

# Construction Contracts Bill

May 2009



Currently the legislation which defines adjudication and payment within the construction industry is the Construct Contracts (Northern Ireland) Order 1997 ("the Order").

In April 2009 the Department of Personnel and Finance launched a consultation paper on their proposals to amend the Construct Contracts (Northern Ireland) Order 1997 and the corresponding Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1998 ("the Scheme"). The closing date for the consultation is 3 July 2009.

The proposals are as follows:

## 1. ADJUDICATION

### 1.1. Construction contracts no longer to be in writing

**Currently** the Order only applies to those contracts evidence in writing. In some cases this leads to time and money being spent on adjudication only to have the adjudicator determine that the contract is not entirely in writing and that he has no jurisdiction to act. The **proposal** is that Order will apply to construction contracts which are agreed "wholly in writing, only partly in writing, entirely orally or varied by oral agreement"

### 1.2. Preventing agreements that interim payment decisions shall be conclusive

**Currently** the Order provides a right to stage payments rather than payment on completion of the works. Additionally the Scheme allows the adjudicator to "open up, revise and review any decision take or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive" The **proposal** is that a prior agreement that a stage payment decision be conclusive will be ineffective, however the parties will be entitled to agree that a stage payment decision be conclusive after the amount of the interim payment has been decided.

### 1.3. Statutory framework for adjudicator's costs

**Currently** the parties may specify within the contract who shall be liable for costs. In the past this has acted as a disincentive for matters being referred to an adjudicator. The **proposal** is that agreements as to the payment of adjudicator's costs will only be valid if made in writing after the appointment of the adjudicator thus making the decision to refer to adjudication less financially prohibitive.

## 2. PAYMENT

### 2.1. Prevention of unnecessary duplication of payment notices

**Currently** the Order requires the employer to issue a payment notice setting out payments made or proposed to be made not later than 5 days after the date on which a payment becomes due. This can led to duplication as the payment notice and payment certificate may contain the same information. The **proposal** is to prevent "unnecessary duplication by allowing a notice, or certificate from a third party, to act as an Article 9 (2) payment notice."

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2.2. Clarification of the requirement that a payment notice should be served

**Currently** the Order requires a payment notice to be served in certain circumstances, however the drafting is unclear. The **proposal** is to remove the ambiguity and require that a payment notice be served in all circumstances when a payment becomes due under the contract.

2.3. Clarity of the content of payment and withholding notices

**Currently** the Order requires both a payment and a withholding notice to be served. There is currently confusion as to how these interact with each other. The **proposal** is to bring clarity to the current provisions and to avoid duplication by confirming how a payment notice can act as a withholding notice

2.4. Clarity of the sum due

**Currently** in cases where certificates are issued it has been held by courts that the sum due is the amount in the certificate, however the position is less clear in contracts without certificates. The **proposal** is that the sum due shall be the sum specified in the payment notice.

2.5. Prohibiting the use of pay-when-certified clauses

**Currently** pay-when-certified clauses are permitted and the **proposal** is to prohibit same. This will prevent a main contract determining the timing for payment on sub-contracts.

### 3. **IMPROVING THE RIGHT TO SUSPEND PERFORMANCE**

**Currently** the Order allows for the contractor to suspend performance after 7 days notice if payment is not made by the employer by the final date for payment and no withholding notice has been served. The problem with the current legislation is that suspension can lead to remobilisation costs which the contractor has no right to recover those cost. Further to the financial consequences, remobilisation also has timing consequences which are often not reflected in the contractual time for completion. The **proposals** aim to provide a statutory right to compensation for reasonable losses caused by the suspension and to provide an extension of time for any delay caused by the suspension. Additionally they aim to minimise the remobilisation consequences by confirmed that the contractor does not have to suspend performance of all of its obligations under the contract.

If you feel that this may affect you or your business please contact Lisa Boyd or another member of the Construction Unit who will be happy to help you.

This item is a brief outline of the legal issues arising and is not intended to provide a comprehensive or detailed statement of the law. Specific legal advice should be sought on the circumstances of a particular case.

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