

## **Building Bridges**

### **How the Construction Contracts Bill 2008 looks to reduce disputes in the Construction Industry**

The construction industry is notorious for business failures. Many of the failures have been caused by problems of cash flow and drawn out disputes. The Housing Grants Construction and Regeneration Act 1996 (“the 1996 Act”) sought to address these issues by the introduction of statutory rights for contractors to receive stage payments and to refer disputes under construction contracts to adjudication. However, it was becoming increasingly clear that the intentions of the 1996 Act were not translating into practice. The impact of the 1996 Act has been the subject of scrutiny over the past three years, in the form of a review by the government, part of which has involved extensive consultation with industry bodies. This consultation has led to the recent publication of the Construction Contracts Bill 2008 (“the 2008 Bill”) which, if passed, will introduce significant changes to the 1996 Act. This note focuses on the proposed amendments to statutory payment provisions. The 2008 Bill will also impact on adjudication provisions and the requirement for contracts to be in writing.

#### **Pay-when-certified**

All construction contracts are obliged to have an adequate mechanism for determining when a payment is due and a final date for payment. The 1996 Act prohibits ‘pay-when-paid’ provisions. However, as matters currently stand it is perfectly acceptable to have a ‘pay-when-certified’ provision i.e. where a main contractor links the timing of payment to a subcontractor to the timing for certification of works in the main contract. This can leave a subcontractor in a position where he is left waiting for payment until a certification process under another contract has been completed. The 2008 Bill would prohibit payment mechanisms which seek a link with obligations under another contract. On the face of it, this is of benefit to subcontractors, but it has the potential to expose main contractors to funding more payments to subcontractors. So contractors may seek to extend these payment periods with subcontractors.

#### **Payment and withholding notices**

The 1996 Act requires a paying party to give one of two notices – either a payment notice or a withholding notice. If a paying party fails to pay and does not issue a withholding notice, the payee can (a) seek adjudication and expect a decision in its favour for payment of the amount demanded and/or (b) suspend work. Section 7 of the 2008 Bill introduces a new statutory payment mechanism, whereby either the paying party or the payee can issue a payment notice which specifies the sum considered to be due and the basis of calculation. Section 8 of the 2008 Bill will replace the withholding notice with a notice which requires the paying party to identify a different sum it believes is due and the basis of its calculation. The 2008 Bill would require payment of the sum specified in the paying party’s notice and it would only be the difference that would be determined by adjudication.

## **Right to suspend performance of obligations**

The 1996 Act allows a payee to suspend performance of contractual obligations where the time period for making payment has expired and no withholding notice has been issued. There are various problems with the current position. It is an all or nothing remedy i.e. part suspension is not an option; and should the payee suspend work there is no provision for payment of costs of a valid suspension nor for any extension of time to reflect the winding down/remobilisation inherent in a suspension of works. The 2008 Bill enables a payee to suspend performance of part of its contractual obligations i.e. it would not have to resort to the 'nuclear' option. Provision for extensions of time and payment towards payee's costs is also included in the 2008 Bill.

## **Interim Payments**

A party to a construction contract (of more than 30 days) is entitled to regular payments. These interim payments are commonly made following certification by an architect or engineer and the parties agree in advance that the certificate will be binding on them. In practice, this is a technique which may be utilised by paying parties to prevent a payee from challenging the payment in adjudication. The 2008 Bill would only permit parties to agree that an interim certificate is binding after it has been issued. The consultation period for comments on the 2008 Bill ended in mid-September and whilst the industry has voiced concerns over some elements of the proposed drafting, the proposed changes are acknowledged as being a step in the right direction to further streamline payments and disputes in the construction industry.

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