 2009.

The changes proposed for the Scheme do not bring any additional costs or deliver any additional benefits beyond those which were included in that Impact Assessment.

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