

**Amendments to the Construction Act: Update**  
**March 2010**

In December 2008 we summarised the Bill which proposed various amendments to the Construction Act. After some last minute 'tweaks' in the House of Commons, the Bill has now passed into legislation, receiving Royal Assent on 12 November 2009.

The amendments are contained in the Local Democracy, Economic Development and Construction Act 2009 ("**Amending Act**"). However, they are not yet in force in England and will only take effect on a date to be specified by the Secretary of State. A different process is necessary to bring the amendments into force in Wales. The date to be specified by the Secretary of State is likely to be in spring 2011 if the Amending Act is not repealed after the general election.

The delay is to allow time for amendments to the Scheme for Construction Contracts. The proposed consultation on the Scheme is due to start this month.

**Last minute changes to the Bill**

Two key changes were made just before the Amending Act was passed. These relate to adjudication costs and the Government's power to make exclusion orders.

Adjudication costs

The Bill originally prohibited parties from agreeing how the costs of adjudication (ie their own costs and the adjudicator's fees and expenses) were to be allocated, unless such an agreement was reached after the referral notice had been issued ("**the prohibition**"). This was to ensure that neither party was committed in advance of an adjudication as to how the costs would be shared. There have been instances of contractors insisting on clauses whereby the referring party agrees to pay both parties' own costs regardless of the outcome.

The prohibition (as originally drafted) would have abolished the usual practice of allowing an adjudicator to allocate his or her fees and expenses, which received some opposition. There was also a concern that parties might try to avoid paying the adjudicator's fees and expenses because of an ineffective clause in the construction contract dealing with adjudication costs.

In view of these concerns, the prohibition was amended prior to the Royal Assent. Under the Amending Act parties may agree in advance to confer power on the adjudicator to allocate his or her own fees and expenses provided such agreements are in writing and are contained in the construction contract. However, any agreement about the parties' own costs can only be made after the referral notice has been issued and must be in writing. Any such agreement – made after the

referral notice has been issued – may also address the allocation of the adjudicator's fees and expenses in the absence of prior agreement in the construction contract.

Unless these requirements are met after the Amending Act comes into force, any agreement made between parties about adjudication costs (ie their own costs and/or the adjudicator's fees and expenses) will be ineffective.

## Exclusion Orders

The Amending Act extends the Government's power to exclude certain types of construction contracts from part, or all of, the provisions of Part II of the Construction Act. This will give the Government more flexibility, as previously an exclusion order could only disapply all of the provisions of the Construction Act.

It will now also be possible for the authorities in Scotland and Wales to issue their own exclusion orders. However, this could cause confusion if different exclusion orders are issued in the different countries in respect of the same types of contract.

It is thought that the Government will use this section to disapply the provisions of the Construction Act to PFI sub-contracts. Currently PFI contracts are excluded under the Act, but the PFI sub-contracts are not.

## **Other key amendments**

We summarise below the other key amendments, which remain unchanged since our previous update.

### Written and oral contracts

The main amendment remains - ie the Amending Act repeals the provision that the Construction Act only applies to contracts that are in writing. Once in force, the Construction Act will apply to both written and oral contracts, which should put an end to disputes about whether a contract is in writing.

### Payment

#### *Delayed Payment*

The Amending Act contains measures to prevent payments to sub-contractors being delayed by operations carried out under other contracts. This is intended to address the problem of payments to sub-contractors being determined by certificates issued under an upstream contract, which may also cover work done by others.

## *Payment Notices*

The Amending Act also amends the provisions about payment notices. It replaces the current 'withholding notice' regime, but the effect is broadly the same.

A payer or payee will be able to issue a 'payment notice' specifying a lesser amount than the notified sum and the basis on which that lesser amount is calculated. The lesser amount can be zero. In practice, the payer will almost always be the one issuing payment notices as the payee will have already notified the sum it believes is owed (unless the notified sum has subsequently reduced for some reason). Payment notices must be issued within five days after the due date for payment.

If a 'payment notice' is issued, the payer must pay the lesser amount specified in that notice within the prescribed period. If no such notice is issued then the payer must pay the notified sum. Payment notices are likely to become an essential part of the procedure for payment.

## *Suspension*

A party who validly suspends its work because of non-payment will under the Amending Act also be entitled to (a) its reasonable costs and expenses arising from the suspension and (b) an extension of time covering the period of the suspension, as now, but also any additional time spent "*in consequence of the exercise*" (eg re-mobilisation).

We will be following the amendments to the Scheme and providing further updates on our website.

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