

The implications of the new Construction Contracts Bill



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The draft Local Democracy, Economic Development and Construction Bill was published in December 2008 and is currently at the committee stage in the House of Lords. It is anticipated that the draft bill will be enacted by the end of 2009, and that the amendments will become operative some time after that. Please see below for a brief description of how the proposed bill will affect Part II of the Housing Grants Construction and Regeneration Act 1996 ("the HGCRA")

ORAL CONTRACTS

The current situation:

The HGCRA, and statutory adjudication, only apply to construction contracts in writing, which potentially excludes contracts made wholly or partly orally, or amended orally or by conduct.

The proposed new provisions:

With the intention of increasing access to adjudication, it is proposed that S.107 of the HGCRA is repealed so that all contracts relating to construction operations will come within the definition of Construction Contracts. Notwithstanding this, an adjudication agreement which provides for rules other than the statutory Scheme to apply will still have to be in writing; otherwise the Scheme will apply by default.

ADJUDICATOR'S POWER TO MAKE CORRECTIONS

The current situation:

In England and Wales there is a common law right for adjudicators to correct clerical or typographical errors

The proposed new provisions:

This right will be codified and extended to adjudications in Scotland.

In addition, adjudicators will be granted the express ability to award more than the notified sum (see below for a description of the notified sum).

ADJUDICATION COSTS

The current situation:

Some parties have attempted to discourage the other party to a contract from referring disputes to adjudication by requiring the referring party to pay all of his own and his opponent's costs and expenses, whether or not he wins

The proposed new provisions:

These clauses are to be banned so that the parties can only agree the allocation of costs in writing after the notice of intention to refer a dispute to adjudication has been served.

PAYMENT BY REFERENCE TO OTHER CONTRACTS

The current situation:

'Pay when certified' and 'pay what certified' clauses have been developed to avoid the HGCRA's existing prohibition on 'pay when paid' clauses.

The proposed new provisions:

Construction contracts will no longer be able to provide that payments are conditional upon either the performance of obligations under another contract or a decision by a person as to whether obligations under another contract have been performed. This ban will also affect equivalent project relief provisions that are common in PFI and PPP contracts.

NEW PAYMENT NOTICE PROVISIONS

The current situation:

The requirements of s.110(1)(a) of the HGCRA for an adequate payment mechanism are regarded as vague and the payment notices required by s.110(2) are frequently ignored.

The proposed new provisions:

The payment structure is to be overhauled and s.110(2) will be repealed. Put simply, the new structure will require the employer, or its representative, to provide a payment notice no later than 5 days after the payment due date. If this is not done, the contractor will be able to submit its own payment notice. The sum set out in either of these notices will be the 'notified sum' and, if no notice to pay less (see below) is served, this becomes the amount due.

Withholding notices have been replaced by the somewhat less memorable 'notice of the payer's intention to pay less than the notified sum'.

(As before, if such a notice is not served by the relevant final date for payment then the notified sum must be paid. However the parties can agree in the contract the date by which the notice to pay less than the notified sum must be served but this date cannot be later than the final date for payment).

With the intention of codifying the decision in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* [2007] UKHL 18 (and so that the decision remains confined to insolvency situations), the draft bill expressly provides that a notice of intention to pay less than the notified sum need not be given where the contract provides that no payments are required where the payee has become insolvent.

The final significant point to note regarding the payment provisions is that, while the HGCRA currently provides that a withholding notice must specify the amount to be withheld and the grounds for doing so, the draft bill provides that all notices must set out the sum claimed and the basis upon which it has been calculated. It is considered that this is more onerous than the current requirements because it may be difficult to produce definitive calculations at interim stages and within the prescribed time constraints, especially with regard to set-off and abatement. As a result, there may be more frequent disputes concerning the adequacy of such notices.

SUSPENSION OF PERFORMANCE

The current situation:

Although the contractor has the right to suspend performance pursuant to s.112 of the HGCRA, the level of compensation available is not considered sufficient by contractors.

The proposed new provisions:

Contractors will be able to suspend part of the works, not just all of them, and contractors will be entitled to 'a reasonable amount in respect of costs and expenses reasonably incurred'. It is also proposed that a contractor will be entitled to an extension of time from the date of suspension until it has remobilised, rather than until it has received the outstanding payment.



We will continue to monitor the progress of the bill and provide further updates in due course.

For any further information or advice on the new construction bill, adjudication or other construction related matters please contact **Tim Barwick** on **020 7003 8104** or email **tbarwick@cclaw.co.uk**

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