

WHY IS CONSTRUCTION TREATED DIFFERENTLY FROM OTHER INDUSTRIES?

Take this scenario: you tell your retained solicitor or accountant that from now on you will be issuing the bills. Furthermore, you insist that you have the right to issue a second bill which may make deductions from the first bill.

If he/she doesn't like any of your bills he/she can go to a third party – an adjudicator – who will decide whether the bill is ok. We suspect that the reaction to this proposal would be unprintable. This is exactly what could be proposed in this Parliamentary session by way of an amendment to Part II of the Housing Grants, Construction and Regeneration Act 1996 (known generally as the Construction Act).

The Act was introduced to promote payment certainty in an industry which continues to be bedevilled by poor payment practices. The burden of these, inevitably, falls upon Small and Medium sized Enterprises (SMEs).

In March 2004 Gordon Brown (when Chancellor) announced a review of the Construction Act to curb payment delays and abuse. In the 2006-07 Parliamentary session almost 200 MPs signed EDM 1941 seeking specific changes to the Act to improve payment security.

Responsibility for amending the Act rests with the Department for Business, Enterprise and Regulatory Reform (BERR).

THE KEY ISSUE (WHICH BERR ACKNOWLEDGES) IS THAT SMES NEED CERTAINTY ABOUT HOW MUCH AND WHEN THEY WILL GET PAID. SUCH CERTAINTY, AFTER ALL, EXISTS IN MOST OTHER INDUSTRIES.

BERR'S PAYMENT AMENDMENTS

As we have already indicated that BERR wishes to amend the Act to require the payer to issue a payment notice telling the payee that the amount in that notice is the sum due. Deductions from that amount can be made in a revised notice issued subsequently.

As a fall-back mechanism, when the payer forgets to tell the payee what will be due, BERR proposes that the payee issues an invoice or payment application. The amount claimed is due at the date for payment unless the payer, in the meantime, has issued a notice making deductions. The amount then due is that which is left (if any) after the deductions have been made.

Therefore, we should amend the Act to incorporate BERR's fall-back mechanism. It's simple and moreover, it's what other industries do.

Furthermore, if we want payment certainty, let's outlaw all clauses that make payment conditional upon some event or process under another contract.

BERR only wants to outlaw pay-when-certified clauses (enabling a main contractor to delay paying subcontractors until he's got an architect's certificate under his contract).

BERR'S PROPOSED AMENDMENTS ALSO NEGLECT OTHER KEY CHANGES

- Outlawing cross-contract set-off: the practice whereby a payer will withhold monies because of alleged shortcomings by the payee on other contracts.
- Ensuring that payments commence from the date of contract, rather than from the date of work starting on site, which could be many weeks later (after which substantial assembly or manufacturing may have taken place).
- Protection for SMEs against insolvencies up the supply chain (EU countries, the US and Australia have statutory insolvency protection for SMEs engaged on construction works).
- Improving access to adjudication – meant to be quick and inexpensive – which is now regarded as costly. A single adjudication procedure and an increase in adjudicators' powers is necessary to reduce the costs of construction adjudication.

We want to make the Construction Act work in the way intended by Parliament.

Then we can begin to 'cure' the disease of payment abuse which afflicts the majority of firms in construction, SMEs.

This problem is now worse in construction than in any other industry. If we can make progress, the industry will be better placed to invest in training, upgrade skills and employ more people. In this way it can improve its capacity and deliver value for money.

WHAT CAN I DO?

- Watch out for draft legislation incorporating amendments to the Construction Act.
- Email contact@secgroup.org.uk if you are able to receive briefings and put down amendments.

ABOUT SEC GROUP

SEC Group is the representative voice of the specialist engineering sector. It brings together the construction industry's premier trade associations:

- Association of Plumbing and Heating Contractors (APHC)
- British Constructional Steelwork Association (BCSA)
- Electrical Contractors' Association (ECA)
- Heating and Ventilating Contractors' Association (HVCA)
- Lift and Escalator Industry Association (LEIA)
- SELECT (Electrical Contractors' Association of Scotland)

Together these organisations represent a sector comprising over 60,000 companies and a workforce of more than 300,000. The output of the sector represents almost 40% of the construction industry's output.



IF YOU HAVE ANY COMMENTS OR VIEWS ON THE CONTENT OF THIS PARLIAMENTARY NEWSLETTER, PLEASE CONTACT:

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