

RESOLUTION

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Professional Quantity Surveying Services & Alternative Dispute Resolution Services

Inside this issue:

- **See our full range of services**
- **Ignoring a design approval clause!!**

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UPDATE - LATEST CONSULTATION ON PROPOSALS TO AMEND THE HGCRA 1996 & THE SCHEME 1998

The second consultation document dated 20 June 2007 is now available and responses are solicited for a date of 17 September 2007. If you missed out on the first round in March 2005 you can now catch up with the movers and shakers within this document. The document guides you through the reasoning and intentions of the proposed changes and even those that were ditched in the first review and those still under consideration. Originally the intention was that the proposed changes would be introduced through a Legislative Reform Order but this was not possible and so they must now be enacted through Primary Legislation and hence the ongoing delay, most likely to lead into next year. The proposals are far from radical but to those who regularly use and rely on the process, they are essential maintenance to the Housing Grants Construction and Regeneration Act 1996 through usage or mis-usage of the current process. The Act is working, of that there is little argument, however the proposals would undoubtedly improve the process and make it fairer than it currently is. As always where legislation is passed the legal system finds ways around the written letter and twists the odd word, in time resulting in

unintended results which then require 'fixing'. The quick fix has turned into a large bureaucratic process, of consultation and re-consultation until a few years later here we are still a good year from action. Now even the Minister of State for Industry and the Regions has changed, since this second consultation was issued last month!

Briefly summarised below are the key proposed changes;

- Competition on a 'level playing field' – allowing costs only where they are reasonable and agreed after a dispute arises. This should put paid to those 'Tolent' clauses that currently defeat the principles of adjudication where they require one party to pick up the entire costs of the adjudication whatever the result of same.
- Removing the requirement that the Construction Act should only apply to contracts in writing – this will remove the restriction of the application of the Construction Act to contracts in writing, which has become the stock jurisdictional challenge leading to enforcement proceedings in court.
- Prohibiting agreements that interim or stage pay-

- -ment decisions will be conclusive - this will prevent parties pre-agreeing that interim decisions will be final and conclusive as to the amount of the payment, such that the adjudicator will be able to 'open up, revise and review a decision'.
- Prevention of unnecessary duplication of payment notices – this will allow a notice or certificate from a third party to act as a section 110(2) payment notice.
- Clarification of the requirement that a section 110(2) payment notice should be served – this will make it clear that a payment notice is always required if a payment would become due under the contract.
- Clarity of the content of payment and withholding notices – section 110(2) payment and section 111 withholding notices should be in the same format - **Cont. page 2**

UPDATE - LATEST CONSULTATION ON PROPOSALS TO AMEND THE HGCRA 1996 & THE SCHEME 1998

- - whereby the withholding notice becomes a revision of the payment notice. The proposals would clearly state why and when such notices are required, which may result in more withholding notices being issued than currently.
- Clarity of the sum due – where a payment notice is not issued the sum due would be determined by a new fall-back provision, whereby the sum due would then be the amount in a claim by the payee issued before the final date for payment.
- Prohibiting the use of pay-when-certified clauses – a certificate on one contract should not act as a mechanism to determine the timing of payment for work done under another contract.
- Improving the rights to suspend performance – this will reduce the burden on the party who exercises his rights by

allowing him to claim for the costs of suspending and remobilising following payment of an outstanding debt.

Other issues being considered as part of the consultation include a 'slip rule' for adjudicators enabling them to correct errors in their decisions for a period of 1 week or more if agreed and the application and section 111 withholding notices where the contract has been determined.

If you would like to discuss any of the issues raised in this article please contact Arbicon ADR Ltd Tel: 01480 426560.



Contractors/sub-contractors - Ignore a design approval clause at your Peril!

Where design approval is required under a design and build contract, the contractor will be required to produce designed drawings in respect of the installation prior to proceeding. Usually a timescale will be included to indicate the time allowed for answering queries with approval or acceptance. If the employer or architect as appropriate fails to provide the acceptance within the timescale there will be an extension of time entitlement. If no timescale is specified a "reasonable" time will be implied into the contract. The contractor will be deemed to have allowed in his programme for a reasonable period to obtain approval.

Problems that often arise are where the contractor fails to obtain approval from the Employer/Architect and commences work without approval. If the design work is subsequently not approved the contractor will be culpable for the delay in rectifying the work, the delay in submitting a late design that is acceptable and he will have to bear the costs of aborted works and as appropriate claims from its subcontractors. A further danger of lack of design approval is if the price has been agreed the contractor takes a risk as design and price have not been fused. It is thus very important that design be produced, identified and approved prior to the contract starting or at a very early stage in the works. It is important to note that a variation cannot arise until the design is approved. Thus claims that changes have taken place and extra payment due will be entirely invalid. So beware the clause requiring design approval. **Call Arbicon ADR Ltd to review your contracts and make sure of your obligation and minimise the risk of losses Tel: 01480 426560.**



Arbicon are actively seeking good quality QS staff to join their team and would like to hear from anyone interested in joining via email or by phone 01480 426560.

Arbicon ADR - A full range of services for all

Arbicon is a leading provider of Professional Quantity Surveying and Cost Management Services and Alternative Dispute Resolution Services including the following:

Pre-contract services

- Cost planning
- Estimating and tendering including audits
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasting
- Quantity and procurement checks
- Material scheduling
- Contract procurement

Post Contract services

- Preparation of final accounts
- Contractual procedures advice
- Re-measurement
- Cost reconciliation reports
- Subcontract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of time claims
- Loss and expense claims
- Dispute resolution/mediation/

adjudication/arbitration

- Support in litigation
- Risk management and dispute prevention
- Expert witness

**Call us now on
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we can help you**

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