

The Local Democracy, Economic Development and Construction Act 2009



GENERAL DESCRIPTION AND LEGISLATIVE BACKGROUND

On 12 November 2009, the Local Democracy, Economic Development and Construction Act 2009 (the "LDEDCA") received Royal Assent. No date has yet been announced for when the LDEDCA will come into force although it is expected to do so in the next twelve to twenty four months.

The LDEDCA introduces amendments to Part II of the Housing Grant, Construction and Regeneration Act 1996 (the "Construction Act") and contains a series of key amendments in relation to Exclusion Orders, adjudication and payment.

EXCLUSION ORDERS AND PFI/PPP

It will now be possible to exclude particular types of construction contract from the operation of all or part of the Construction Act (whereas previously the power to exclude applied to the application of the Construction Act as a whole). It will still not be possible to "contract out" of the Construction Act. The power to exclude its operation shall remain with the Secretary of State.

The extension of the power to exclude certain parts of the Construction Act is the culmination of prolonged lobbying by the PFI/PPP industry which has had to grapple with the consequences of the prohibition of so called "pay-when-paid" and "pay-when-entitled" mechanisms (culminating in the case of Midlands Express Way -v- Carillion Construction & Others in 2005). If PFI/PPP contracts are excluded from the application of the Construction Act, we could see the long overdue demise of the tortuous "equivalent project relief" provisions typically found in PFI/PPP subcontracts and other equally dubious instruments such as parallel loan agreements.

The importance of securing the exclusion of PFI/PPP from the application of the Construction Act is underlined by the ban on "pay-when-entitled" and "pay-when-certified" provisions in the LDEDCA. Although the Courts have previously cast doubt on the enforceability of such provisions the LDEDCA puts the issue beyond doubt. This will further limit room for manoeuvre when drafting equivalent project relief provisions if PFI/PPP is not excluded from the application of the Construction Act by the LDEDCA.

ADJUDICATION

The amendments to the Construction Act seek to encourage a greater use of adjudication by banning provisions which allocate responsibility for adjudication costs unless they are agreed to in writing after the service of a notice of adjudication. This seeks to avoid a more powerful contracting party imposing its own terms at the outset.

The amendments to the Construction Act also introduce a slip rule allowing adjudicators to correct minor errors in their decision. The omission of such provisions from the original Construction Contract was clearly an oversight and it is sensible for this to be addressed.

PAYMENT

The central purpose of the Construction Act was to improve cash flow in construction projects and to address the perceived imbalance of power between contractors and sub-contractors. It is therefore no surprise that the payment provisions in the Construction Act have been further amended to reflect experiences since its introduction. Whilst this is generally welcome there is some concern that the amended Construction Act provisions are far from clear.

In essence, the amendments to the Construction Act seek to bring the statutory regime in line with the reality of the payment cycles under construction contracts. The paying party shall now be allowed to appoint a person to serve payment notices on its behalf (in recognition of the practice that architects and employer's agents often perform such a role). There shall also be a sanction if the paying party fails to serve a payment notice. The payee will be entitled to serve its own payment notice specifying the amount it considers payable and such amount will become payable unless the original paying party serves its own withholding notice.

CONCLUSION

The potential change in approach heralded by the LDEDCA is welcome and long overdue. Whether or not these initiatives ever become law depends more perhaps on the outcome of the imminent general election and other competing legislative priorities rather than the merits of the LDEDCA itself. No doubt the industry will continue to lobby for the LDEDCA to become law sooner rather than later and for PFI/PPP to be finally recognised as a legitimate exception to the rule when it comes to being “paid-when-paid”.

FURTHER INFORMATION

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