Late payment and the Construction Act

Construction firms are still plagued by the scourge of late payment and the problem persists despite measures to tackle it, writes Sheena Sood.

It is widely acknowledged that late payment is an endemic issue across the construction industry. According to the Asset Based Finance Association, construction and real estate firms had to wait an average of 107 days to receive payment – longer than in any other industry.

There have been a number of initiatives to improve payment practice in the construction industry, chiefly the payment regime under the Housing Grants, Construction and Regeneration Act 1996.

The Act introduced a payment process and adjudication to improve payment in the Construction industry. It advocates payment in stages with specific events and dates triggering payment. If payment isn’t made the recourse is adjudication.

The Act, now close to 20 years old, has helped introduce stronger payment mechanisms but the issue of late payment in construction has not been solved. Reasons for this include:

- The Act most benefits those who understand the complex payment process and it can be difficult to apply in practice;
- Suppliers may be reluctant to employing the tools provided by the Act due to concerns of jeopardising long term relationships with an employer;
- The Act is being exploited, for example, by the inclusion of extremely prescriptive contractual payment provisions which seek to circumvent the Act, such as requiring significant additional requirements and condition precedents to be complied with before payment will be due.

A review of the Act has been commissioned by parliament and it remains to be seen if any amendments will address the concerns listed above.

Legislative initiatives to tackle late payment

There are a number of legislative initiatives which are in the process of being implemented to tackle the issue of late payment generally and will therefore affect the construction industry.

Small Business, Enterprise and Employment Act 2015

The Small Business, Enterprise and Employment Act 2015 provides for further regulations requiring companies to publish a report on their payment practices and procedures. This requirement will undoubtedly help with payment but it is unclear if it will cause a wholesale change in construction payment practices. Having the requirement enshrined in statute will surely help.

Secondary legislation was supposed to be introduced in April 2016 to introduce these requirements and a league table of companies and their payment practices. No legislation has been passed and it remains to be seen whether it will be.

Late Payment Directive

The Late Payment Directive (2011/7/EU) has only been implemented in part in the UK. One of its features is a right for industry bodies to challenge “grossly unfair” payment terms. To date this has yet to be implemented in legislation.

Other steps to address late Payment

Project Bank Accounts

Project Bank Accounts (PBAs) have been successful in the public sector. When a PBA is used the contractor and named members of the supply chain are paid out of a single account. PBAs provide additional certainty and transparency and the Government Construction Strategy 2016-2023 proposes an increased use in PBAs in the public sector which will hopefully result in their use in appropriate private sector projects.

Payment Charters

Payment charters like the Prompt Payment Code and the Construction Supply Chain Payment Charter have set a good benchmark but have not been used to their full potential. There is no real incentive to become a signatory and the consequences for failing to comply are not significant. If used to their full potential then payment charters can be another helpful tool in tackling late payment.

Technology

New technology and the digitisation of the construction industry could also assist in late payment. Issuing payment applications, invoices and pay less notices digitally would make the payment process transparent and would standardise the payment process.

Our view

Late payment remains an endemic issue for the construction industry. Whilst recognised as an inherent problem, with efforts being made by government and industry, the measures to improve the position must be fully embraced by the industry across the supply chain. Our advice to business remains that the best way of tackling late payment is good payment practices. That means fee proposals that are realistic, contract terms that embody a fair and sensible payment mechanism, prompt submission of applications for payments and invoices, prompt chasing for payment and taking early and effective action when payment is delayed.

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