

Insight

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Government publishes Bill to amend the Construction Act

A draft has been published of the Construction Contracts Bill to amend key provisions of the "Construction Act" (the Housing Grants, Construction and Regeneration Act 1996, Part 2).

The UK Government intends to put the Bill before Parliament in December this year. It has called for comments on the draft by 12 September 2008.

The text is at: <http://www.berr.gov.uk/sectors/construction/constructionact/page13956.html>

There is a major widening of the ban on conditional payment clauses, extending beyond the present pay-when-paid. The proposal is to outlaw making payment "conditional on the performance of obligations under another contract", or on a "decision by any person as to whether obligations under another contract have been performed".

Withholding notices - on one of the most difficult parts of the original Act - are being replaced in a wholly new payment structure. It starts with new "payment notices" (in a complete rewrite of the old s.110(2), now to be s.110A) with "payee notices" (under new s.110B) if the payer fails to give a payment notice. The result of these payment notices will be a "notified sum". The old s.111 on withholding notices has been abandoned.

In its place is a new s.111 which requires the payer to pay the notified sum, unless the payee is given "a notice of the payer's intention to pay less than the notified sum".

A curious proposal, likely to cause controversy over the meaning of "binding", bans provisions that make "an interim payment decision by a person other than the parties to the contract binding between the parties", unless the parties agree after the decision is notified to them. The draft probably means "final and conclusive", rather than binding.

As widely expected, the Bill has new controls on adjudication costs. It bans (in s.108A) agreements allocating adjudication costs between the parties, unless that agreement is made in writing after the adjudicator is appointed. Even then, the adjudicator can change (under the new s.108B) any such agreed allocation if any part of the costs which a party is required to pay is unreasonable. The new Act will also state expressly the parties' joint and several liability to pay the adjudicator's reasonable fees and expenses (s.108C).



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The original Act created a right to suspend work for non-payment, but there were difficulties in its workability. A new s.112(3A) should help by making the defaulting payer liable to pay the suspending party "a reasonable amount in respect of costs and expenses reasonably incurred" as a result of suspending.

Also as widely expected, the Bill is to repeal the controversial writing requirement in s.107, which spawned some unfortunate court decisions. The writing requirement disappears altogether for all construction contract purposes under the Act, except in relation to contractual provisions for adjudication, under s.108. These must be "in writing", but that phrase is given an expansive and liberal definition in a new s.115A.

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