Reconsidering Payment and Adjudication: Consultation on the 2011 Changes to the Housing Grants, Construction and Regeneration Act 1996 (the “Construction Act”)

The UK government is currently consulting on the effect of the 2011 changes to the Construction Act to consider whether these changes have met their objectives.

Industry Concerns

Beale & Company has been closely following the industry wide issue of late payment, including hosting a Round Table with a cross section of the construction industry to consider late payment. The Round Table confirmed that, although the Construction Act has improved the payment landscape, there were a number of concerns about the Construction Act’s effectiveness in solving the issue of late payment, as identified in this note. Some of the key concerns included that:

- the Construction Act was a “short term fix” to the payment process, which was diluted by the risk of an adjudicator’s award being overturned;
- a number of suppliers refused to take advantage of the Construction Act due to concerns of undermining long term relationships; and
- the Act was being circumvented through extremely prescriptive contractual payment provisions.
The consultation

In response to such industry wide concerns the UK government is undertaking a non-statutory “post implementation review” of the 2011 changes to the Construction Act.

The Construction Act consultation will run in parallel with a consultation on retentions in the construction industry, which is being undertaken due to concerns about (i) retentions being lost on main contractor insolvency, (ii) retentions being withheld under subcontracts until they are released under the main contract (contrary to the Construction Act) and (iii) unjustified late and non-payment of retentions. The retention consultation will therefore explore alternatives to retentions, such as a deposit scheme and a trust account.

Aim of Construction Act consultation

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The Construction Act aimed to ensure fair and prompt payment through the construction supply chain and to enable the effective completion of construction projects.

The consultation seeks to establish how effective the 2011 changes to the Construction Act have been in securing the objectives of:

1. encouraging parties to resolve disputes by adjudication, where appropriate;
2. increasing transparency in the exchange of information relating to payments; and
3. strengthening the right to suspend performance.

Areas covered by the consultation

The consultation considers:

1. the effectiveness of the 2011 changes to the Construction Act to (i) address the costs of adjudication, (ii) improve clarity and transparency of payment, and (iii) improve the right to suspend for non payment;
(2) the payment framework in the amended Construction Act, focussing on its complexity, effectiveness, contractual payment days, actual payment days, use of payment and pay less notices and use of adjudication; and

(3) the affordability of adjudication, its misuse and relevance, including the value of disputes, the costs of adjudication, whether adjudication is used for more complex disputes and any “abuse” of the adjudication process.

Over 50 questions are included in the consultation, which is relevant to any party to a commercial construction contract, adjudicators, arbitrators, lawyers and insolvency practitioners. The consultation closes at 11:45 p.m. on 19 January 2018. Based on the responses the government will decide what steps are required to improve the payment regime and the adjudication process.

We hope that this is a positive step towards resolving the issue of late payment and will be keeping a very close eye on the consultation as it develops. The consultation (including guidance on how to respond) can be found here – we will be taking part!

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