Executive Note

DRAFT : The Construction Contracts (Scotland) Exclusion Amendment Order 2006

The above instrument is made in exercise of the powers conferred by section 106 of the Housing Grants, Construction and Regeneration Act 1996. The instrument is subject to affirmative procedure.

Policy Objective

The purpose is to amend the existing Exclusion Order and thus exempt all PFI-type contracts that may be awarded by public sector bodies in Scotland from the requirements of Part II of the Housing Grants, Construction and Regeneration Act 1996 (aka Construction Act).

This amendment should have been made earlier as a consequence of devolution; and will also see Scotland align itself with comparable arrangements already in place south of the border.

Part II of the Construction Act requires that construction contracts must include provisions which ensure the prompt payment of contractors and the rapid adjudication of disputes. Section 106 confers powers on the "Secretary of State" to exclude, by means of an Order, certain categories of contract from the operation of the Construction Act. Following devolution, this power is now exercisable by Scottish Ministers. One of the categories in the existing Exclusion Order covers agreements entered into by public bodies under the private finance initiative (or projects applying similar principles) and those are defined in article 4 of the Order.

The intention remains that all PFI-type contracts awarded by public sector bodies in Scotland should be excluded from complying with the requirements of the provisions of Part II of the Construction Act. The exclusion only applies to the top-level service contracts between public sector clients and the private sector providers, not the construction "sub-contracts" which may exist between PFI providers and their works contractors. The public sector bodies will include, but may not be limited to the Scottish Executive, Executive Agencies, Associated Departments, Crown Office, NHS bodies, Further Education Colleges, Higher Education Colleges, water and sewerage authorities, Non-Departmental Public Bodies, Local Authorities, Fire and Police Boards.

We consider that there is a need to revise the definition in article 4(2)(c) of the bodies that may be a party to a PFI-type contract/agreement. Paragraphs (ii) to (iv) are presently framed to exclude bodies by reference to the accounting and audit treatment of those bodies. However, following devolution the accounting and audit arrangements in the public sector generally were altered, so that Scottish devolved bodies no longer have their accounts dealt with by the National Audit Office. A exclusion for bodies in the Scottish public sector is achieved by adding into article 4(2)(c) those bodies whose accounts are audited by auditors appointed by the Auditor General for Scotland.

Consultation

Consultation is not appropriate on this occasion.

Financial Effects

There are no consequential financial effects.

Scottish Executive - FCSD
August 2006