

WITHHOLDING PAYMENT UNDER JCT AND NEC CONTRACTS

A practical guide to defending withholding notices:

Provided that a party to a contract issues a compliant withholding notice setting out the ground or grounds and the sums attributable to each ground then the party may legitimately withhold.

So what can you do to defend that position?

Technical Challenge:

- Are the provisions of the contract compliant with the HGCR Act?
- Is the notice to withhold compliant with the contractual requirements?
- Is the notice to withhold compliant with the timing requirements?
- Is the notice to withhold compliant with the means of issue? (e.g. recorded delivery post?)

Contractual Entitlement Challenge:

- What is the cause (breach) of the contract giving entitlement to withhold?
- Is there a loss naturally flowing from that breach?

Quantum Challenge:

- Is the valuation of the withholding prepared correctly and/or in accordance with the contract?
- Is the evidential material fully auditable and relevant?
- Do the costs claimed/presented naturally relate and flow from the alleged breach?
- Have the quantities been properly calculated?
- Are the rates and prices fair and reasonable?
- Are the reference points correct?

The new **Construction Contracts Bill** or to give it its full name "The Local Democracy, Economic Development and Construction Bill", an updated version of the HGCR Act (1996), is likely to come into force this year.

What's new in the new Bill? – amongst other things...

- The Act will now apply to contracts agreed in writing or orally
- Adjudication Costs—any attempt to allocate the costs of Adjudication between the parties will be invalid
- Conditional payment—ban "pay when certified" clauses
- The payment provisions specifically relating to withholding will be fundamentally changed.

JCT and NEC compared

There are significant differences in the timescales for withholding in JCT and NEC Contracts.

To help understand some of these differences we have prepared flow charts for the following:

- JCT 2005 SBC/Q Revision 2 2009
- SBC Sub/A and SBC Sub/C Revision 2 2009
- NEC3 Subcontract

These are on the reverse side of this Newsletter. You must be careful to check for any amendments to the Standard Forms which have been used as a basis for this illustration.

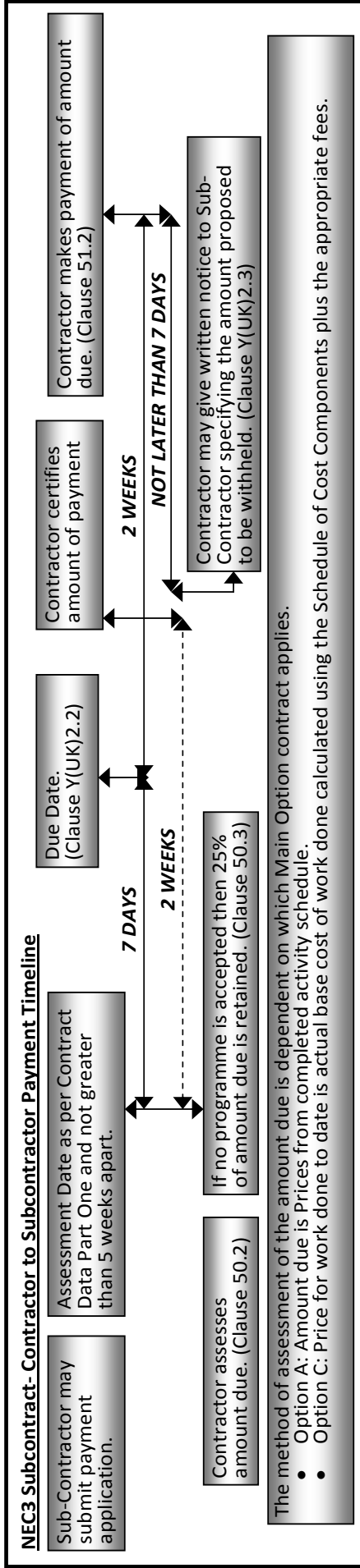
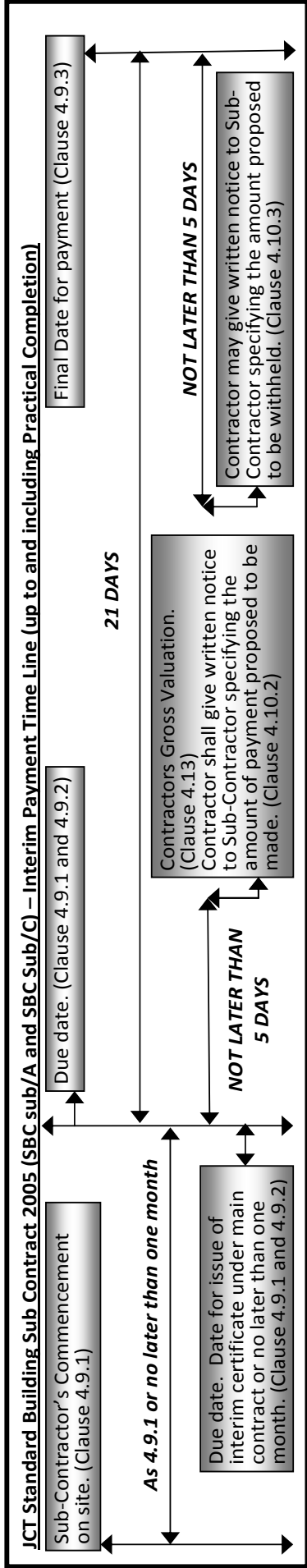
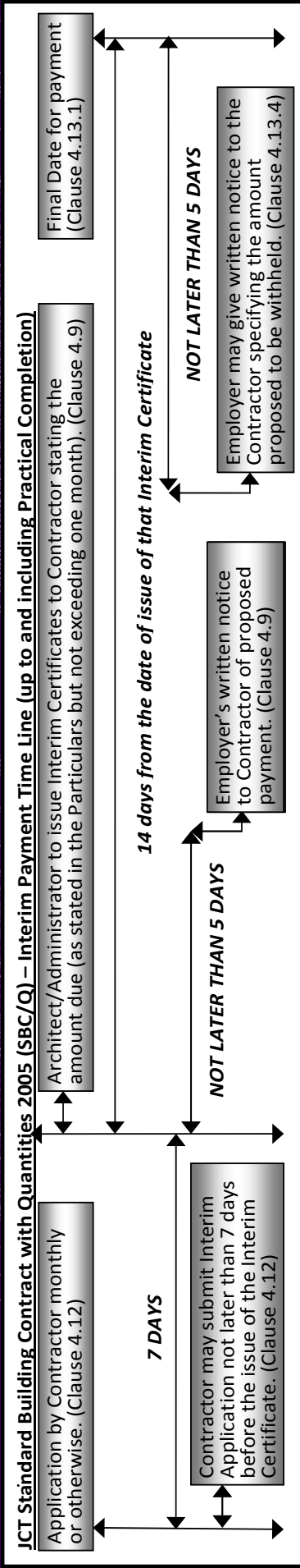
Withholding Notices - what level of information is required

The law is clear in that a party cannot withhold a payment of a sum due after the final date for payment, unless it has issued an effective notice of intention to withhold, as provided by s111 of the HGCR Act 1996. The extent of the guidance provided by the Act as to the level of detail required in an effective withholding notice is provided at s111 (2). This simply states that the notice must specify— (a) the amount proposed to be withheld and the ground for withholding payment; or (b) if there is more than one ground, each ground and the amount attributable to it.

Neither the Act, nor any decisions in the courts provide specific guidance or clarity as to what will constitute an effective withholding notice and how it should be drafted. The courts have "*stressed the need for clarity*" when withholding money against interim payments, in order to promote confidence in cash flow, as intended by s111 of the Act. An example of the approach of the courts can be found in *Aedas Architects Ltd v Skanska Construction UK Ltd*. The Judge in this case stated that "*The contract demands attribution to each ground. It does not ask for any apportionments and in my view it is a competent way to proceed by debiting all sums. The Statute speaking of "each ground" says attribution "to it" must take place. In my view that also is what the counter notice has done. All the grounds which can be calculated have so been and a global figure debited. In my view that is compliance.*" Here the Judge distinguishes between *attribution* and *apportionment*. So... the Act requires attribution to each ground but does not require apportionment. It follows on this view that a "global" sum could be attributed to all grounds in the withholding notice without being apportioned.

In conclusion, when drafting a withholding notice, as a safeguard it is important to set out the grounds and the amount attributable to each ground. To avoid the possibility of a withholding notice being challenged on this basis, it would be prudent to apportion and attribute where necessary. The position with such notices will change (probably this year) with the new Construction Contracts Bill (see above).

WITHHOLDING PAYMENT UNDER JCT AND NEC CONTRACTS



Sheffield : 0114 230 1329
 Belper : 01773 599 299
 www.ramskillmartin.co.uk



Regulated by the RICS