

**8 September 2010**

Senator Feargal Quinn,  
Seanad Éireann,  
Leinster House,  
Dublin 2,  
Ireland.

**Re CONSTRUCTION CONTRACTS BILL 2010 [Draft 4]**

Dear Senator Quinn,

Further to our meeting with you in the Department of Finance on the 27<sup>th</sup> July 2010, the Society of Chartered Surveyors have given careful consideration to the above Bill and have met on many occasions to review it. We now take this opportunity to enclose our considered and detailed opinion on the Bill, set out on a section by section basis.

While the Society of Chartered Surveyors endorses the four objectives outlined by you in the aforementioned meeting, namely:

- Certainty of time of payment
- Certainty of amount to be paid
- Certainty of enforcement
- Certainty that there will be cash available to pay

and we further support the introduction of legislation to enforce these objectives, there are a number of key considerations, as detailed within, that we feel must be adopted to give the Bill greater effectiveness.

The problems of cash flow in the industry are not new. In times of plenty the tolerance of poor compliance with conditions of payment, late payments and occasional failure to pay is high and the trickle-down effect, while always an issue, is less significant. In a tightening market this tolerance is removed and as the market hits the aggressive levels of tendering that are being seen recently, poor cash flow has an almost immediate disastrous effect on all firms in the industry.

It is imperative that any legislation introduced addresses this uniformly, across all sectors and without arduous mechanisms that can be used or abused to undermine the four tenants underpinning the introduction of this legislation.

We summarise, as follows, the main points of our opinion, in the order that they arise in the Bill:

### **Application to all Construction Contracts**

- We believe this Bill must be uniform across all sectors, at all levels and easily understood. The introduction of any ambiguity as to what contracts the legislation is applicable to, or a distinction between payments between employer and main contractor as opposed to main contractor and subcontractor, must be avoided. Any exclusion will give rise to disputes at the margins and will create doubt and confusion in the lower tiers of the payment chain. The SCS believe that contracts with residential occupiers – within certain parameters as detailed - Public Works Contracts and independently certified contracts must not be excluded. All such contracts are prone to payment disputes just as any other contracts.

### **Application to all disputes**

- This Bill must apply to all disputes, as any process of filtering or deciding as to whether the legislation is applicable will only cause a further layer of delay and disputes. Small value disputes can, on occasion, be immensely complex, while very large value disputes can be relatively simple. To draw any line as to what is or is not covered by the legislation due to value or complexity will cause delay and undermine the purpose of the legislation

### **Timing of introduction**

- The introduction must take cognisance of existing contracts and the fact that there will be contracts procured with the pre-legislation credit terms and conditions assumed but that the sub-contracts to those contracts will not have been let. For example, commencement of the Act must provide for sufficient notice to avoid a situation where the Act would not apply to an employer/main contractor relationship but would then apply for the same works between this main contractor and his subcontractors. It is important that these existing contracts and the subcontract to these contracts are respected.

### **Timescales**

- The timescale for notification of intention to pay any amounts other than that claimed must be realistic within the construction process. In cases where there are many subcontracts receiving monthly payments, is it imperative that the time frame for notifications are not administratively impossible without having to retain significant additional resources. Also the industry norm of withholding retention for a period after the works are complete, to allow for snagging and making good defects, and the timescale of final accounts and periods for final measurement needs to be considered.

### **Prohibition on 'pay when paid'**

- Under the current business model of main contractors that are compliant with existing payment obligations, the main contractor will fund approximately 20% to 25% of a project through his own credit facilities, while the remainder will be funded through subcontractors and suppliers credit facilities. Prohibiting 'pay when paid' can mean that in certain circumstances a main contractor will be obliged to pay a subcontractor, while not having received payment himself. This could, in effect, turn the existing business model of main contractors on its head.

### **Certification of works and Nominated Subcontracts**

- The elimination of certification under another contract, as would be the case for an Architect or Consulting Engineer, could impinge on the certification of payment for nominated subcontractors and accordingly give rise to endless disputes in such circumstances. Equally the prospect of a main contractor self certifying works between himself and a subcontractor as being practically complete, or complete, whereas he currently relies on an Architect's or Engineer's certificate to do so, may also be a source of dispute.

### **Support for Adjudication**

- The SCS support the use of Adjudication and believe that this dispute resolution method must be enforceable, through quick and affordable mechanisms and must also be available for all disputes, as previously noted. It is important however that time limits are set on the referral of disputes to adjudication so as to minimise vexatious referrals.

### **Appointment of the Adjudicator and Nominating Bodies**

- As this is a separate area in itself, as recognised by the intention of the Minister to issue a code of practice governing it, the SCS, with its extensive experience of appointing 300 – 500 property arbitrators every year, intend to make a separate submission on this.

### **Security of Payment**

- Without security of payment the point of this piece of legislation would be lost and the Bill would be utterly meaningless. The means of security of payment must be agreed by the parties prior to the award of a contract, as to do otherwise exposes the parties to the risk of delay to, or frustration of, the commencement of a project. The level of security must reflect the nature of the project and the level of cash flow on site. Once principal security is in place it is the experience of the industry that payment to the lower tiers of subcontractors is generally made. The sheer scale and number of subcontracts that any one main contractor will have in place at any one time must be recognised and it is not viable that individual bonds or means of security be placed for each and every one. Therefore some other form of security for the lower tiers of the industry will be required that can be administered in an affordable fashion. Accordingly, the security of payment system to be introduced must be operable for all contracts, bearing in mind the immense complexity of main contracting with many subcontracts, in cases exceeding a hundred or more on any one contract.

We trust that our comments will be viewed in light of our support for the legislation and our desire to assist in making it workable in an industry that has highly complex chains of payments. We would welcome the opportunity to meet with you to review our comments in detail and make ourselves available at your convenience.

Yours sincerely,

Ciara Murphy,  
Director General

To view the submission in full, please [click here](#)