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## Office of Government Commerce Publishes Prompt Payment Guidance

From 25 March 2010, it is mandatory for all government departments and non-departmental public bodies to include a contract condition requiring contractors to pay their subcontractors in 30 days. The guidance note includes a model clause. The "Procurement Policy Note- Requirement to include 30-day payment clause in new contracts" may be downloaded free by clicking [here](#)

## Changes to Planning Regulations for Dwelling Houses and Houses in Multiple Occupation

The DCLG has published a circular which gives guidance on the planning regulations for dwelling houses and houses in multiple occupation, as amended by the *Town and Country Planning (Use Classes) (Amendment) (England) Order 2010* (Statutory Instrument 2010 No 653) and the *Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010* (Statutory Instrument 2010 No 654). This guidance applies from 6 April 2010. Download the Circular by [clicking here](#).

## Development and Flood Risk

A new edition of the Planning Policy Statement 25, "Development and Flood Risk" has been published. Tables D1 and D2 in Annex D have been revised to clarify the definition of functional floodplain, and to amend how the policy is applied to essential infrastructure, including water treatment works, emergency services facilities, installations requiring hazardous substances consent and wind turbines in flood risk areas. You can download the new PPS by clicking [here](#)

## One Man's MEAT

In *Sita UK Ltd. v Greater Manchester Waste Disposal Authority*, [2010] EWHC 680 (Ch), the Court considered when a party should have actual or constructive knowledge to enable it to commence proceedings challenging the award of a contract under the Public Service Contracts Regulations 1993. The court examined the correspondence between the parties, and concluded that Sita had been aware of the potential breach of the regulations because it had not been given the requested information on how the final decision had been made. It had delayed in bringing the action and was, therefore, time barred.

## A Quarter of Sites Fail HSE Inspection

A quarter of construction sites failed a Health and Safety Executive inspection blitz in March. The spot checks focused on roofing and refurbishment works on 2,014 sites across the UK, and 691 enforcement notices were issued.

## Horizon's Nuclear Power Plant Will be at Wylfa

E.ON and RWE npower joint venture Horizon Nuclear Power has chosen to progress with plans for a new reactor at Wylfa, on the Isle of Anglesey, as its first nuclear project in the UK. The JV has said that it wants have the Wylfa power station commissioned as early as 2020. A planning application for the site will be submitted in 2012. A planning application for a second power station at Oldbury-on-Severn, in Gloucestershire, will then be submitted once construction at Wylfa is underway. The company is in discussions with two consortia – Westinghouse/Laing O'Rourke/Shaw Group and Areva/Balfour Beatty/Rolls Royce – to deliver the reactors.



## South East

### Consequences of terminating under the common law

In today's current economic climate all too often Parties are entering into dispute, due to poor performance by the Contractor or Sub-Contractor or by the failure by the Employing Party to pay monies due.

Often the recourse of the innocent party is to terminate the Contract. Most standard forms include express clauses on termination, however, they often do not exclude a Party's common law rights.

Where the innocent Party does terminate under the common law due to other Party's breach the primary dual consequences will be, first, to release the innocent Party from all further performance of his obligations and, secondly, to entitle him to full damages, including loss of the contract, resulting from the termination.

Given that the innocent party is released from all further performance of his obligations it follows that the other Party will not be entitled to recover any costs it may incur in completing outstanding works and/or rectifying defects following the termination.

As to the quantum of damages for the innocent party, this could include loss of overheads and profit in relation to the works not completed.

For more information please contact **Richard Silver** by telephone **01992 576440** or by email [richard.silver@alway-associates.co.uk](mailto:richard.silver@alway-associates.co.uk)

## Construction Study Centre

### Keeping up with the latest Building Regulations – Changes Afoot

The Department for Communities and Local Government is responsible for National Policy on Building Regulations, which exist principally to ensure the health, safety and welfare of people in and around buildings, and the water and energy efficiency of buildings. The regulations apply to most new buildings and many alterations of existing buildings in England and Wales, whether domestic, commercial or industrial. Information has now been released on the latest amendments to these regulations;

**Part G** - Sanitation, hot water safety and water efficiency comes into force on 6 April 2010

**Part L** - Conservation of fuel and power comes into force on 1 October 2010

**Part F** - Ventilation comes into force on 1 October 2010

**Part J** - Combustion appliances and fuel storage systems 2010

Amendments to the Approved Documents will be discussed at our **Keeping up with the latest Building Regs & Fire Regs** courses (where we aim to provide an overall update of the changes to the Building Regulations and Fire Regulations that have taken place over recent years, impacting on the building industry).

For further details please see <http://www.constructionstudycentre.co.uk/Courses-details.asp?CID=13> or call us on **0845 3133 414** to discuss what we can offer you.

## Midlands

The region's free breakfast seminars in March were attended by over 80 of our clients and contacts who listened to a well received presentation from **Michael Rowlinson** and **Jaz Bilkhu**. If you are interested in receiving details of our next sessions, to be held on 30 June and 8 July, please send your details to [birmingham@alway-associates.co.uk](mailto:birmingham@alway-associates.co.uk) and we will ensure that you receive an invitation.

A new article is on our website from **Jaz Bilkhu** entitled "**Collateral Warranties – Some Practical Guidance**", in which he discusses some of the issues that Contractors and Subcontractors should consider before entering into such agreements.

We are finding that **payment issues** continue to dominate the agenda with questions about when and how Contractors and Subcontractors can **suspend performance of the works** when they have not been paid.

Alway Associates Director, **Michael Rowlinson**, is presenting a talk entitled "**Insolvency in the Supply Chain. A Practical View of What To Do**" to the FBE Warwickshire Branch on 11 May 2010. For further details see the FBE website. For more information please contact **Jaz Bilkhu** or **Michael Rowlinson** by telephone **0121 702 1980** or by email on [jaz.bilkhu@alway-associates.co.uk](mailto:jaz.bilkhu@alway-associates.co.uk) or [michael.rowlinson@alway-associates.co.uk](mailto:michael.rowlinson@alway-associates.co.uk)

## Brunswick

### Just what the doctor's ordered!

Brunswick<sup>IS</sup> have just completed the Project and Commercial Management of the **Stubley Medical Centre** including the provision of residential apartments and retail accommodation in Dronfield, Derbyshire. The Project was completed very much according to plan, to a high standard and within budget. The Employer and all stakeholders regard the Project as a great success and a flagship example of how medical centres should be provided. Nigel Clayton, Brunswick<sup>IS</sup> Director and Manager of our Sheffield office, was involved in the Project from feasibility through to completion and believes that the joined-up Project and Commercial Management provided was a key factor in its success.



The range of services provided included feasibility analysis, cost planning and life cycle assessment, procurement, planning and programming and post contract project management and quantity surveying.

Further details of the Project can be found on <http://www.brunswickis.co.uk/case-studies.asp> For more information please contact **Nigel Clayton** by telephone on **01142 180608** or by email [nigel.clayton@brunswickis.co.uk](mailto:nigel.clayton@brunswickis.co.uk)

[www.alway-associates.co.uk](http://www.alway-associates.co.uk)

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## Wales & South West

The 2010 Six Nations tournament saw Wales narrowly beaten to the wooden spoon; luckily, we can turn our support to our top football teams, Swansea and Cardiff, who both have an eye on promotion and to the Celtic Crusaders, the only Welsh team in Rugby's Super League, who have moved up the table after their move up to Wrexham. Similarly moving up, is the number of Arbitrations being dealt with by the Cardiff office.

Since the introduction of Statutory Adjudication by way of the Housing Grants, Construction and Regeneration Act 1996, the popularity of Arbitration has been in decline; however, in the last few months we have seen an unprecedented rise in the number of appointments, both as Party Representatives in proceedings and as Arbitrators.

That is not to say that Adjudication is being supplanted. We are currently involved in more Adjudication proceedings than at any time this year and, because of its importance within the construction industry, we are holding a series of free breakfast seminars during April titled "Adjudication: an overview".

This is one of a number of topics planned to be the subject of regular breakfast seminars throughout the year. For more information visit our website at [www.alway-associates.co.uk](http://www.alway-associates.co.uk) and click on Training & Seminars - Up & Coming Events.

For further information on Arbitration, Adjudication or any other related matter, please contact **Steven Evans** in Cardiff on **029 2046 4612** or email [steven.evans@alway-associates.co.uk](mailto:steven.evans@alway-associates.co.uk).

## North

### The Letter Of Intent That Became a Contract by a Supreme Decision

Despite numerous Court decisions warning of perils of beginning work without agreeing the precise basis upon which it is to be done, letters of intent seem to be too frequently used in the industry. Not surprisingly another dispute on whether there is a contract and if so what terms apply finds itself in the Courts. **In RTS Flexible Systems Ltd. v Molerki Alois Muller GmbH & Co. KG [2010] UKSC 14**, the issue to be decided by the Supreme Court was an all too common one: when the expiry date in the letter of intent has lapsed and proposed formal contract document provides it shall not become effective until each Party has executed and exchanged it with other - but the Parties do not, what happens?

The Supreme Court in the current case considered in detail what the Parties had agreed and then reviewed the Parties conduct with regards to what had been negotiated. The court concluded that the Parties had agreed to waive the requirement for a written contract. The Parties had agreed the price and a significant amount of work had been done. No other conclusion made commercial sense. The present case was different from *British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd.*, (1983) 24 BLR 94 and *G. Percy Trentham v Archital Luxfer*, (1993) 63 BLR 44, because it was not a "Subject to Contract" case, and because the Parties had treated all the essential terms as having been agreed. The repercussions of the above decision are that either Party is bound by express terms and consequences that it may not have fully intended. As made clear by Lord Clarke in his decision: the moral of the story is to agree first and to start work later. There is no better piece of advice where construction and engineering is concerned.

For further advice on contract drafting and dispute resolution, please contact **Scott Milner** at our **Sheffield office** on Tel. **0114 2180 668** or by email: [scott.milner@alway-associates.co.uk](mailto:scott.milner@alway-associates.co.uk)

## Republic of Ireland

Despite the doom and gloom in the Irish market presently, Alway Associates continue to receive a greatly increasing number of instructions with huge turnout at our seminars. In fact the CIOB's write up after our last seminar describes our speaker, Robert Shawyer, Director of Alway Associates as to quote:

*'Mr. Shawyer has recently delivered an [evening presentation](#) for our Southern Centre members and the feedback was very positive, with special mention to the instructor's remarkable ability to get the message across and clarify the queries raised.'*

Our next half day seminar is scheduled for 30 April 2010, is again held in conjunction with the CIOB at the Rochestown Park Hotel, Cork at 9am on the New Government Contracts. A Dublin seminar will be scheduled on the same topic for early May and will be advertised on our website and the CIOB's website.

To support the Irish construction industry a new FREE HELPLINE 1800 28 30 55 is available where experts are available to offer initial advice over the phone on any specific matter at no cost.

For more information please contact **Maria Daly** by telephone **Dublin 01 669 4772** or by email [maria.daly@alway-associates.ie](mailto:maria.daly@alway-associates.ie) or **Shane Nash** by telephone **Galway 09 177 1578** or by email [shane.nash@alway-associates.ie](mailto:shane.nash@alway-associates.ie)

## Northern Ireland

### Preventing Disputes – Is it Possible?

It's that time of year again; Final Year students are frantically finishing off research to complete their dissertations. I, like many of you, have been inundated with requests to complete questionnaires and interviews.

Many of these young students are hoping to come up with the solution to a problem that is as old as Construction itself – how to prevent disputes on Construction Projects?

One of the main areas of interest this year is the benefit of using one form of contract over another to prevent disputes. Unfortunately the answer isn't quite that simple. Most of the Standard Forms of Contract have mechanisms in place to allow the Parties to be upfront about progress and costs. In many cases, where those mechanisms are not a condition precedent to recovery, the Parties chose not to utilise the provisions. Often parties cite fear of being accused of the worst crime, 'being contractual' as the reason why. The result of this quite often is unexpected claims for time and money at the end of the Contract. With the Party on the receiving end crying 'that's not fair' and the Claiming Party crying 'you can't deny it, you caused the problem'.

The lesson for all those involved in Construction is that the Contract is there to be utilised and not to balance an unsteady table. By so utilising the contract a Party can ensure that it is in a much stronger position if a dispute does occur.

At Alway Associates in Belfast we will be running a range of seminars on various forms of Contracts including NEC3, JCT05 and the new Irish Government Contracts.

For more information please contact **Ruth Farrell** by telephone **02890 447180** or by email [ruth.farrell@alway-associates.co.uk](mailto:ruth.farrell@alway-associates.co.uk).

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## Legal News

### Insolvency clauses in Standard Forms of Contracts

Getting paid is a concern of everyone in the Construction Industry. However the situation can be complicated if the contract conditions are out of date as far as insolvency is concerned. It is not something that immediately comes to mind but in an insolvency situation any steps that can be taken to recover money is important.

Insolvency law has changed greatly over the past ten years. So many of us are familiar with the 1998 JCT Forms of Contract but these are now outdated as far as the insolvency clauses are concerned. This has been illustrated in *William Hare Limited -v- Shepherd Construction Limited* [2010] EWCA Civ 283 in that the contract between the two Parties did not make any allowance for future changes in the law.

In this case there was a "pay when paid" clause in the Contract. The Employer went into administration which form of insolvency was not covered by the contract but Shepherd tried to rely on this clause in order not to pay its sub-contractors. However the Courts disagreed with Shepherd and ordered payment "down the line".

The Courts consider that businesses should be aware of changes in the law and as contractual clauses should "mirror" current legislation, it would be sensible to insert a clause into the Contract which ensures that it always remains in step with current legislation. After all, the Courts accept that businesses are free to negotiate their own terms, within reason.

Silver Shemmings LLP is a firm of solicitors who have a close working relationship with the Alway Group. Sarah Shemmings is a Partner.

For more information please contact **Sarah Shemmings** by telephone **020 7799 1259** or by email [sas@shemmingsllp.co.uk](mailto:sas@shemmingsllp.co.uk)

## Group News

### Office: International

#### Topic: Dispute Resolution in Dubai

Richard Silver and Alway Associates have been instructed to provide Legal and Commercial advice to a Contractor based in Dubai UAE concerning a Project there. The Contractor, one of the largest fit out Contractors in the world, seeks advice relating to delays, disruption and quantum claims.

The Alway Group can provide support to our clients around the world. For more information please contact **Richard Silver** on

Tel.: +44 1992 576440  
or email [richard.silver@alway-associates.co.uk](mailto:richard.silver@alway-associates.co.uk)

### Office: North West

#### Topic: New Office Contact Details

We announced in our last Newsletter that we were going to open an office in the Warrington Area and we can now provide the contact details as follows:

The Old Rectory  
Rectory Lane  
Winwick  
Warrington  
WA2 8LE

Tel: 01925 642198  
Fax: 01925 642197  
Email: [warrington@alway-associates.co.uk](mailto:warrington@alway-associates.co.uk)

## Helpline

As all of our existing clients will know to their benefit, we have always been willing to offer over the phone initial advice on any specific matter at no cost. If you have a problem or question relating to a construction contract, be it legal or commercial, and want to speak to an expert in the field then call our free helpline on:

**Free Helpline: 0845 838 2759**

Alternatively you can click on the link below to send your question by email:

[help@alway-associates.co.uk](mailto:help@alway-associates.co.uk)

Your call or email will be taken by one of our operators who will note your details. Our experts will then call you back to talk through your concerns and give some initial advice. We will aim to call you back immediately but, at peak times this may not always be possible. However, our undertaking is to ensure that all calls are responded to within 1 hour.

[www.alway-associates.co.uk](http://www.alway-associates.co.uk)



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