



CONSTRUCTION CONTRACTS BILL 2010

1. INTRODUCTION

The Society of Chartered Surveyors Ireland endorses Senator Feargal Quinn's four objectives for this legislation, 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.

However having examined the Bill as passed by Seanad Éireann we have formed the view that the Bill not only fails to meet the stated objectives but actually places many contractors and subcontractors in a worse position that they might otherwise have been prior to its existence.

1.1. This Bill fails to protect those who Senator Quinn set out to assist.

The Bill excludes contracts that are below "200,000 in value. Given that, with rare exception, all subcontracts in the state are below this threshold these vulnerable subcontractors are immediately deprived of any protection.

The Society of Chartered Surveyors Ireland is of the opinion that if the threshold is not removed entirely the legislation will have been a complete waste of time.

1.2. The interaction between the various sections of the Bill renders it ineffective.

The Bill will not ensure certainty of time for payment, it will not ensure certainty of the amount to be paid, nor indeed will there be any meaningful ability to enforce payment. On the matter of ensuring that there will be an availability of funds to honour payment, the Bill fails entirely.

In the event a paying party to a contract fails to pay, the executing party may suspend works. However this period of suspension only lasts 14 days, after which the executing party must return to continue with the works. The position in the existing contracts that allows an executing party to terminate in such circumstances is negated by the legislation.

It is then the executing party's prerogative to refer the matter to adjudication, however In the event the unpaid executing party succeeds in convincing an adjudicator that there is a payment dispute and succeeds in proving his case, all that the paying party must do to further prolong matters is refer the dispute to Arbitration, at which point any obligation to observe the adjudication award evaporates entirely.

The Arbitration process will typically last up to twelve months.

Even if the paying party fails to refer the matter to arbitration and simply ignores the adjudication award (or there is no arbitration clause in the contract) the executing party may only suspend for 14 days after which he must again continue with the works and seek a remedy in the courts.

During this period the executing party will remain unpaid, but must nevertheless continue with the works, must continue financing the project, and is prevented from terminating his employment under the contract. If at any point the executing party fails to continue the works or has inadequate funds to continue the project he will be guilty of breach and his contract will be liable to be terminated!

If having finally achieved a remedy through the courts or by way of arbitration the executing party is in a position to terminate and demand payment there is no guarantee that there will be funds in place to meet the debt.

During this period the executing party will have been obliged to build out the works without payment and at risk for termination in the event he fails to do so.

2. WHAT MUST BE DONE?

The Society of Chartered Surveyors Ireland has considered this legislation in great detail and is of the view that a fundamental redrafting is required. Such re-draft must look in detail at the use of language and a myriad of minor points to ensure that the Bill not only achieves that which it set out to achieve but does so efficiently effectively and at minimum of cost.

2.1. Security for 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. The level of security must reflect the nature of the project and the level of cash flow on site. This security could quite simply be a representative percentage of the contract sum, perhaps two months expenditure which would be lodged into a project account or held in escrow. Such an option is already recognised by the industry and is included in the existing RIAI contracts [Vis Clause 35 (a)(i)] It is worth noting that if such option had been exercised over the past ten years, we would have a lot less of the partially complete developments that have now become a burden for Government and Local Authorities.

In the case of State funded projects, security of payment, between Principal and Main Contractor is rarely an issue and a simple letter from the Contracting Authority, stating that the state funding is in place would suffice to meet the requirements of adequate security.

In order that security is maintained through the supply chain there would be merit in considering the use of a project account from which pre-agreed sums might be discharged directly to the primary subcontractors.

2.2. Removal of the €200,000 threshold

The introduction of high ceilings for the definition of Construction Contracts is against the intention of the introduction of the Bill which is for the protection of the sub-contractor. The vast majority of subcontractors are engaged in contracts for less than " 200,000.00 and payment disputes arise for sums that are a fraction of this.

From our consultations with practicing professionals in the UK we have learned that their experience is that this type of legislation is used primarily for smaller disputes, ranging from £15,000 upward. Accordingly the proposed threshold is completely at odds with the true purpose of the Bill.

2.3 Application to all contracts

Any distinction between State funded and privately funded contracts is likely to cause difficulties in that many sub-contracts will be private contracts and yet the main contract will be state funded and for the various tiers of a project to be included or not included will inevitably give rise to confusion, dispute or unfairness in the process. It is imperative that this Act is unambiguous and clear and that it applies to all tiers of a project.

For these reasons the omission of state contracts below " 50,000.00 must be omitted.

2.4 An ability to terminate

It is unconscionable in circumstances where the paying party is guilty of the most fundamental breach, i.e. a failure to pay, that the unpaid party be compelled to continue with the works. But this is what the Bill demands. In both the public and private contracts an ability to terminate in such circumstances exists under all existing forms of contract and equivalent wording must be incorporated into this Bill.

2.5 Adjudication must be binding

The exclusion or watering down of whether the award is binding entirely undermines the effect of the Bill. To be able to avoid making the payment by merely referring the dispute to the courts or arbitration would make the award meaningless.

It is essential that the award is binding until overturned by another formal process, the purpose of the Bill is to ensure cash flow and the introduction of any mechanism that would frustrate this will undermine the primary purpose of the Bill.

We understand that the State may not wish to be bound by an Adjudicator, in the event that the award is overturned and the payee cannot return the award. However, the purpose of this Bill is to protect cash flow for the payee and these objectives may clash. The resolution is in the implementation of a form of security by bonding or similar. The solution must not be to undermine the primary principle of protection of cash flow.

The Society 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 any process of deciding whether the legislation is applicable or not will only give rise to further disputes. It is important however that time limits are set on the referral of disputes to adjudication so as to minimise vexatious referrals.

2.6 The implications of the new payment terms upon the industry

The Bill introduces two new concepts to the industry.

The banning of ~~pay~~ when paid+ clauses in contracts and, the removal of the ability of a main contractor to agree payment terms with a subcontractor.

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~~and~~ causing a main contractor to have to pay a subcontractor within 25 days of any payment notice will mean that in most, if not all circumstances a main contractor will be obliged to pay a subcontractor, in advance of having received payment himself.

This could, in effect, turn the existing business model of main contractors on its head.

Main contractors will be obliged to increase their funding facilities in the current difficult economic climate.

Whilst this might well be laudable it will in effect result in the introduction of a barrier to entry into the industry or indeed prevent small and medium contractors competing with larger entities.

2.7 Recognition of Architects and Engineers certificates

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 disputes.

Certification by an independent professional has long been recognised by the courts as an important component in any construction contract. It provides certainty for all parties. This must be maintained.

2.8 Interaction of the Bill with the Consumer

The Bill seeks to exclude contracts that relate to dwellings and are less than 200sq metres and "200,000 in value (we assume the use of "more+at 2(b) an error). Unfortunately disputes can arise on such projects and the Society of Chartered Surveyors Ireland are of the opinion that such projects should be included in the Bill.

The Society recognises that the Bill must interact efficiently with existing consumer legislation and not all domestic projects should be covered by the Bill, but to so define a Construction Contract with a single cash or square area limit is inappropriately blunt.

A lower limit, perhaps in line with other proposed legislation that recognises "ordinary+ domestic consumers carrying out modifications to their principle private residences. A possible limit would be domestic housing that falls below a threshold identified in the new proposed property tax.

2.9 Appointment of the Adjudicator and Nominating Bodies

We strongly believe that Adjudicators must have verifiable construction experience and as such must either be drawn from the Construction Professionals (with appropriate experience, training or qualifications in Adjudication) or from the legal professions with verifiable construction experience. It would be inappropriate if the adjudicator were to be viewed as a "judge+ that must be informed or educated in construction management or technology in order to form an opinion. For timely and fair Adjudication it is imperative that the appointed Adjudicator is fully conversant with the construction issues as well as the law applicable.

The Society does not believe that the setting up of a QUANGO, working on behalf of the Minister, to carry out the function of the appointment of Adjudicators would be cost effective, necessary or an improvement on the existing systems for the appointment of Arbitrators, Conciliators and Mediators. Several professional institutions have protocols and systems in place for such appointments and subject to verification and registration we see no reason why this could not be extended, at minimal cost, to Adjudication. We do not believe that the establishment of a QUANGO will aid the economic or speedy resolution of disputes.

It is imperative that the parties have the option, under the Act, to agree on an Adjudicator. In many disputes the parties agree the Arbitrator, Conciliator or Mediator, the parties know the dispute, know the proposed third person and have confidence in his ability and knowledge, leading to quicker and more acceptable resolutions, as they have voluntarily agreed to engage the third party. To remove this choice by the imposition of an appointed person in all cases would be unhelpful, increase the cost of the appointment and be prejudicial to the amicable settlement of the dispute. It is of course, necessary to have the fall back, in a very short time frame, of an appointed Adjudicator in the case where the parties fail to agree.

Where the parties fail to agree an Adjudicator:

In circumstances where a written contract exists it will be possible to seek a nomination from a pre agreed appointing body.

In circumstances where no written contract exists (or there is a failure to pre-agree) the plaintiff must be free to seek a nomination from the President of one of the bodies that are listed in section 8 of the Bill.

2.10 Application to Payment Disputes

The introduction of a qualification that adjudication only applies to payment+disputes will give rise to challenge. Virtually all disputes involve money but equally all disputes can be argued that they are a matter of principle and that the consequential payments are secondary. The result is that the party with the best lawyers will frustrate the application of the act and undermine the intention of quick resolution for cash flow disputes.

2.11 Code of Practice on Adjudication

The Bill indicates that the Minister may publish a code of practice. The Society of Chartered Surveyors Ireland, with its extensive experience of appointing 300-500 arbitrators every year, intends to make a separate submission on this.

3 CONCLUSION

We are pleased to be able to continue our input into this piece of legislation that is so important to the industry and we hope that we can make further detailed submissions on each of the next stages of the Bill, however at present we think that the principles need to be debated in advance of the detail.

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, fair and economical to implement in an industry that has highly complex chains of payments.

Society of Chartered Surveyors Ireland

28th June 2011

The Society of Chartered Surveyors Ireland

Dating back to 1895, the Society of Chartered Surveyors Ireland is the independent professional body for Chartered Surveyors working and practicing in Ireland.

Working in partnership with RICS, the pre-eminent Chartered professional body for the construction, land and property sectors around the world, the Society and RICS act in the public interest: setting and maintaining the highest standards of competence and integrity among the profession; and providing impartial, authoritative advice on key issues for business, society and governments worldwide.

Advancing standards in construction, land and property, the Chartered Surveyor professional qualification is the world's leading qualification when it comes to professional standards. In a world where more and more people, governments, banks and commercial organisations demand greater certainty of professional standards and ethics, attaining the Chartered Surveyor qualification is the recognised mark of property professionalism.

Members of the profession are typically employed in the construction, land and property markets through private practice, in central and local government, in state agencies, in academic institutions, in business organisations and in non-governmental organisations.

Members' services are diverse and can include offering strategic advice on the economics, valuation, law, technology, finance and management in all aspects of the construction, land and property industry.

All aspects of the profession, from education through to qualification and the continuing maintenance of the highest professional standards are regulated and overseen through the partnership of the Society of Chartered Surveyors Ireland and RICS, in the public interest.

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