

## TPC2005 (amended 2008): March 2013 changes to The Late Payment of Commercial Debts (Interest) Act 1998

Current as at 15 May 2013

On 16 March 2013 changes were made to The Late Payment of Commercial Debts (Interest) Act 1998 (as amended) (the **Late Payment Act**) by The Late Payment of Commercial Debts Regulations 2013. The changes effectively impose restrictions on what purchasers (in TPC terminology the 'Client') can agree in terms of payment dates and interest rates in the event of late payment. There are different restrictions depending on whether the Client is a 'contracting authority' or not. For these purposes 'contracting authority' has the same meaning as in The Public Contracts Regulations 2006 (as amended).

Trowers & Hamblins LLP and the Association of Consultant Architects do not consider that any changes are needed to TPC2005 where the Client is not a 'contracting authority'. However, some changes are considered necessary where the Client is a 'contracting authority'.

'Contracting authorities' are required to pay within 30 days of certain 'trigger dates' in the revised Late Payment Act. Trowers & Hamblins LLP and the Association of Consultant Architects recommend that the amendments contained in this loose leaf updater are incorporated into TPC2005 for contracts entered into after 16 March 2013 where the Client is a 'contracting authority' to cover this. The amendments:

- Shorten the payment period for consultants to 'fit' within the new statutory timescale (no changes are considered necessary for the payment timescales for the Service Provider).
- Impose a new obligation on Consultants and the Service Provider to provide (where the Client requires a VAT invoice) a VAT invoice within a certain number of days from the issue a payment notice. This is to try and ensure that the final date for payment for a particular payment occurs before statutory interest starts to run pursuant to the revised Late Payment Act. To the extent that a Consultant or Service Provider does not comply with this obligation it waives any right to statutory interest for the period of delay.

As well as incorporating the amendments in this loose leaf updater into the Partnering Terms if revised payment periods are stated in the Price Framework and/or the Consultant Payment Terms these should be shorter than the revised time periods mentioned in this loose leaf updater.

These amendments will be incorporated into the published form when it is next updated and republished.

A marked up version of the payment clause (which is itself contained in a loose leaf updater) is included in this loose leaf so that users can easily see how that clause should 'look' when the amendments set out in this updater are included within it.

In addition to the amendments contained in this loose leaf updater the Client should consider what level of interest (in the event of late payment) it wishes to include in clause 7.6 in the Term Partnering Agreement.

**Amendments to clause 7 in TPC2005 (amended 2008) as amended in October 2011 loose leaf**

**1 Clause 7.6(ii)**

Delete "thirty (30) Working Days" and "twenty five (25) Working Days" and insert "twenty (20) Working Days" and "fifteen (15) Working Days" respectively.

**2 Clause 7.18**

Insert new clause 7.18 as follows:

VAT invoices and  
late payment

7.18

If VAT invoices are required by the Client:

- (i) the Service Provider or the Consultant (as applicable) shall within 4 days from the date of issue of the relevant payment notice pursuant to clause 7.4, clause 7.5 or clause 7.14(iii) deliver the required VAT invoice to the Client;
- (ii) to the extent that the Service Provider or the Consultant does not comply with clause 7.18(i) the Consultant or the Service Provider hereby waives its right to interest pursuant to the Late Payment Act for the period up to and including the final date for payment.

**Mark up of clause 7 including Construction Act changes showing suggested changes contained in this loose leaf updater**

	<b>7</b>	<b>Prices and Payment</b>
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 payments to Service Provider	7.4	Within five (5) 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 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	<p>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:</p> <ul style="list-style-type: none"><li>(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><li>(ii) each Consultant the respective amount stated in the relevant notice issued pursuant to clause 7.5 within <del>twenty thirty (2030)</del> Working Days from the due date for payment or within <del>fifteen twenty five (1525)</del> 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.</li></ul>
Default notice	7.7	<p>If the Client Representative or the Client does not issue a notice in accordance with clause 7.4 or 7.5 respectively:</p> <ul style="list-style-type: none"><li>(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><li>(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.</li></ul>
Pay less notice	7.8	<p>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:</p> <ul style="list-style-type: none"><li>(i) the payer shall pay the amount stated in such notice by the final date for payment;</li><li>(ii) the payee shall reissue any required VAT invoice to reflect the sum stated in the notice.</li></ul>
Adjustment of notices	7.9	<p>No notice, VAT invoice or payment shall:</p> <ul style="list-style-type: none"><li>(i) prevent its later reconsideration and adjustment; or</li><li>(ii) constitute or imply or be evidence of approval or acceptance of any part of any Task.</li></ul>
Fluctuation	7.10	<p>Amounts payable under the Partnering Contract shall be subject only to such fluctuation provisions, if any, as are stated in the Price Framework</p>

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	<p>The following procedures shall apply in relation to the Final Account:</p> <ul style="list-style-type: none"><li>(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.</li><li>(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).</li><li>(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.</li><li>(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</li></ul>

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.

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.

VAT invoices and late payment 7.18 If VAT invoices are required by the Client:

- (i) the Service Provider or the Consultant (as applicable) shall within 4 days from the date of issue of the relevant payment notice pursuant to clause 7.4, clause 7.5 or clause 7.14(iii) deliver the required VAT invoice to the Client;
  
- (ii) to the extent that the Service Provider or the Consultant does not comply with clause 7.18(i) the Consultant or the Service Provider hereby waives its right to interest pursuant to the Late Payment Act for the period up to and including the final date for payment.