

HGCRA LDED and Construction Act 2009 Amendments

SPC2000 (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 SPC2000, 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 & Hamlin LLP and the Association of Consultant Architects recommend are incorporated into SPC2000 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 (amended 2008)

1 Clause 18.3(xii)

In line 1 insert "any or all of" before 'its obligations'

2 Clause 20

Delete clause 20 in its entirety and insert the following:

20 Payment

Payment obligations

20.1 The Constructor shall be responsible for payment to the Specialist of all agreed amounts in respect of Specialist Pre-Construction Activities and comprising the Specialist Price, plus in each case VAT (if applicable), subject to and adjusted in accordance with these Specialist Terms.

Payment applications

20.2 Subject to any agreed payment milestones, activity schedules or cashflows and any other payment arrangements set out in the Specialist Payment Terms, 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 date stated in the Specialist Agreement or (if no date is stated) the relevant interval after the date of commencement of the Specialist Works in accordance with the Specialist Contract. 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 for payment 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 20.2.

Interim payments to Specialist	20.3	Within five (5) days from receipt of each application for payment made by the Specialist in accordance with clause 20.2, clause 20.13 or when otherwise required by these Specialist Terms, the Constructor shall issue to the Specialist a payment notice calculated in accordance with clause 20.4, 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 20.6, the Constructor shall pay to the Specialist the sum stated as due in the payment notice by the final date for payment. Subject to any revised period stated in the Specialist Agreement, the final date for payment 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.
Content of Specialist valuations	20.4	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 any Specialist Pre-Construction Activities properly performed or 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 15.4 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 shared savings, shared added value and pain/gain Incentives pursuant to clause 13.2, any Incentives that link payment to achievement of Specialist KPI Targets pursuant to clause 13.3 and any sums due pursuant to clauses 17.3, 17.4, 18.5 or 18.6 and taking into account any sums due pursuant to clauses 20.9 and/or 20.15.
Default notice	20.5	If the Constructor does not issue a payment notice in accordance with clause 20.3: (i) the Specialist's application for payment under clause 20.2 shall be treated as the payment notice; (ii) subject to any notice issued in accordance with clause 20.6, the Constructor shall pay the amount stated as due in the application for payment by the final date for payment.
Pay less notice	20.6	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 20.6: (i) the payer shall pay the amount stated in such notice by the final date for payment; (ii) the payee shall re-issue any required VAT invoice to reflect the sum stated in such notice.

Adjustment of notices	20.7	The issue of any notice, VAT invoice or the payment of any amount by the payer shall not in any way affect the right of the Constructor or the Specialist to contend that (i) any Specialist Pre-Construction Activities or the Specialist Works have or have not been properly valued; and/or (ii) that any amount has been improperly paid or withheld. In calculating any notice, the payer shall be entitled to reconsider and, if necessary, adjust any assessment made in arriving at any previous notice.
Notices not approval	20.8	The issue of any notice, VAT invoice or the payment of any amount shall not: (i) constitute or imply or be evidence of the Constructor's approval or acceptance of any part of any Specialist Pre-Construction Activities or the Specialist Works; or (ii) in any way affect the responsibilities of the Specialist under the Specialist Contract.
Interest on late payment	20.9	Any delay in a due payment beyond the final date stated in clauses 20.3, 20.14 and/or 20.16 shall entitle the payee to be paid interest at the percentage specified 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.
Fluctuation	20.10	The Specialist Price shall be subject only to such fluctuation provisions, if any, as are set out in the Specialist Payment Terms.
Payment of Sub-Specialists	20.11	The Specialist shall pay all Sub-Specialists the amounts to which they are entitled (with provision for interest on late payment equivalent to clause 20.9), shall maintain full records of all amounts payable and paid and shall make these records available to the Constructor on request.
Statutory deduction	20.12	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 Act 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.
Payment on Specialist Completion	20.13	Within twenty five (25) Working Days following Specialist Completion (or any Completion (or any other period stated in the Specialist Agreement), the Constructor shall prepare and issue to the Specialist an account confirming the balance of the Specialist Price due as between the Constructor and the Specialist, calculated in accordance with clause 20.4. The Constructor and

the Specialist shall seek to agree the amount of that balance, taking into account any adjustment provided for in these Specialist Terms and subject to deduction of any amount stated as a Specialist Retention in the Specialist Payment Terms. On or after forty five (45) Working Days following Specialist Completion (or any revised period stated in the Specialist Payment Terms) the Specialist shall issue a payment application in accordance with clause 20.2 and the due date for payment shall be the date of receipt by the Constructor of such application.

Specialist Final
Account

20.14

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

- (i) Within twenty (20) Working Days from the date or event stated in the Specialist Agreement, the Constructor shall prepare and issue to the Specialist a Specialist Final Account in respect of the Specialist Works (calculated in accordance with clause 20.4 and taking into account any adjustment provided for in these Partnering Terms) for agreement between the Constructor and the Specialist.
- (ii) On or after forty (40) Working Days from the date or event stated in the Specialist Agreement, the Constructor or the Specialist (as the case may be) shall make an application for payment which shall state the sum the Constructor or the Specialist considers to be due to it and the basis on which that sum is calculated and which shall be accompanied by such details as are stated in the Specialist Works Brief and such further information as the Constructor or the Specialist may reasonably require. Such application shall either be in the agreed amount or if agreement is not reached then in such amount as the payee considers to be due on the due date for payment, calculated in accordance with clause 20.4. The due date for payment in respect of the application shall be the date of receipt by the payer of such application.
- (iii) Within five (5) days of the due date for payment the payer shall issue to the payee a payment notice stating the sum the payer considers to have been due on the due date for payment, either calculated in accordance with clause 20.4 or as agreed, and the basis on which that sum is calculated. Subject to any revised periods stated in the Specialist Payment Terms, the final date for payment shall be the later of twenty five (25) Working Days from the due date for payment and twenty (20) Working Days from receipt by the payer of any required VAT invoice in the same sum as the payment notice.
- (iv) If a payment notice is not issued in accordance with clause 20.14(iii) the application for payment pursuant to clause 20.14(ii) shall be treated as the payment notice. Subject to any notice issued in accordance with clause 20.6, the payer shall pay the sum stated as due in the payment notice or the application for

payment by the final date for payment.

- (v) The Final Account, when agreed, shall be conclusive evidence as to the balance of the Specialist Price due between the Constructor and the Specialist.

Suspension of
performance

20.1720.15 If the Constructor fails to make any payment due in accordance with this clause 20 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 any or all of its obligations and the grounds for such intended suspension, then the Specialist may suspend performance of any or all 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 the
Constructor

20.1820.16 Any sum due to the Constructor (other than pursuant to clause 20.14) 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.

3 **Clause 26.4(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"

4 **Clause 26.13**

Insert new clause 26.13:

"In the event of the Constructor or the Specialist 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 20.6;

- (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 20.6."

5 **Appendix 1**

In line 1 of definition of Specialist Final Account delete "20.13" and insert "20.14"

6 **Appendix 4 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."

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.

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

Mark up of clause 20 in SPC2000 (amended 2008) showing changes made

	20	Payment	
Payment obligations	20.1	The Constructor shall be responsible for payment to the Specialist of all agreed amounts <u>in respect of under any</u> Specialist Pre-Construction <u>Activities Agreement</u> and comprising the Specialist Price, plus in each case VAT (if applicable), subject to and adjusted in accordance with these Specialist Terms.	
Payment applications	20.2	Subject to any agreed payment milestones, activity schedules or cashflows and any other payment arrangements set out in the Specialist Payment Terms, 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 date stated in the Specialist Agreement or (if no date is stated) the relevant interval after the date of commencement of the Specialist Works in accordance with the Specialist Contract. 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 for payment 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 20.2.</u>	
<u>Interim Valuations and payments to Specialist</u>	20.3	<u>Subject to any revised period stated in the Specialist Agreement, W</u> within <u>ten (10) Working Days</u> five (5) days from receipt of each application for payment made by the Specialist in accordance with clause 20.2, <u>clause 20.13 or and</u> when otherwise required by these Specialist Terms, the Constructor shall issue to the Specialist a <u>payment notice valuation</u> calculated in accordance with clause 20.4, specifying the <u>sum amount of the Constructor considers to have been due on the due date for the</u> payment <u>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 also be a notice pursuant to Section 110(2) of the HGCRA. Subject to any notice issued in accordance with clause 20.6, the Constructor shall pay to the Specialist the sum stated as due in the payment notice by the final date for payment.</u> Subject to any revised period stated in the Specialist Agreement, the <u>final date for payment shall be the later of</u> <u>Constructor shall pay to the Specialist the amount stated as due in each such valuation within twenty five</u> fifteen (25-15) Working Days from the <u>due date for payment of issue of such valuation and or twenty ten (20-10)</u> Working Days 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 shall be the final date for payment.</u>	
Content of Specialist	20.4	The amount payable under each application for payment by the Specialist	

valuations

shall be calculated in accordance with the Specialist Payment Terms to establish the value of any Specialist Pre-Construction Activities properly performed or 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 15.4 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 shared savings, shared added value and pain/gain Incentives pursuant to clause 13.2, ~~and any Incentives that link payment to achievement of Specialist KPI Targets pursuant to clause 13.3~~ and any sums due pursuant to clauses 17.3, 17.4, 18.5 or 18.6 and taking into account any sums due pursuant to clauses 20.9 and/or 20.15.

Default notice

20.5

If the Constructor does not issue a payment notice in accordance with clause 20.3:

- (i) the Specialist's application for payment under clause 20.2 shall be treated as the payment notice;
- (ii) subject to any notice issued in accordance with clause 20.6, the Constructor shall pay the amount stated as due in the application for payment by the final date for payment.

Withholding or deductionPay less notice

20.6

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(31) 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. 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 20.6:

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

Adjustment of valuationsnotices

~~20.8~~20.7

~~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 payer Constructor shall not in any way affect the right of the Constructor or the Specialist to contend that~~

- (i) any Specialist Pre-Construction Activities or the Specialist Works have or have not been properly valued; and/or
- (ii) that any amount has been improperly paid or withheld.

~~and, if~~ In calculating any noticevaluation, the payer Constructor shall be entitled to reconsider and, if necessary, adjust any assessment made in arriving at any previous noticevaluation.

Notices, Valuations not approval	20.920.8 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 <u>not</u>: (i) _____ constitute or imply or be evidence of the Constructor's approval or acceptance of any part of any Specialist Pre-Construction Activities or the Specialist Works; or (ii) _____ shall in any way affect the responsibilities of the Specialist under the Specialist Contract.
Interest on late payment	20.1020.9 Any delay in a due payment beyond the final date stated in clause <u>20.3, 20.14 and/or 20.16</u> shall entitle the <u>payee Specialist</u> to be paid interest at the percentage specified in the Specialist Agreement and the Specialist <u>and the Constructor</u> confirms that such interest is a substantial remedy for late payment in compliance with Section 9 of the Late Payment Act.
Fluctuation	20.1120.10 The Specialist Price shall be subject only to such fluctuation provisions, if any, as are set out in the Specialist Payment Terms.
Payment of Sub- Specialists	20.1220.11 The Specialist shall pay all Sub-Specialists the amounts to which they are entitled (with provision for interest on late payment equivalent to clause 20.98), shall maintain full records of all amounts payable and paid and shall make these records available to the Constructor on request.
Statutory deduction	20.1320.12 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 Act 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.
Payment on Specialist Completion	20.1420.13 Within twenty five (25) Working Days following Specialist Completion (or any other period stated in the Specialist Agreement), the Constructor shall prepare and issue to the Specialist an account confirming the balance of the Specialist Price due as between the Constructor and the Specialist, <u>calculated in accordance with clause 20.4. subject only to any outstanding entitlements and claims by the Constructor or the Specialist notified to the other party prior to that date, and t</u>The Constructor and the Specialist shall seek to agree the amount of that balance, taking into account any adjustment provided for in these Specialist Terms and subject to deduction of any amount stated as a Specialist Retention in the Specialist Payment Terms. <u>Within twenty five (25) Working Days from the date of issue of that account, the Constructor shall issue a valuation in accordance with clause 20.3 in the agreed amount, or if agreement is not reached then, subject to clause 20.6, in such amount as is fair and reasonable. The Constructor shall pay in accordance with clause 20.3 the amount stated as</u>

~~due in such valuation.~~ On or after forty five (45) Working Days following Specialist Completion (or any revised period stated in the Specialist Payment Terms) the Specialist shall issue a payment application in accordance with clause 20.2 and the due date for payment shall be the date of receipt by the Constructor of such application.

Specialist Final
Account

~~20.15~~20.14 The following procedures shall apply in relation to the Specialist Final Account:

- (i) Within twenty (20) Working Days from the date or event stated in the Specialist Agreement, the Constructor shall prepare and issue to the Specialist a Specialist Final Account in respect of the Specialist Works (calculated in accordance with clause 20.4 and taking into account any adjustment provided for in these Partnering Terms) for agreement between the Constructor and the Specialist. ~~The Specialist Final Account, when agreed, shall be conclusive evidence as to the balance of the Specialist Price due as between the Constructor and the Specialist and, upon agreement, the Constructor shall issue a Specialist Final Account valuation. The Constructor shall pay in accordance with clause 20.3 the amount stated as due in such valuation, and clause 20.6 shall not apply to such valuation.~~
- (ii) On or after forty (40) Working Days from the date or event stated in the Specialist Agreement, the Constructor or the Specialist (as the case may be) shall make an application for payment which shall state the sum the Constructor or the Specialist considers to be due to it and the basis on which that sum is calculated and which shall be accompanied by such details as are stated in the Specialist Works Brief and such further information as the Constructor or the Specialist may reasonably require. Such application shall either be in the agreed amount or if agreement is not reached then in such amount as the payee considers to be due on the due date for payment, calculated in accordance with clause 20.4. The due date for payment in respect of the application shall be the date of receipt by the payer of such application.
- (iii) Within five (5) days of the due date for payment the payer shall issue to the payee a payment notice stating the sum the payer considers to have been due on the due date for payment, either calculated in accordance with clause 20.4 or as agreed, and the basis on which that sum is calculated. Subject to any revised periods stated in the Specialist Payment Terms, the final date for payment shall be the later of twenty five (25) Working Days from the due date for payment and twenty (20) Working Days from receipt by the payer of any required VAT invoice in the same sum as the payment notice.
- (iv) If a payment notice is not issued in accordance with clause 20.14(iii) the application for payment pursuant to clause 20.14(ii)

shall be treated as the payment notice. Subject to any notice issued in accordance with clause 20.6 the payer shall pay the sum stated as due in the payment notice or the application for payment by the final date for payment.

(v) The Final Account, when agreed, shall be conclusive evidence as to the balance of the Specialist Price due between the Constructor and the Specialist.

Non-agreement of
Specialist Final
Account

~~If agreement of the Specialist Final Account is not reached within forty (40) Working Days from the date of its issue in accordance with clause 20.13, either the Constructor or the Specialist may implement the procedure described in clause 27 if appropriate.~~

Suspension of
performance

~~20.16~~20.15 If the Constructor fails to make any payment due in accordance with this clause 20 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 any or all of its obligations and the grounds for such intended suspension, then the Specialist may suspend performance of any or all 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

20.16 Any sum due to the Constructor (other than pursuant to clause 20.14) 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.