

SEC **GROUP** briefing

Voice of the Specialist Engineering Contractor

The members of the SEC
Group are:

Association of Plumbing
and Heating
Contractors

British Constructional
Steelwork Association

Electrical Contractors'
Association

Heating and Ventilating
Contractors' Association

Lift and Escalator
Industry Association

SELECT

REVIEW OF THE CONSTRUCTION ACT

The Government is consulting the industry on changes to the Construction Act. On your behalf your Association through the Specialist Engineering Contractors (SEC) Group has been identifying the issues for consultation. The purpose of this Special Briefing is two-fold:

- to obtain feedback from you on the issues under consideration in order to inform the consultation process, and
- to provide a 'crib-sheet' for use by Association staff and members.

PAYMENT

THE BASIC ISSUE

The payment provisions in the Act should provide an effective and simple regime that establishes payment certainty.

Feedback from firms suggests that the payment provisions in the Act need to be substantially strengthened.

SEC GROUP'S PROPOSALS

- 1 Greater certainty as to when a debt arises.
- 2 Outlawing of cross-contract set-off.
- 3 No withholding of monies unless the amount is quantified with reasonable accuracy.
- 4 Outlawing of pay-when-certified.
- 5 Abolition of pay-when-paid on a third party insolvency.
- 6 Extension of right of suspension to include the cost consequences of suspension and the time/cost consequences of remobilisation.
- 7 Existing Statutory right to progress payments to commence from start of early off-site activity (eg: manufacture, design).
- 8 Long-stop period to curtail excessive payment periods.
- 9 Direct payment by client in the event of main contractor insolvency.



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How will the proposals help?

Failure to issue payment notices and other ploys to frustrate payment certainty

Under the Act [section 110(2)] a payer is required to issue a notice within 5 days of the due date for payment indicating the amount he intends to pay. If this notice is not issued the payer gains time because the payee, ultimately, will have to go to adjudication to determine **what is due**. Even if issued, and the payee disagrees with the amount notified, the due amount can only be determined by an adjudicator. SEC Group has proposed, therefore, amendment to the Act as follows:

- Payee to have a statutory right to apply for payment.
- Payer to pay the amount applied for or the difference between such amount and any lesser withheld amount (provided an Act-compliant notice of withholding has been issued). [**Proposal 1**]
- Pay-when-certified provisions to be outlawed. [**Proposal 4**]

Set-off Abuse

Proposals 2 and 3 are designed to curb set-off abuse. **Proposal 2** was recommended by Sir Michael Latham over 10 years ago.

Lengthy Payment Periods

Increasing the length of payment periods is aimed at reducing the impact of the Act. SEC Group has proposed a long-stop of 35 days plus 17 days for discharge of payment reflecting the benchmarks used in the Scheme for Construction Contracts. [**Proposal 8**]

Payments to commence from start on site

With more and more work such as fabrication, assembly and design starting well before arrival on site, payments should flow from the time when the contract was made. [**Proposal 7**]

Improving payment security

- The statutory right of suspension for non-payment will be made more effective by the payee having a right to compensation for the period of suspension and remobilisation costs (including time extended for remobilisation). [**Proposal 6**]
- The current legislation (Section 113) legitimises the use of pay when paid provisions when a 3rd party payer goes into insolvency. Thus a main contractor will not be required to pay a sub-contractor when the client is insolvent (unless monies become available). **Proposal 5** will abolish this right.
- Recent insolvencies of main contractors have highlighted the losses incurred by sub-contractors. In this situation many clients are prepared to make direct payment to sub-contractors provided that they will not be required to make the same payments to the main contractor's insolvency practitioner. [**Proposal 9**]

For Discussion and Feedback

Should the legislation also:

- 1 Require direct payments in the event of non-payment by a main contractor other than for insolvency?
- 2 Require the payer to supply payment bonds whenever he requires a performance bond, parent company guarantee, warranty, retention or other similar form of security for performance?

THE BASIC ISSUE

Is adjudication becoming too costly and complex or is it fulfilling the original idea of a simple, quick and cheap process to keep cash flowing throughout the course of the contract?

Feedback to date suggests that adjudication is generally working well but changes are needed to ensure it stays simple, quick and cheap.

SEC GROUP'S PROPOSALS

1. Adjudicator should decide his own jurisdiction (e.g. whether a dispute exists);
2. There should be one single adjudication procedure;
3. There should be a ban on provisions requiring a referring party to pay all costs;
4. There should be a ban on adjudicator awarding party/party costs;
5. There should be a ban on trustee stakeholder accounts;
6. The meaning of 'in writing' should be restored;
7. 'Process plant' should be covered by the Act;
8. Consideration should be given to inclusion of contracts with householders and PFI head contracts into Act;
9. 'Final and conclusive' exception in para 20(a) of the Scheme should be deleted;
10. Further training of and guidance to adjudicators should be instituted.

How will the above proposals help?

Adjudicator's decisions are too open to challenge

- Numerous challenges to adjudication decisions are made on the basis that the adjudicator did not have jurisdiction or power. Giving the adjudicator binding authority to decide on his own jurisdiction would reduce these challenges. **[Proposal 1]**
- At the moment anyone can draft an adjudication procedure so long as it complies with the list of principles set out in the Act. This leads to preliminary disputes and also jurisdictional arguments. Moving to one single adjudication procedure would cut out a number of disputes and possible challenges to enforcement as well as making the process simpler for parties to administer. **[Proposal 2]**

Onerous costs provisions are used to discourage parties from referring disputes to adjudication

- Provisions requiring the referring party to pay the other party's costs irrespective of the outcome of the adjudication have been ruled enforceable and thus are becoming more and more prevalent. Two successive Construction Ministers have agreed to ban it. **[Proposal 3]**

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- It had been thought that (under the Scheme for Construction Contracts) the adjudicator had no jurisdiction to make a party pay the 'winner's costs'; a case has shown that this is not the position. The balance of opinion in SEC Group has been to ban such costs awards on the basis that it discourages small firms from entering into adjudication – there isn't a way of ensuring reasonable costs are allocated. The opposite view is also strongly held – that if a party wins an adjudication, it should be entitled to its costs – but the balance at the moment falls in favour of the approach currently being taken by SEC Group. **[Proposal 4]**
- Trustee stakeholder accounts are also used to ensure that money does not have to pass until a final award is made. This undermines the legislation's intention of 'pay now, argue later'. **[Proposal 5]**
- Para 20(a) of the Scheme allows the adjudicator to open up, revise and review any decision or certificate unless stated to be final and conclusive. This has been used to undermine the right to adjudication since some contracts state that all decisions/certificates are to be *final and conclusive*. **[Proposal 9]**

Adjudication is not sufficiently comprehensive

There are a number of areas where the Act does not apply and SEC Group has either been proposing or supporting others' proposals to increase the coverage of the Act.

- According to the Court of Appeal in the *RJT Consulting Engineers* case all contracts must fully set out in writing **everything** agreed by the parties, otherwise they will not come within the Act. The pre-*RJT* understanding of the meaning of 'in writing' should be restored since it was thought sufficient that the 'bare bones' of the agreement (e.g. price, work to be done) had to be in writing. **[Proposal 6]**
- Other types of contract originally excluded from the Act should either now be included (process plant) **[Proposal 7]** or at least consideration should be given to their inclusion (contracts with householders, PFI head contracts). **[Proposal 8]**

The quality of adjudicators gives rise to concern

There have been persistent complaints about the quality of adjudicators although evidence is difficult to find – SEC Group is currently researching this. Quality is being tackled by training and guidance. **[Proposal 10]**

FEEDBACK

It is important to SEC Group and its member associations that firms make their views known. Are there any other concerns on payment/adjudication that need to be addressed? KEEP YOUR ASSOCIATION INFORMED.

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