BIS | Department for Business Innovation & Skills

THE SCHEME FOR CONSTRUCTION CONTRACTS (ENGLAND AND WALES) REGULATIONS 1998

Analysis of consultation responses

JUNE 2011

Contents

Amendments to the Scheme for Construction Contracts (England and Wales) Regulations 1998 –

Introduction

This analysis relates to the Consultation on Amendments to the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"). That consultation sought views on amendments to the Scheme following the enactment of Part 8 of Local Democracy, Economic Development and Construction Act 2009. The 2009 Act made some important changes to the payment regime, to the right to submit a dispute to adjudication and to the right to suspend performance of a construction contract because of non-payment.

There have been parallel exercises in Scotland (Consultation Document On Amendments to the Scheme For Construction Contracts (Scotland) Regulations 1998 and the Construction Contracts (Scotland) Exclusion Order 1998, - February 7 2011) and Wales (Part 8 of the Local Democracy Economic Development and Construction Act 2009: 21 March 2011). Ensuring that the legislation relating to construction contracts remains more or less the same throughout the whole of Great Britain is a shared objective.

There were 30 responses to the English consultation paper from across the industry and those who provide dispute resolution services to it. Three of the respondents were trade associations specifically representing the very many SMEs in construction supply chains. Throughout the whole exercise, we have been particularly grateful for the contribution of the pan industry Construction Umbrella Bodies Adjudication Task Group and the individuals and organisations represented on it.

Summary of responses

ADJUDICATION

Question 1

Do you believe it appropriate and necessary for the Scheme to contain provision allowing the adjudicator to apportion his fees and expenses between the parties to a dispute?

- 19 respondents agreed in principle that it was appropriate for the Scheme to be amended though some queried the absolute necessity for this
- 10 respondents stated that it was inappropriate and unnecessary to amend the Scheme

Question 2

Do you believe 7 days is an appropriate period to allow for the correction of errors? If not, what do you suggest would be an appropriate period and why?

- All respondents were in favour of a “slip rule”
- 2 respondents were in favour of a 7 day period
- 16 respondents were in favour of period of not more than 5 days
- 2 respondents suggested a 24 hour period
- 1 respondent suggested a limit of up to 14 days
- 1 respondent suggested there should be no “slip rule” in the Scheme i.e. that if the parties had made no provision that should be the end of the matter

Question 3

Do you agree it is necessary to amend paragraph 21 of Part 1 of the Scheme to allow for a period of time within which the adjudicator's decision should be complied with?

- 20 respondents saw no practical need for a compliance period
- 8 respondents agreed such a change was required

Question 4

Do you agree that 8 days is an adequate period for compliance? If not, what would be an appropriate period?

The breakdown of the 8 respondents who agreed the need for such a change was:-

- 4 respondents believed that 7 days should be sufficient
- 1 respondent suggested 5 days
- 1 respondents suggested 6 days
- 2 respondents suggested that the period should not be more than one day

PAYMENT

Question 5

Do you agree that, paragraphs 9 and 10 aside, the Scheme requires no further amendment consequent to the changes to the Act's payment framework? If not, would you set out what further amendments you believe to be necessary and explain why.

- 14 respondents agreed that no further amendment was necessary
- 10 respondents requested some further amendments.

Question 6

Do you believe it is the right approach to continue with a "payer led" payment notice in the Scheme provisions? Please give reasons for your answer.

- 18 respondents agreed that the "payer led" approach should continue
- 6 respondents suggested that the Scheme should adopt a "payee led" approach

Question 7

Do you agree that the Scheme should require the "intention to pay less" notice to be issued 7 days before the final date for payment

- 12 respondents agreed with a 7 day limit for the "intention to pay less" notice
- 11 respondents suggested it should be reduced to 5 days to reflect the conditions in some of the industry's standard forms of contract.

SUPPLEMENTARY PROPOSALS

Question 8

Do you believe it is necessary to clarify the date of referral in paragraph 7 of the Scheme? Should it be 7 days:

a) from the receipt of the adjudication notice by the adjudicator?
b) from the appointment of the adjudicator?
c) from some other event?

- 10 respondents believed that amendment was needed
- 17 respondents felt that no change was necessary

Question 9

Are you content with the current position that an adjudicator cannot adjudicate related disputes unless both parties agree?

- 22 respondents favoured no further amendment
- 6 respondents saw the need for amendment

Question 10

How often do you believe parties to adjudication would wish the adjudication to be confidential on the grounds of:

a) *The fact of the adjudication?*
b) The *matters than arise in it?*

How might the Scheme be amended to better take account of this?

- 21 respondents felt the issue was already adequately covered in the Scheme
- 5 respondents suggested a number of different amendments

Question 11

Is there any practical problem which prevents the deletion of the words "unless the contract states that the certificate is final and conclusive" from paragraph 20(a) of the Scheme?

- 21 respondents said that deleting the words would not cause problems
- 8 respondents felt the deletion would cause practical problems

Question 12

Do you consider it appropriate for the Scheme to give the adjudicator a wider power to award interest than that currently conferred?

- 18 respondents agreed that the adjudicator should have a wider power
- 10 respondents felt that the existing provision adequately covered the award of interest.

Government's response

ADJUDICATION

Adjudication costs

As originally enacted, Part 2 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") was silent on adjudication costs. New section 108A of the 1996 Act will mean that agreements as to adjudication costs will be ineffective, except in two cases – an agreement in writing in the construction contract whereby the adjudicator may allocate his own fees and expenses as between the parties, and an agreement (whether concerning the adjudicator's or the parties' costs) made in writing after the giving of the notice of intention to refer a dispute to adjudication. The consultation paper asked whether it was necessary, in the light of the 2009 amendments, to change the existing Scheme provisions on adjudicators' fees and expenses.

Some of the respondents questioned the need to do anything at all as the Scheme already makes provision for the adjudicator to allocate his fees and expenses between the parties. Many felt that the proposed amendments were overly complicated.

Option to be taken forward

Pursuant to section 108 (5) of the1996 Act, the adjudication provisions of the Scheme will apply when the contract does not comply with section 108, subsections (1) – (4). Section 108A is not one of those subsections. The Scheme's adjudication provisions may apply in circumstances where a valid contractual agreement as to costs has been made under the exceptions set out in section 108A and what the Scheme currently says about the adjudicator's costs must recognise this.

This explains the amendments to paragraphs 9, 11 and 25 of Part 1 of the Scheme. The existing position – a Scheme adjudicator can apportion his costs between the parties but the parties remain jointly and severally liable for such costs – is preserved, but this is simply said to be subject to any valid section 108A agreement.

The “slip rule” (the adjudicator’s power to make corrections)

The 2009 Act requires construction contracts to provide that the adjudicator has the power to correct a clerical or typographical error in his decision. The Scheme currently contains no such provision and requires an adjudicator’s decision to be complied with immediately in the absence of any instruction from the adjudicator. The consultation document asked what was an appropriate period of time to allow for the correction of an error and whether any change was needed to the requirement that an adjudicator’s decision should be complied with immediately.

The consultation proposed that a seven day period was appropriate. Respondents were keen for this period to be as short as possible with the majority suggesting that 5 days was a more appropriate period.

The consultation further suggested that the introduction of the “slip rule” would require the introduction of a period to allow any “slip” to be corrected before the adjudicator’s decision should be complied with. This suggestion was almost universally dismissed by respondents who felt that its effect would be to extend the length of an adjudication (28 days) by whatever period was determined simply to accommodate the rare occasions when the adjudicator made a simple “slip”. Furthermore, respondents were firmly of the view that it was common practice for the adjudicator anyway to set a period within which the decision should be complied with and that, as well as being undesirable, an additional period was unnecessary.

Options to be taken forward

We will amend the Scheme to introduce a new provision entitling the adjudicator to correct a “slip”. We will allow for a 5 day period within which the adjudicator may correct that “slip”. In addition, we will not pursue the suggestion that the adjudication period should be extended to allow for the correction of an error.

"Tolent" clauses

"In terms of adjudication we are taking specific measures to address the key issues which have been raised with us by the industry during our review. The first is the ability of a party with greater clout to use the costs of the adjudication process as a barrier by, for example, requiring that the weaker party pays all the costs of the adjudication, irrespective of where they arise. We have prevented the use of such clauses".

Lord Brett [**Hansard Reference – Col.GC293: Local Democracy Economic Development and Construction Bill, Grand Committee Tuesday 3 March 2009**]

While the issue was not directly raised in the consultation paper, a number of respondents took the opportunity to express concerns about the drafting of new section 108A of the 1996 Act – the prohibition (subject to two very narrow exceptions) of agreements as to the costs of adjudication.

108A Adjudication costs: effectiveness of provision

(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to subsection (1) is ineffective unless

a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication

There is a distinction between the contract providing for an adjudicator to allocate his fees and expenses and the contract providing for the allocation of party legal costs. It was suggested in a number of consultation responses that section 108A does not make the distinction between legal costs and adjudication fees and expenses. The Government believes that it does.

Section 108A (1) applies in relation to the allocation of "costs relating to the adjudication of a dispute arising under the construction contract". It does not specify legal costs, other party costs or the adjudicator's costs. It is simply costs relating to the adjudication. Section 108A (2) then carves out from that general prohibition contractual provision whereby the adjudicator can allocate his own fees and expenses between the parties. We

believe that draws a very clear distinction between those costs and others associated with the adjudication process.

Some respondents also suggested that it would be possible under section 108A to draft a single contractual provision covering party legal costs and conferring power on the adjudicator to allocate his fees and expenses. They argue that this would have the effect of "saving" any agreement as to the party legal costs i.e. their reading of section 108A(2)(a) is such that as long as the adjudicator was being given the power to allocate his costs, other wording (part of the same provision) about party costs would be effective. This argument confuses a specific contractual provision (i.e. a contract clause) with something the contract provides for. It is the latter sense which applies when reading section 108A. In short, contractual provision as to the party legal costs is not contractual provision conferring power on the adjudicator to allocate his costs.

Option to be taken forward

We consider that section 108A is fit for purpose and achieves what Parliament intended in preventing the use of "Tolent" clauses. There is no further action to be taken.

PAYMENT

Payment notices

The 2009 Act made changes to the statutory payment notice framework. The consultation paper asked three questions:-

- Whether, paragraphs 9 and 10 of Part 2 aside (ie those dealing with the payment and withholding notices), the Scheme worked effectively given the changes to primary legislation

- Whether the Scheme should continue with the "payer-led" approach to payment notices

- Whether it was right to continue with a 7 day period for the new "intention to pay less" notices.

There was general agreement that, paragraphs 9 and 10 aside, the Scheme required no amendment.

Views were more divided on whether the Scheme should continue with a payer-led approach, but most respondents considered that it should. In effect the divergence of opinion here simply reflected that which had been apparent when changes to the primary legislation were discussed. In that respect the dilemma remains that different parts of the

industry will favour either a payer-led or payee-led process depending on their particular position in the supply chain.

A number of respondents suggested that paragraphs 9 and 10 needed to be amended to take account of the new provision in the primary legislation for the payee to issue the payment notice where the payer was in default.

As regards the question of whether 7 days was an appropriate period within which to issue an “intention to pay less” notice, responses were mixed. A large number of people suggested that the period should be amended to reflect the position in JCT’s standard forms – 5 days. There was also an interesting suggestion that, rather than the final date for payment, the anchor for the “pay less notice” should be the due date.

Options to be taken forward

Given the general support for the position that the current drafting of the Scheme was adequate, we will not be making more general amendments.

Given the lack of any clear consensus to move away from the current position, and given the additional clarity we believe we have introduced to the payment process through amendments to the primary legislation, we have decided to continue with a payer-led approach to payment notices. The revised Scheme will therefore make provision for that.

We do not believe it necessary for the Scheme to take account of the facility under section 110B of the revised Act for the payee to issue, or be deemed to have issued, a payment notice as this is anyway a statutory right - section 110B will in any event always apply.

The arguments for and against a 7 day period for the issue of an intention to pay less notice were finely balanced. Given the lack of clear consensus for change however, we have decided to maintain the current position in our revisions to the Scheme.

SUPPLEMENTARY PROPOSALS

At the invitation of BIS, the Construction Umbrella Bodies Adjudication Task Group ("CUBATG") and its members made a number of suggestions as to further consultation questions to establish the appetite for change beyond the changes which had to be made as a consequence of the changes to the primary legislation. These suggestions are considered below.

Date of referral for adjudication disputes

CUBATG suggested that there was a need to clarify the date of referral. The majority of respondents did not support any change, but we have concluded that it would be appropriate to amend the Scheme such that the adjudicator is to inform the parties as to the date of the referral. We believe that this will remove any potential for doubt.

Joinder

The consultation asked whether people were content with the current position that an adjudicator cannot adjudicate related disputes unless both parties agree. There was no widespread support for the adjudicator to be given this right in the absence of any agreement between the parties. We are therefore not taking this any further.

Confidentiality

The consultation asked whether there was a need to extend the Scheme's provisions about confidentiality. The current wording requires the adjudicator and any party not to disclose any information or document which the party supplying it has indicated is to be treated as confidential. There was very strong support for the adequacy of this position. We are therefore not taking this any further.

Final and conclusive

The consultation asked whether there was any practical problem which prevents the deletion of the words "unless the contract states that the decision or certificate is final and conclusive" at paragraph 20(a) of the Scheme.

There was a strong body of opinion which felt that the deletion of these words would not cause a problem. Some felt that the inclusion of this wording in the Scheme was "ultra vires" in that it conflicted with the intent of the primary legislation and many respondents suggested that there was no practical problem

However, other respondents spoke of the need to acknowledge such terms – for instance, when agreeing the final account or on any settlement agreements.

We have therefore concluded that there would be circumstances in which there would be practical difficulties if we were to delete the words. We are not therefore taking this any further.

Award of interest

The consultation asked whether it was appropriate to give the adjudicator a power to award interest. Most responses were broadly in favour of giving the adjudicator such a power.

There were also convincing counter arguments, however. Currently the Scheme reflects the fact that there may already be interest provisions in the contract. Granted that this is so, we considered it somewhat perverse to add a general discretion to award interest. There is also existing legislation which deals with the late payment of commercial debts.

On balance, we consider that the counter arguments were stronger. We have therefore concluded that the current Scheme adequately deals with the question of interest.

ADDITIONAL PROPOSALS COMING FORWARD FROM THE CONSULTATION

Peremptory decisions

A number of respondents asked why an adjudicator had the power to order his decision to be complied with "peremptorily" and why section 42 of the Arbitration Act 1996 applied (see paragraphs 23(1) and 24 of Part 1 of the Scheme). These provisions were never used and were ignored by the courts was one reply. We are therefore removing paragraphs 23(1) and 24 from the Scheme.

Reasons

Some respondents to the consultation suggested that the adjudicator should be required to give reasons for his decisions. The current position is that an adjudicator is required to give reasons if requested to do so by either one of the parties (paragraph 22 of Part 1). The end result is therefore the same. Should a party wish to see the reasons for a decision the Scheme already provides that facility and we are not convinced of the need to go further.

Next Steps

In terms of going forward, the responses to the consultation exercise which are summarised in this analysis will, together with the changes introduced to the primary legislation at part 8 of the Local Democracy Economic Development and Construction Act 2009 ('the 2009 Act'), inform the development of the draft Statutory Instrument to amend the secondary legislation i.e. the Scheme.

The draft Instrument will be laid under the Affirmative Procedure before parliament in summer 2011 and approved by resolution in each House.

Finally, we would expect to be in a position to commence the changes to the primary and secondary legislation on 1 October 2011.

Annex A: Responses by type of organisation or respondent

(All respondents - those who used the response form together with those who submitted free-form responses.)

Type of organisation	
Trade bodies	3
Professional bodies / Professionals / Consultancies	10
Legal Bodies / Legal Firms / Solicitors / Barristers/adjudicators/arbitrators	15
Other	2
Total	**30**

Capacity in which respondent replied

Capacity	**Number**	**%**
As an individual	0	0
As an adjudicator/arbitrator	6	20
As a solicitor	15	50
Main-contractor/Client	3	10
Sub-contractor	4	13
Other	2	7

Capacity	Number	%
Total	30	100

Annex B: Responses by Country of origin:

England –29

Scotland – 0

Wales - 1

Northern Ireland – 0

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