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Construction Law

news and advice from Birkett Long

Winter 2008

Cash Flow

Part 2 of the Housing Grants Construction and Regeneration Act 1996 (the Act) was passed by Parliament to increase cash flow in the construction industry. It was felt that paying parties were too powerful and could hold on to monies that should be paid out.

As a result of this, all construction contracts (as defined in the Act) must have staged payments, unless the duration of the work is to be less than 45 days. These contracts should also have a mechanism for determining what amount of money was due to be paid under the contract and a final date for that payment. Part of that mechanism must include the service of two notices (these can be combined). The first is a notice by the paying party of the amount of money paid or to be paid. The second is a notice of intention to withhold any of those monies. These notices can be found in most standard forms of contract.

If the contract does not have such clauses in it, then they are implied into the contract by the Act. In this situation, the Scheme for Construction Contracts applies, and the notices as prescribed in that scheme must be followed.

Originally, it was thought that when a party applied for an interim payment, if these notices were not served then the amount applied for would be the amount due. However, a number of cases confirmed that this was not correct. The amount applied for is not necessarily the amount due under the contract, just because these notices are not served. The notices are still important because if they are not served, the paying party will be on the back foot in any dispute. An adjudicator will start from the amount claimed rather than the amount in the notice.

It is even more important for the paying parties intending to withhold payment to serve a notice of intention to withhold. Without such a notice, that party will not be able to withhold any monies from the amount due, meaning that the paying party will not be able to deduct liquidated and ascertained damages, delay damages, the cost of repairs to works damaged by the receiving party and costs incurred in carrying out remedial works. This could mean that monies are being paid that are not due.

It should be remembered that each interim valuation is a separate and completely new valuation, and as such, completely separate and new notices of amounts to be paid and most importantly, notices of intention to withhold payments, should be served. They should also be served within the strict time limits in the contract. If they are not, they will not be valid notices and an adjudicator will not rely on them when making his decision.

It is important therefore that the timetable for payments in each contract is set out and complied with throughout the duration of the contract. The timetable should set out the date when valuations should be applied for, when valuations should be made, when notices should be served and the final dates for payment. These notices and the time limits for serving them will become even more important if the proposed changes to Part 2 of the Act are introduced.

Essex Construction Training Association

ECTA is a non-profit making company whose members are construction related companies. It provides a one-stop-shop for advice on all training and development requirements, provides training courses at cost to members and at a small uplift for non-members. Additionally it provides advice on the various ways of claiming CITB ConstructionSkills grants. It holds quarterly meetings at which both industry and non-industry speakers are invited to brief members on legislation and best business practice.

For more information visit www.ecta.co.uk, call 01206 363794 or email lindsey@etca.co.uk

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The Draft Construction Contracts Bill

The effects of Part 2 of the Housing Grants Construction and Regeneration Act 1996 (the Act) have been subject to review for a number of years. As a result of those reviews, a draft bill was published to make certain amendments to the Act. This has now been incorporated into the Local Democracy Economic Development and Construction Bill, which is now passing through Parliament and is likely to become law in 2009.

Outlined below are the major likely changes to be made and the consequences they may have for you. The proposed changes to the Act and how it applies are significant. The reason for the changes is to increase the scope of the contracts to which the provisions apply and improve further cash flow in the construction industry.

- Construction contracts will no longer have to be in writing for the effects of the Act to apply. This means that the provisions of the Act will apply to oral contracts as well as those in writing, though this should not diminish the fact that your contracts should be in writing. If they are not in writing then it is very difficult to decide what works were to be carried out, how long the works would take and what the cost of those works were.
- It will not be possible to allocate the costs of adjudication before a referral to adjudication takes place. This will prevent clauses in contracts making the referring party pay the adjudicator's costs and sometimes even the responding party's legal costs.
- Clauses that mean interim payments do not have to be paid until a decision has been made by a third party will become unenforceable if Clause 5 of the draft bill is adopted. This will mean that a paying party cannot rely on a decision of a third party who is not part of the contractual arrangements to certify, for example, the quality of workmanship before the payment is due.
- It will not be possible to rely on a process outside of the direct contract to value the amount of an interim payment. For example, a valuation process in a main contract could not be used to value the sum due in a sub-contract. This will be a major change meaning that a main contractor will have to value its sub-contractor's works.
- There are a number of changes to the serving of payment notices. The party that is to be paid will also have a right to serve its own notice of the amount that it feels is due. This in effect would be its own valuation of the value of its work to date. If no response is received from the paying party to that valuation then the amount in the valuation is likely to be the amount due pursuant to the contract. It will be important therefore for paying parties to correctly comply with the valuation procedure in the contract. If the paying party does not then even if the receiving party claims an amount that is not due, that sum will have to be paid.
- The rules on serving notices of withholding are being tightened up as well. This means that if a proper notice is not served then the amount that becomes due on the valuation procedure is the amount that must be paid. Without a notice of withholding it will not be possible to withhold payment.
- A receiving party has a right to suspend performance of a contract if it is not paid a sum due under the contract. This right will remain and the suspending party will be entitled to claim for the cost of restarting a job if works are suspended. Therefore, the cost of demobilising from site and then remobilising to site will be a cost that will be recoverable from the paying party.

If these changes are introduced, it will become even more important for contracting parties to comply strictly with the requirements of their contracts relating to the valuation process. If they are not strictly adhered to, it is likely that monies will have to be paid that should not be paid. The provisions in existing contracts should be considered now and you should, if you do not already do so, strictly follow the payment procedures in your existing contracts so that the changes to the Act, when they are brought into effect, will not be too dramatic. Full details of the actual changes will be detailed in a future newsletter.

Community Infrastructure Levy

The Community Infrastructure Levy (CIL) is expected to come into force in 2009. This is a new planning charge that will be calculated when planning permission is granted. Payment will not be due until the development is commenced. The amount of the levy will be set by local councils and will be based on the size and character of individual developments. The money raised will be spent by local councils on infrastructure to support development in their area, for example transport, schools, hospitals and parks. CIL has replaced the previously proposed Planning Gain Supplement. It will sit alongside section 106 agreements, which will continue to be used to impose site-specific planning obligations on developments and for the provision of affordable housing. At the time of writing, it is unclear exactly how the levels of CIL will be calculated. We hope that councils will be careful to ensure that it does not act as a disincentive to future development.

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