On 19 June 2019, the UK Government released their response to a recent call for evidence on late payments, primarily being another consultation. Whilst it is encouraging that the Government remains committed to discussing and acknowledging the key issue of late payment, we feel this was a missed opportunity to make a substantive impact. A consultation on payment “enforcement mechanisms” will be published in due course.

Kelly Tolhurst MP and the Department for Business, Energy & Industrial Strategy (BEIS) have recently released their response to the call for evidence in relation to tackling late payment that was issued on 4 October 2018, a copy of which can be found here. The call for evidence considered existing payment practices and statistics, and requested industry participants to provide examples of their late payment experiences and ideas on how to improve payment culture. What is the government’s immediate action plan in response to this call for evidence?

Firstly, another consultation. A new consultation (not yet published) will seek views on the merit of providing the Small Business Commissioner with powers to activate enforcement mechanisms against large businesses who do not comply with information requests and/or are found to have poor or unfair payment practices towards small and medium-sized enterprises (SMEs). “Enforcement mechanisms” currently being contemplated include court orders, fines, as well as the ability to impose an undertaking of binding payment plans, with further fines available if a business is in breach of the imposed payment plans.

In our view, for the issue of late payment in the construction industry to be resolved firm enforcement mechanisms and/or incentives will be required, so the suggestions of court orders and fines are encouraging.

The Government also intends to establish a ministerial group in an effort to encourage key government departments to collaborate on improving prompt payment, and the voluntary Prompt Payment Code will now fall under the remit of the Small Business Commissioner. Further Government actions include:

- taking a “tough compliance approach” to those who do not comply with the Reporting on Payment Practices and Performance Regulations 2017, which allow for fines to be imposed on those who are successfully prosecuted for non-compliance;
- launching a Business Basics Fund competition up to £1 million which will be intended to encourage SMEs to utilise payment technology;
Late payments update – Another consultation!

- working with UK Finance and the finance sector to review the role of supply chain finance in prompt payments, including the potential for a new standard for good practice in supply chain finance; and
- working with the Financial Reporting Council (FRC) in an effort to bring greater transparency to how supply chain finance is reported in company accounts and assessed in audits.

The steps to make the Small Business Commissioner responsible for the Prompt Payment Code, promote innovation and further research into supply chain finance are likely to be received positively by the industry.

However, a number of criticisms of the consultation and these plans have already been levied by senior representatives of the construction sector. For example, the Specialist Engineering Contractors Group has stated in an article by The Construction Index that they had hoped the BEIS would have committed to reducing the maximum payment terms to 30 days in accordance with the Public Contracts Regulations 2015. Maximum payment terms are currently at 60 days. In the same article, the National Federation of Builders further question the effectiveness of the BEIS’ efforts, and have stated that the response does not help the SMEs currently at risk of insolvency due to the amount of money they are owed.

Such criticisms should not come as a surprise and we share the concerns expressed. Late payment in the construction industry has been a hot topic for a significant time now and despite various government consultations, few outcomes have actually been implemented. For example, there has been very little progress following the consultation on the Housing Grants, Construction and Regeneration Act 1996 and the simultaneous consultation on retentions, both of which concluded in January 2018.

Further examples of the reluctance to commit to lasting legislative change in payment practices can be seen with the continuous delays of the second readings for the Construction (Retention of Deposit Schemes) Bill and Public Sector Supply Chains (Project Bank Accounts) Bill, with neither having been given new dates for the second readings since postponement in May.

Unfortunately, it therefore appears unlikely that any legislative steps to tackle late payment in the construction industry or generally will be brought into force in the near future. It is therefore important to seek to agree reasonable and acceptable payment provisions in all contracts and to take steps to encourage recovery of any sums outstanding beyond the agreed payment periods in an effort to manage the risk of late payment.

On 26 September 2019, we are hosting a webinar on ‘Managing payment from developers’, which will highlight the key steps to take to try and force payment following completion. To register to attend please follow the link here.

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