The Construction Contracts Act 2013 – some pointers for consultants

With the Construction Contracts Act 2013 ("The Act") expected to be given a commencement date in the first half of 2016, now is an opportune time to provide an over-view of some of the issues that consultants working in the construction sector will need to bear in mind when considering their own contracts and building agreements they may be administering.

The Act applies to Construction Contracts (written or oral) for the carrying out of Construction Operations. “Construction Operations” is broadly defined, such that the services provided by consultants to their clients on most projects will fall within its scope. A limited number of exclusions are provided for in the Act, including a value based exception (contract value of less than €10,000) and a further exception for smaller domestic dwellings where the contract is with the property owner. Contracts between state authorities and their partners (PPPs) are not covered by the Act, but contracts made by PPPs with contractors and consultants will be covered if they meet the criteria.

It is not possible to contract out of the Act, which will be deemed to apply even when the parties to a Construction Contract purport to limit or exclude its operation. As a result, a careful review of the Act and the Code of Practice Governing the Conduct of Adjudications is recommended for all consultants, particularly those who take on responsibility for administering building agreements and those who engage sub consultants.
The Act’s first purpose was to provide for the inclusion in Construction Contracts of provisions to address the amount and timeframe for payment of interim and final payments, the primary intention of which was to prohibit the “pay when paid” clauses often included in sub contracts. The second purpose was to provide for the introduction of statutory Adjudication for disputes relating to claims for payment. Both aspects of the legislation will have an immediate impact on the construction industry once the Act is commenced.

Payments under Construction Contracts

The Act requires the inclusion in Construction Contracts of provisions for the amounts of interim and final payments due on foot of the contract and for payment claim dates, or adequate contractual mechanisms for determining these. The equivalent UK legislation was amended in 2009 to disallow “pay when certified” clauses, but these are not prohibited by the Act. However, the Act has included the UK exception to the prohibition on “pay when paid” clauses. Such clauses may be effective in the event of employer insolvency, receivership or examinership, putting this risk back on sub contractors. The legislation has a feature unique to Ireland in the form of a Schedule, which is to apply to a main contract to the extent the contract fails to provide for the matters specified and to a sub contract, save to the extent that the sub contract contains provisions that are more favourable to the sub contractor. A time frame is provided for the service of Payment Claim Notices setting out the amount claimed and providing back-up data and for a Response in the event the paying party wishes to dispute the amount claimed.

In general, the payment provisions in Irish standard forms of contract do not adequately address the requirements of the legislation and amendments will be required. Once the Act is in force, consultants will have to be aware of the requirements when making their own agreements with clients and agreements entered into with sub consultants.

Sub consultants will have the benefit of the Schedule unless the sub consultancy agreement provides more favourable terms. The legislation may ensure that payments due to sub consultants or sub contractors do not coincide with those due on foot of main contracts and this may impact upon cash-flow for the paying party. Those administering building agreements once
the Act is in force will have to acquaint themselves with the payment mechanisms in the Act and the provisions of the Schedule. There is likely to be a period during which contracts that do not meet the requirements of the Act will be in use and the Schedule will apply.

The Act provides a right to suspend work for non-payment in full by the due date of an amount due under a Construction Contract and contains provisions addressing how time is to be dealt with in the event of a suspension. A right to suspend work in the event of non-payment is a standard feature of building agreements. However, it should be noted that the Act introduces a regressive step and a feature that is unique to the Irish legislation. If the other party refers for Adjudication a dispute relating to the amount, the right to suspend work is lost and work may not be suspended notwithstanding payment has not been made. The rationale behind this is not clear, bearing in mind that standard form building agreements generally provide that work must only recommence once payment has been made. The Act contains some poorly-worded provisions providing how the period of suspension must be accounted for in reckoning time under the contract. Whilst the legislation states that periods of suspension are to be “disregarded” when considering time, it is possible that what was meant was in fact the opposite of this and that regard is to be had to periods during which the works are suspended.

Statutory Adjudication

In the UK, most disputes arising on foot of construction contracts are dealt with by Adjudication and disposed of at this stage and it is reasonable to anticipate that in Ireland the claims landscape will be considerably altered by the introduction of statutory Adjudication.

The Act provides that a party to a Construction Contract has the right to refer for Adjudication at any time any dispute relating to payment arising under the Construction Contract and this right is exercised by serving on the other party to the contract a Notice of Intention to Refer the payment dispute for Adjudication. It is likely that “dispute” will be afforded its ordinary meaning and this right to refer subsists even though the parties may be at Arbitration or engaged in litigation in relation to the claim.

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It is important to note that the right to refer a payment dispute for Adjudication sits alongside whatever dispute resolution provisions are in the contract and both the Act and the contract will apply. It remains to be seen how this will be dealt with in practice pending the incorporation of statutory Adjudication into standard forms. A party wishing to refer a dispute for Adjudication under the Act should adopt a prudent approach and ensure that the requirements of the legislation are met, whatever the contract may provide as regards dispute resolution.

Once appointed, the Adjudicator will set a timetable for conduct of the Adjudication and he is obliged to allow each party adequate time to make its case and address the issues raised by its opponent. Consultants should make themselves familiar with the very tight timeframes that will apply to statutory Adjudication, as failure to comply with these may be fatal to a claim or its defence. It is anticipated that the Adjudicator’s decision will be reached within 28 days, unless this time is extended by agreement.

The fact that the dispute referred for Adjudication under the Act must relate to a claim for payment will not prevent the Respondent party from using all defences that would otherwise be available to it in Court or at Arbitration. Therefore, if a dispute arises in relation to fees owed to a consultant and the consultant serves a Notice of Intention to Refer the dispute for Adjudication, the Respondent party would be in a position to defend itself using all arguments that would be available had the dispute been litigated or arbitrated, including allegations of professional negligence and / or breach of contract against the consultant. The Adjudication procedure is unlikely to lead to many counterclaims seeking payment of monies, as the Notice of Intention to Refer is not likely to encompass a referral of any counterclaim a Respondent may wish to make, ensuring that the Adjudicator would not have jurisdiction to consider it.

The exact scope of the phrase “relating to payment” in this context remains to be explored. However, Consultants administering building agreements should note that it is likely that claims on foot of building agreements that encompass other issues, such as extensions of time, may be referred for Adjudication, so long as they also concern payment.

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Adjudicator’s decisions once published will be binding until the payment dispute is finally settled by the parties, or a different decision reached on referral to Arbitration or Court. Consultants should keep in mind when certifying works for payment under a building agreement that an Adjudicator’s decision will be binding on them as certifier, as well as binding on future Adjudicators in respect of payment claims that may be made in relation to that contract. The Act contains provisions to allow for a suspension of works in the event of non-payment of the amount awarded, but works may not be suspended if the Adjudicator’s decision is disputed.

Key to the outcome for either party will be the content of the Notice of Intention to Refer, from which the Adjudicator’s jurisdiction will derive and the Statement of Case or Response delivered. It is essential that all documentation to be relied upon by a party is submitted with the Statement of Case or Response. Adjudications will take place mainly on paper, with oral hearings being reserved for those cases where there is a genuine dispute as to the facts or where it is otherwise justified. Whilst this has caused some to query whether this amounts to a denial of Constitutional rights, it would seem that the intention is to keep legal costs to a minimum and to ensure that the dispute is resolved within the shortest possible timeframe. This is one more reason for consultants to ensure that their files of papers are properly maintained, whether in respect of their own contracts or those they are administering.

A party intending to refer a payment dispute for Adjudication is likely to have to prepare its Notice of Intention to Refer and its Statements of Case well in advance of serving the Notice, in order to be in a position to meet the tight timeframes provided for in the Act. A Respondent party may be “ambushed” and face a challenge in meeting the timeframe provided for delivery of its Response. In these circumstances, the assistance of legal advisors with experience of Adjudication will be invaluable.

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