EXECUTIVE NOTE

THE SCHEME FOR CONSTRUCTION CONTRACTS (AMENDMENT) (SCOTLAND) REGULATIONS 2011

SSI 2011/371

Introduction

The Scheme for Construction Contracts (Amendment) (Scotland) Regulations 2011 are made in exercise of the powers conferred by sections 108(6), 114 and 146(1) and (2) of the Housing Grants, Construction and Regeneration Act 1996. The instrument is subject to affirmative procedure.

Purpose of the Instrument

The purpose of this instrument is to make changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 ("the Scheme") following changes to the primary legislation, namely Part 2 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act").

Legislative Context

Part 2 of the 1996 Act was designed to provide the construction sector with effective and fair payment practices and, in the event of dispute, access to a quick and relatively inexpensive adjudication process. Where parties to a construction contract fail to make provision in their contract for one or more of the various terms relating to payment and adjudication in the 1996 Act, the provisions of the Scheme take effect.

Part 8 of the 2009 Act has made a number of changes to the payment and adjudication provisions of Part 2 of the 1996 Act. Some of these require consequential changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 so that the "suite" of construction contracts legislation in Scotland remains effective.

Policy objectives

As stated above, the 1996 Act was designed to provide the construction sector with effective and fair payment practices and, in the event of dispute, access to a quick and relatively inexpensive adjudication process. Whilst the 1996 Act has generally improved cash flow and dispute resolution, extensive consultation with the construction industry and its clients revealed a need for changes to the legislation to make it more effective in achieving its objective.

These changes are largely technical and include:

- extension of the 1996 Act to oral construction contracts and to those that are partly oral and partly in writing;
- provision on when the allocation of the costs of adjudication is ineffective;
- provision enabling the adjudicator to correct a clerical or typographical error in his decision;

- changes to the current payment framework, including the prohibition of "pay when certified" clauses[1] in construction contracts;
- clarification of the circumstances in which the payer must give notice to the payee if he intends to pay less than the amount due;
- improvement to the provisions relating to the right of a party to whom payment is due to suspend performance of his obligations under a construction contract.

The changes to the 1996 Act require consequential changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 so that:

- provisions in the Scheme relating to the adjudicator's fees and expenses apply subject to any valid agreement by the parties to the contrary;
- provision is made for the adjudicator to correct a clerical or typographical error in his decision; and
- the Scheme reflects the new payment notice framework in the 1996 Act.

Territorial Extent and Application

This instrument applies to Scotland only. Similar instruments have been laid in England and Wales.

Consultation

We have worked closely with officials in the UK and Welsh Governments, which are making equivalent changes to the Schemes operating in England and Wales respectively, with a view to ensuring that construction contracts legislation remains consistent between jurisdictions.

We consulted on the proposed changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 and an initial Business and Regulatory Impact Assessment from February to April 2011. The consultation document was published on the Scottish Government's website and publicised via Scottish Procurement Policy Note 1/2011 and the Public Contracts Scotland portal. We also consulted direct with organisations represented on the industry-led Scottish Construction Forum.

We received a total of eighteen responses to the consultation and have taken full account of these in finalising this instrument. Where respondents gave permission for their responses to be made public, these were published on the Scottish Government's website on 13 May 2011: http://www.scotland.gov.uk/Publications/2011/05/05104752/0. An analysis of the responses will be published on the Scottish Government's website shortly.

We will issue a further Scottish Procurement Policy Note to stakeholders to alert them to the changes to the legislation and to provide guidance on the practical implications. The Note will also be published on the Scottish Government's website and the Public Contracts Scotland portal.

[1] "Pay when certified" clauses are clauses which make the timing or entitlement to payment conditional on the issue of a payment certificate (for example from an architect or quantity surveyor) relating to the progress or completion of work under another contract in the same supply chain. For example, A contracts with B for the provision of a roof. B sub-contracts with C for the supply of roof tiles and makes payment to C conditional on the issue of a payment certificate under the contract between A and B which takes into account the extent to which work on the roof has been progressed or completed. The 2009 Act changes will prohibit such clauses.

Impact assessment

The changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 will have no impact on people from any of the equality groups. As a result, an equality impact assessment has not been completed.

Financial effects

A final Business and Regulatory Impact Assessment has been completed and is attached. In our view, the changes to the Scheme for Construction Contracts (Scotland) Regulations 1998 will not lead to any additional costs to businesses beyond those associated with the changes to the primary legislation.

Contact

Jessie Laurie
jessie.laurie@scotland.gsi.gov.uk
Tel: 0141 242 5672
Scottish Procurement and Commercial Directorate
Scottish Government
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