Session 2010/2011

First Report

Committee for Finance and Personnel

Report on the Construction Contracts (Amendment) Bill (NIA 16/09)

Together with the Minutes of Proceedings of the Committee relating to the Report, Memoranda and the Minutes of Evidence

Ordered by The Committee for Finance and Personnel to be printed 20 October 2010
Committee for Finance and Personnel

Report: NIA 09/10/11R

Committee Remit, Powers and Membership

Remit, Powers and Membership

The Committee for Finance and Personnel is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Finance and Personnel (DFP) and has a role in the initiation of legislation.

The Committee has the power to:

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Finance and Personnel.

The Committee has eleven members, including a Chairperson and Deputy Chairperson, with a quorum of five members. The membership of the Committee during the current mandate has been as follows:

Ms Jennifer McCann (Chairperson[1]
Mr David McNarry (Deputy Chairperson)[2]
Mr Paul Girvan[3] Mr Mitchel McLauglin
Dr Stephen Farry Mr Adrian McQuillan
Mr Paul Frew[4] Mr Declan O'Loan

Mr Simon Hamilton Ms Dawn Purvis
Mr Daithí McKay[5]

[1] Ms Jennifer McCann replaced Mr Mitchel McLaughlin as Chairperson on 9 September 2009.
[2] Mr David McNarry was appointed Deputy Chairperson on 12 April 2010 having replaced Mr Roy Beggs on the Committee on 29 September 2008.
[3] Mr Paul Girvan replaced Mr Jonathan Craig on 13 September 2010; Mr Jonathan Craig had been appointed as a member of the Committee on 13 April 2010. Mr Peter Weir left the Committee on 12 April 2010. Mr Peter Weir had replaced Mr Simon Hamilton as Deputy Chairperson on 4 July 2009. Mr Simon Hamilton replaced Mr Mervyn Storey as Deputy Chairperson on 10 June 2008.
[4] Mr Paul Frew joined the Committee on 13 September 2010; Mr Ian Paisley Jr left the Committee on 21 June 2010 having replaced Mr Mervyn Storey on 30 June 2008.
[5] Mr Daithí McKay replaced Mr Fra McCann on 13 September 2010.

List of Abbreviations and Acronyms used in the Report

BERR Department for Business, Enterprise and Regulatory Reform
BIS Department for Business, Innovation and Skills
CFP Committee for Finance and Personnel
CIC Construction Industry Council
CIFNI Construction Industry Forum for NI
CoPES Centres of Procurement Expertise
CPD Central Procurement Directorate
CUBATG Construction Umbrella Bodies Adjudication Task Group
DETI Department of Enterprise, Trade and Investment
DFP Department of Finance and Personnel
DTI Department of Trade and Industry
EQIA Equality Impact Assessment
GB Great Britain
HGCR Act Housing Grants, Construction and Regeneration Act 1996
IDBR Inter Departmental Business Register
JCT Joint Contracts Tribunal
LDEDC Act Local Democracy, Economic Development and Constructions Act 2009
LFS Labour Force Survey
MLA Member of the Legislative Assembly
MP Member of Parliament
NI Northern Ireland
NIABA Northern Ireland Annual Business Inquiry
RIA Regulatory Impact Assessment
SME Small to Medium Sized Enterprises
UK United Kingdom

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Executive Summary

Legislation relating to construction contracts in Northern Ireland closely mirrors similar legislation in Great Britain. Following amendments to the GB Housing Grants, Construction and Regeneration Act 1996, the Department of Finance and Personnel has introduced the Construction Contracts (Amendment) Bill to maintain parity.

The Construction Contracts (Amendment) Bill, which was introduced to the Assembly by the Minister of Finance and Personnel on 26 April 2010, comprises nine clauses. Following its Second Stage in the Assembly on 17 May 2010, the Bill was referred to the Committee for Finance and Personnel for Committee Stage. The Committee issued a public call for evidence, commissioned Assembly Research, and received oral briefings from Department of Finance and Personnel officials on the provisions of the Bill.

During the evidence sessions with the departmental officials the Committee sought clarification on a number of matters including the impact of the House of Lords judgement in the case of Melville Dundas vs. Wimpey. On this and other matters the Department provided detailed responses to which the Committee was content. No responses were received to the Committee's public call for evidence.

To conclude, there were no concerns raised during the Committee Stage with any of the provisions in the Bill and the Committee is content with the Bill as drafted.

Introduction

Background

1. The Construction Contracts (Amendment) Bill was introduced to the Assembly by the Minister of Finance and Personnel on 26 April 2010 and received its Second Reading on 17 May 2010,

when it was subsequently referred to the Committee for Finance and Personnel for Committee Stage. The Bill has nine clauses and the provisions of each clause are explained in the Explanatory and Financial Memorandum.[1]

Purpose of the Bill

2. The Bill replicates as closely as possible the originating legislation in GB, namely the amendments to Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (HGCR Act).[2] These amendments are set out in Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act)[3] which received Royal Assent in November 2009. The reforms aim to further improve payment practices and address restrictions with regard to access to adjudication of contractual disputes in the construction industry.

The Committee's Approach

3. The Committee was actively involved in examining the policy intentions behind the provisions of the Bill at an early stage in the development of the legislation. Members received a briefing from Department of Finance and Personnel officials on the draft proposals to amend the Construction Contracts Order (NI) 1997 and the Scheme for Construction Contracts in NI Regulations (NI) 1999 (the Scheme) at its meeting on 4 June 2008. Departmental officials also briefed the Committee in September 2009 on the outcome of the public consultation on the draft proposals. Members subsequently received a pre-introductory briefing on the Construction Contracts (Amendment) Bill on 21 April 2010. The Bill received its First Reading in plenary on 26 April 2010, and passed its Second Reading on 17 May 2010.

4. A public notice was placed in the main provincial newspapers on 19 May 2010, following the commencement of Committee Stage, inviting written evidence on the provisions in the Bill. The Committee also notified a number of key stakeholders who had responded to the Department's earlier consultations.

5. Given the pressure on its work programme, the Committee sought Assembly approval to extend the Committee Stage to 26 November 2010. The Assembly granted approval and the Chairperson assured the House that the Committee would endeavour to complete its work well in advance of that date.

6. The Committee received no written evidence (other than the papers provided by DFP) and there were no comments made on any of the clauses during the Committee's public call for evidence. Over summer recess, Assembly Research prepared a briefing paper which examined the outcome of the consultation on the corresponding legislation in GB. The aim of this research was to establish whether there were any issues raised in the GB consultation which could be of potential relevance in NI.

7. The research paper was issued to DFP for a response, which was considered during a final evidence session with departmental officials on 15 September 2010. The only issue where it appeared that consultation responses were in disagreement was in relation to a House of Lords judgement in the case of Melville Dundas Ltd (in receivership) and others v. George Wimpey UK Ltd and others: [2007] UKHL 18. This is discussed further in the consideration of the provisions within the Bill.

8. Prior to the clause-by-clause scrutiny the Committee received written clarification from DFP on how revisions to the Scheme might impact on the current Construction Contracts (Amendment) Bill and how progress on the Scheme would be affected by progress on amending the GB Scheme in Parliament.

9. Departmental officials advised that it will be necessary to amend the NI Scheme before the planned Construction Contracts (Amendment) Act could become effective, and DFP would carry out a further public consultation on these proposals. In pursuit of the objective of maintaining parity of legislation with GB, the proposals for the NI Scheme cannot be finalised until the precise changes have been agreed in respect of the GB Scheme. However, DFP officials further advised that there is no anticipated significant effect on the proposed timing of the passage of the NI Bill.

10. The Minutes of Proceedings relating to the Committee's deliberations on the Bill are included at Appendix 1. Copies of the Official Reports of the oral evidence sessions are at Appendix 2. Follow up memoranda including the written responses from DFP to queries raised by the Committee are at Appendix 3. Finally Appendix 4 includes a research paper provided by the Assembly Research and Library Services to assist the Committee's deliberations.

Consideration of the Provisions within the Bill

11. During the clause-by-clause scrutiny of the Bill the Committee agreed all the clauses and the Long Title without the need to propose amendments. The commentary below, however, summarises the main issues which the Committee raised as part of its wider consideration of the provisions in the Bill, including the clarification and assurances provided by DFP.

Parity Issue

12. Throughout the policy consultation process and again during the pre-legislative scrutiny, departmental officials advised members that there was strong support from respondents to the consultation exercises for maintaining parity in law across the UK. Members were content therefore that the Department's approach of replicating provisions contained in the GB legislation was appropriate.

Clause 1 – Requirement for construction contracts to be in writing

13. At policy consultation stage and also during pre-legislative scrutiny members expressed concerns that the introduction of this clause might encourages parties not to use written contracts at all. However, during evidence sessions, departmental officials advised that, while contracts between two parties start out in writing, changes during the course of the contract are often made through oral agreements. The Committee was assured that the introduction of this provision was to aid the adjudication process, which can currently be hamstrung because the adjudicator does not have the power to consider disputes because contracts were not wholly in writing. Furthermore, the respondents to the DFP consultation were unanimous in their support for this proposal and consequently departmental officials did not foresee that this provision would lead to a move away from written contracts.

Clause 2 – Power to disapply provisions of the 1997 Order

14. During the clause-by-clause scrutiny members questioned DFP officials on the need for the power provided in Clause 2. The DFP officials explained that the Bill introduces the ability for the Department to disapply part, or all, of the 1997 Order from a particular class of construction contract. The change will mean that many of the Order's features continue to apply while giving the Department flexibility to deal with any specific issues of direct concern.

Clause 5 – Determination of payments due

15. During the clause-by-clause scrutiny members raised concerns about how this clause might be enforced, highlighting the difficulties faced by sub-contractors when the benefits of prompt payment are not passed on by main contracting parties. Departmental officials advised that the main scheme for construction contracts allows for subcontractors to ask for payments to be made under its provisions. However they did recognise that there could be a perceived risk to a subcontractor if it tries to take on a main contractor in this way.

16. DFP officials further advised that this matter is under consideration by the Construction Industry Forum for NI (CIFNI) and that, in respect of public sector contracts, measures are being put in place whereby project managers will seek information from the main contractor on what payments have been made to subcontractors. The project manager will also have the power to undertake periodic checks to verify this information. Related correspondence from DFP advised the Committee that these measures will be included in new construction works contracts tendered after 1 March 2010 which will require the main contractor to comply with a revised "Code of Practice for Government Construction Clients and their Supply Chains" and includes a "Fair Payment" Charter.

Clause 7 – Requirement to pay notified sum

17. During their deliberations members sought further written clarification from DFP on its approach to the House of Lords judgement in the case of Melville Dundas vs. Wimpey, the one area of disagreement amongst respondents to its consultation. The respondents to DFP's consultation on the draft Bill were divided on the proposal that Article 10 of the Construction Contracts Order (which corresponds with Section 111 of the HGCR Act 1996) should not apply in cases of insolvency, but should apply in other cases.

18. DFP officials assured the Committee that, in proposing the provisions of Clause 7, the Department was seeking to provide a balanced view following the outcome of the House of Lords ruling.

Regulatory Impact Assessment

19. During pre-legislative scrutiny members noted that the Explanatory and Financial Memorandum states that it "is also expected that the proposed amendments to the payment provisions will reduce the administrative burden on businesses and provide greater statutory protection to small and medium-sized businesses trading with larger commercial concerns".

20. Departmental officials went on to clarify that this conclusion had been reached based on methodology used by the previous Whitehall Department for Business, Enterprise and Regulatory Reform (BERR) in its own consultation on these proposals. The volume of construction throughput in GB was compared with throughput for NI to reach a pro rata figure on the notional savings on litigation costs arising from the increased accessibility to adjudication.

[1] http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm

[2] http://www.legislation.gov.uk/ukpga/1996/53/part/II

[3] http://www.legislation.gov.uk/ukpga/2009/20/pdfs/ukpga_20090020_en.pdf

Appendix 1

Minutes of Proceedings

Wednesday, 4 June 2008
Senate Chamber, Parliament Buildings

Present: Mitchel McLaughlin MLA (Chairperson)
Mervyn Storey MLA (Deputy Chairperson)
Roy Beggs MLA
Dr Stephen Farry MLA
Simon Hamilton MLA
Fra McCann MLA
Jennifer McCann MLA
Dawn Purvis MLA
Peter Weir MLA

In Attendance: Shane McAteer (Assembly Clerk)
Vivien Ireland (Assistant Assembly Clerk)
Colin Jones (Assistant Assembly Clerk)
Paula Sandford (Clerical Supervisor)
Chris McCreery (Clerical Officer)

Apologies: Adrian McQuillan MLA
Declan O'Loan MLA

10.08 am The meeting commenced in open session

6. Construction Contracts Bill: Policy Consultation – Evidence from DFP

The Committee took evidence from the following DFP officials: Robin McKelvey, Construction Initiatives Branch, Central Procurement Directorate and Gary McCandless, Acting Deputy Director, Central Procurement Directorate. The session was recorded by Hansard.

Wednesday, 30 September 2009
Room 152, Parliament Buildings

Present: Jennifer McCann MLA (Chairperson)
Dr Stephen Farry MLA
Mitchel McLaughlin MLA
David McNarry MLA
Declan O'Loan MLA
Adrian McQuillan MLA

In Attendance: Shane McAteer (Assembly Clerk)
Kathy O'Hanlon (Assistant Assembly Clerk)
Karen Jardine (Assistant Assembly Clerk)
David McKee (Clerical Supervisor)

Apologies: Peter Weir MLA (Deputy Chairperson)
Simon Hamilton MLA

Fra McCann MLA
Ian Paisley Jr MLA
Dawn Purvis MLA

10.12 am The meeting commenced in open session.

5. Consultation Report on Construction Contracts Bill (DFP Evidence Session)

The Committee took evidence from Robin McKelvey, Construction Initiatives Manager, Central Procurement Directorate (CPD), DFP and Stewart Heaney, Deputy Director, Construction Advisory Division, DFP. The session was recorded by Hansard.

Agreed: that the DFP officials will provide information as requested by the Committee during the evidence session.

Wednesday, 4 November 2009
Room 135, Parliament Buildings

Present: Jennifer McCann MLA (Chairperson)
Peter Weir MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Simon Hamilton MLA
Fra McCann MLA
Mitchel McLaughlin MLA
David McNarry MLA
Adrian McQuillan MLA
Declan O'Loan MLA
Ian Paisley Jr MLA
Dawn Purvis MLA

In Attendance: Shane McAteer (Assembly Clerk)
Karen Jardine (Assistant Assembly Clerk)
Kathy O'Hanlon (Assistant Assembly Clerk)
David McKee (Clerical Supervisor)
Kevin Marks (Clerical Officer)

10.09 am The meeting commenced in open session.

9. Correspondence

The Committee noted the following correspondence:

- DFP: Follow up to Construction Contracts Bill evidence session on 30 September 2009.

Wednesday, 21 April 2010
Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry (Deputy Chairperson)

Mr Jonathan Craig MLA
Dr Stephen Farry MLA
Mr Fra McCann MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

10.07am The meeting commenced in open session.

4. Construction Contracts Bill – Pre-Introductory Briefing (DFP Briefing)

The Committee received a pre-introductory briefing on the Construction Contracts Bill from the following DFP officials: Stewart Heaney, Divisional Director, Construction and Advisory Division, Central Procurement Division; and Robin McKelvey, Construction Initiatives Manager, Central Procurement Division.

The evidence session was recorded by Hansard.

11.45am Mr McQuillan left the meeting.

11.46am Mr McNarry left the meeting.

11.52am Mr McNarry returned to the meeting.

11.59am Mr McCann left the meeting.

12.05pm The Chairperson left the meeting.

12.05pm The Deputy Chairperson took the Chair.

12.12pm The Chairperson returned to the meeting and resumed the Chair.

Agreed: the Committee approved a draft press notice regarding public consultation on the Bill, for issue upon the Bill's referral to the Committee.

Wednesday, 26 May 2010
Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry (Deputy Chairperson)
Mr Jonathan Craig MLA
Dr Stephen Farry MLA
Mr Simon Hamilton MLA

Mr Fra McCann MLA
Mr Adrian McQuillan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

Apologies: Mr Mitchel McLaughlin MLA
Mr Declan O'Loan MLA

10.13 am The meeting commenced in open session.

11. Correspondence

The Committee agreed to take agenda item 9 next and considered the following correspondence:

- DFP: Reply to issues raised by Committee regarding Construction Contracts Bill;

Wednesday, 15 September 2010
Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Miss Karen Jardine (Assistant Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)

10.05 am The meeting commenced in open session.

5. Construction Contracts (Amendment) Bill – Research Briefing

Members received a briefing from Assembly Research on the Construction Contracts (Amendment) Bill.

11.47am Ms Purvis returned to the meeting.

6. Construction Contracts (Amendment) Bill – DFP Evidence Session

The Committee took evidence from the following DFP officials: Stewart Heaney, Divisional Director Construction and Advisory Division, Central Procurement Directorate; and Robin McKelvey, Construction Initiatives Manager, Central Procurement Directorate. The evidence session was recorded by Hansard.

11.48am Mr McNarry left the meeting.

Wednesday, 29 September 2010
Room 30, Parliament Buildings

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

Apologies: Mr Mitchel McLaughlin MLA
Ms Dawn Purvis MLA

10.03 am The meeting commenced in open session.

6. Construction Contracts (Amendment) Bill Clause-by-Clause Scrutiny

The following DFP officials provided advice to the Committee during this session: Stewart Heaney, Divisional Director, Construction and Advisory Division, Central Procurement Directorate (CPD); and Robin McKelvey, Construction Initiatives Manager, CPD.

10.47am Mr McNarry left the meeting.

10.49am Mr Hamilton returned to the meeting.

The Committee undertook its formal clause-by-clause scrutiny of the Construction Contracts (Amendment) Bill as follows:

Long Title

Question: That the Committee is content with the Long Title of the Bill, put and agreed to.

Clause 1 – Requirement for construction contacts to be in writing

Clause 2 – Power to disapply provisions of the 1997 Order

Clause 3 – Adjudicator's power to make corrections

Clause 4 – Adjudication costs

10.55am Mr McNarry returned to the meeting.

Clause 5 – Determination of payments due

In response to concerns raised by a number of members, the DFP officials clarified the position regarding the payment of sub-contractors.

Agreed: that DFP correspondence previously considered by the Committee on this issue is provided to Mr Girvan, Mr Frew and Mr McKay.

Clause 6 – Notices relating to payment

Clause 7 – Requirement to pay notified sum

Clause 8 – Suspension of performance for non-payment

Clause 9 – Short title and commencement

Question: that the Committee is content with clauses 1 to 9 put and agreed to.

Wednesday, 20 October 2010
Parliament Buildings, Stormont

Present: Ms Jennifer McCann MLA (Chairperson)
Mr David McNarry MLA (Deputy Chairperson)
Dr Stephen Farry MLA
Mr Paul Frew MLA
Mr Paul Girvan MLA
Mr Simon Hamilton MLA
Mr Daithí McKay MLA
Mr Mitchel McLaughlin MLA
Mr Adrian McQuillan MLA
Mr Declan O'Loan MLA
Ms Dawn Purvis MLA

In Attendance: Mr Shane McAteer (Assembly Clerk)
Mrs Kathy O'Hanlon (Assistant Assembly Clerk)
Mr David McKee (Clerical Supervisor)
Mr Dominic O'Farrell (Clerical Officer)
Mr Gareth Brown (Bursary Student)

10.05am The meeting commenced in open session.

8. Construction Contracts (Amendment) Bill – Consideration of Draft Report

The Committee undertook paragraph-by-paragraph consideration of its draft Report on the Construction Contracts (Amendment) Bill.

Agreed: that paragraphs 1 – 2 stand part of the Report;

Agreed: that paragraphs 3 – 6 stand part of the Report;

Agreed: that paragraphs 7 – 10 stand part of the Report;

Agreed: that paragraphs 11 – 12 stand part of the Report;

Agreed: that paragraphs 13 – 20 stand part of the Report, with a minor amendment to paragraph 14;

Agreed: that the Executive Summary stands part of the Report;

Agreed: that the Appendices stand part of the Report;

Agreed: that the extract of the unapproved Minutes of Proceedings of today's meeting is checked by the Chairperson and included in Appendix 1.

Agreed: that the Report, as amended, be the First Report of the Committee for Finance and Personnel to the Assembly for session 2010/11;

Agreed: that the Report on the Construction Contracts (Amendment) Bill be printed.

Members noted that, in line with normal protocol, a typescript copy of the Report will be issued to DFP and two typescript copies will be laid in the Business Office in advance of printed copies being made available.

Appendix 2

Minutes of Evidence

4 June 2008

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)
Mr Mervyn Storey (Deputy Chairperson)
Mr Roy Beggs
Mr Simon Hamilton
Mr Fra McCann
Ms Jennifer McCann
Ms Dawn Purvis
Mr Peter Weir

Witnesses:

Mr Robin McKelvey
Mr Gary McCandless Department of Finance and Personnel

1. The Chairperson: Michael, thank you very much for appearing before the Committee today.

2. The next item on the agenda is consultation on the construction contracts Bill policy. I refer members to the DFP paper in their folders. Officials will brief the Committee on the proposals in advance of the public consultation. I welcome Mr Robin McKelvey from the construction initiatives branch of the central procurement directorate of the Department of Finance and Personnel; and Mr Gary McCandless, who is the acting deputy director of the central procurement directorate. I remind everyone that the session is being recorded by Hansard and that mobile phones should be switched off entirely as they interfere with the recording equipment.

3. Gentlemen, I welcome you to the meeting, and I invite you to make your preliminary remarks.

4. Mr Gary McCandless (Department of Finance and Personnel): Chairperson, thank you very much for giving us the opportunity to brief the Committee on this proposal. I will hand over to my colleague Robin McKelvey, who has researched this matter and produced the detailed proposal.

5. Mr Robin McKelvey (Department of Finance and Personnel): Good morning. We wish to amend the provisions of the Construction Contracts (Northern Ireland) Order 1997 and its associated Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999. For the sake of brevity, I will refer to this legislation as the Order and the Scheme.

6. The Order is the Northern Ireland version of part II of the Housing Grants Construction and Regeneration Act 1996, known in Great Britain as the Construction Act. The Construction Act had originally been brought into being to promote greater collaboration and integrated teamwork in the construction industry and to reduce the adversarial climate for which it had become notorious. Adjudication for the speedy resolution of disputes, together with measures to establish a regime to ensure proper payment, were implemented in GB in 1998. The provision of similar measures for Northern Ireland followed by way of the 1997 Order, which became effective in June 1999.

7. However, it was not long before it became obvious that some amendment to the Act and, therefore, to the Northern Ireland Order was necessary. At the heart of this proposal to launch a public consultation in Northern Ireland is the intention to amend the legislation in England and Wales and in Scotland, which arose from the conclusions of the various consultations conducted by the Department for Business, Enterprise and Regulatory Reform (BERR), and its predecessor, the Department of Trade and Industry (DTI), as well as a separate exercise that was carried out by the Scottish Government.

8. Interest in the need to amend the legislative position at that time was not confined to GB. Several MLAs wrote to the right honourable Gordon Brown in January 2006 to express their concerns about payment difficulties being experienced by small and medium-sized enterprises in the construction industry here. Their correspondence urged the former DTI, now BERR, to address those difficulties in its review of the Construction Act. The central procurement directorate of the Department of Finance and Personnel, which closely monitored the outcome of the review, undertook to consult fully on any draft proposals to amend Northern Ireland legislation.

9. That review of the Construction Act had been triggered by an announcement in the 2004 Budget. Nigel Griffiths, the then Parliamentary Under-Secretary of State for Construction, Small Business and Enterprise, asked Sir Michael Latham to undertake the review. Sir Michael's report, which was published in September 2004, concluded that although the Construction Act was generally working well, some improvements to it would be helpful. According to various industry surveys, poor payment practices continued to be a major source of concern for many in construction. In March 2005, DTI — which has been known as BERR since June 2007 — and the National Assembly for Wales jointly published a first consultation paper, entitled 'Improving payment practices in the construction industry'.

10. In January 2006, DTI issued its consultation analysis, in which it set out a proposed way forward. During the remainder of 2006, members of an industry sounding board appointed by DTI and working with Sir Michael Latham developed detailed proposals. Following on from those discussions, a second consultation document — jointly for England and Wales — was issued in June 2007, which proposed reconsidered amendments to the Construction Act. However, those amendments would affect England and Wales only.

11. The Construction Act also applies to Scotland, where policy responsibility for it is a matter for the Scottish Executive. Any amendments that affected Scotland would have to be agreed by the Scottish Parliament. Our proposals embody the Construction Act and those preceding GB consultations, and, as in GB, represent proportional amendment to existing legislation rather than wholesale change.

12. We propose further to encourage parties in dispute over construction contracts to resolve their differences through adjudication, where appropriate, rather than resorting to more costly and time-consuming solutions, such as litigation. We propose to improve transparency and clarity in the exchange of information relating to payments, to enable better management of cash flow and to improve the facility to suspend performance under the contract.

13. Our proposals will improve access to the right to refer disputes for adjudication by applying the legislation to oral and partly oral contracts; prevent the use of agreements that interim payment decisions will be conclusive in order to avoid adjudication on interim payment disputes; and ensure that the costs involved in the process are fairly allocated.

14. I will now move to the subject of payments. Our proposals will prevent unnecessary duplication of payment notices; clarify the requirement to serve a payment notice; clarify the content of payment and withholding notices; ensure that the payment framework creates clear interim entitlement to payment; and prohibit the use of "paid when certified" clauses.

15. On the question of suspension, we propose to improve the statutory right to suspend performance by allowing the suspended party to claim the resulting costs of delay.

16. Guidance, however, remains the preferred route to improving the operation of construction contracts. We have considered further legislative intervention only where we believe it to be absolutely necessary. Through the consultation process, we are seeking the views of the construction industry and its clients in Northern Ireland on whether our package of proposals, which closely mirrors the proposals developed to date in GB, addresses properly and adequately the perceived weaknesses in the framework. We also want to determine how best to evaluate the cost and benefits of the package.

17. Although responsibility for part 11 of the Housing Grants, Construction Regeneration Act 1996 has been transferred to Northern Ireland and to the Scottish Government, the four Administrations should work together, where possible, to minimise divergences. Our proposed

consultation will also seek the views of the industry and the wider public on the need or desirability of minimising divergence across the United Kingdom.

18. I will now move to the issue of partial regulatory impact assessment. Disputes over construction contracts often jeopardise the effective delivery of projects on time and within budget. They can also threaten the viability of businesses and collectively damage the longer-term health of the construction industry as a whole. Our proposals seek to improve the statutory framework set out under the Construction Contracts Order (Northern Ireland) 1997 to reduce the incidence and impact of disputes; the proposals have been conceived to introduce a better, more focused and effective regulatory framework. Bearing in mind the importance of the construction industry to Northern Ireland's economy, it is essential that it be enabled to operate as efficiently as possible.

19. One of the alternative options available was to maintain the legislation as it stands and take forward a voluntary process of improving construction contract and payment practices through guidance only. It is, after all, acknowledged that Government and all parts of the construction industry here generally have a good track record of working together to improve adjudication. Developing proposals to amend legislation on adjudication as well as suggestions for areas of further guidance would be helpful. BERR has striven to maintain and build on existing positive relationships.

20. Several issues were considered throughout the review process, where it was decided that to do nothing was the best option; however, other issues remained. Therefore, in developing the payment and adjudication proposals, BERR and the Department of Finance and Personnel have chosen to go down the targeted regulation route and to intervene where it is clear that the legislation is not meeting the original objectives effectively and guidance on its own is not felt to be sufficient.

21. However, we seek to fine-tune rather than to reinvent the existing statutory framework. Through this approach we have identified a package of legislative measures to target specific weaknesses and to improve the clarity and operational effectiveness of the legislation. Many of the measures are technical and have low regulatory impact.

22. The other option, which we rejected, is that of extensive regulatory intervention. As a review of the Construction Act progressed, some proposals were suggested which, in BERR's view — a view with which we concur — would undermine the compromises that were reached in 1997 and would fundamentally alter the statutory framework.

23. Throughout our review, we wish to remain mindful of the finely balanced compromise that distinguished the original legislation. Our guiding premise, therefore, has been to intervene only when it has been considered that the legislation has been shown not to have delivered its original objective. We propose to intervene only in such ways as do not undermine the structure of the legislation. The proposals are targeted to fine-tune the statutory framework. We consider that following a more regulatory route would be fundamentally to change the Construction Order and the contracts that it regulates. At the very least, that would impose considerable transitional burdens on the industry and its customers.

24. We have encountered difficulty in obtaining data on the incidence and cost of adjudication and enforcement proceedings in Northern Ireland. In order to consider the regulatory impact of our proposals, we had to examine GB data and to extrapolate as appropriate. On adjudication, our calculations tentatively suggest that modest benefits to the industry might accrue by reducing the average cost of adjudication, and enforcement proceedings when required, of the order of £170 per adjudication and £100 for every enforcement proceeding. Although the revised payment framework will improve communication between the parties, enable cash to flow

through the supply chain to improve liquidity, reduce the costs of servicing debt and enable the parties to address problems and give grounds for withholding payment, we estimate that its operation might generate marginal savings to the industry in Northern Ireland of some £170,000 per annum.

25. The broader benefit of the new framework, however, is the creation of clear entitlements to payment, which may be reviewed at adjudication in an arrangement that is comparable to interim certification under many standard forms of construction contract. That will enable disputes to be resolved early in any given payment period. That improvement will reduce financial costs for payer and payee and prioritise the need for payment to crystallise and change hands at an early stage rather than being delayed by the determination of the amount legally payable irrespective of the delay. That is of considerable benefit to the industry and to its customers.

26. It is difficult to quantify the savings to the construction industry and its clients with regard to reducing costs and increasing productivity and efficiency. However, research recently commissioned by the Office of Government Commerce in support of the Fair Payment Charter indicated that improvements to the payment framework to ensure that contracts could clear the time and entitlement syndrome payment are estimated to save between 1% and 1·5% of the average project cost. Reflecting that across construction in Northern Ireland would represent potential savings of £3·25 million to £5 million per annum.

27. Our quality impact assessment policy has been developed having due regard to the need to promote equality of opportunity among the nine categories of persons defined in section 75 of the Northern Ireland Act 1998. Our pre-consultation among interested bodies in the industry did not identify any expected impact on any of the section-75 groups. Our proposed full consultation will seek the views of the wider public, interested individuals and groups in order to canvass any other views on the relative impact of our proposals on section-75 groups.

28. The proposed amendments to the Order affect contracts between businesses and self-employed individuals. They will apply equally to all businesses and individuals from all ethnic and age groups and to men and women alike. Our proposals are unlikely to have greater impact on one group over another. The proposed amendments all put in place some degree of regulatory reform that will reduce burdens by improving the operation of the legislation, ensuring greater clarity and transparency and by reducing disincentives to use adjudication where appropriate.

29. The proposed amendments will also help to maintain a level playing field in a competitive market with a large proportion of small firms and will underpin best practices in the industry. The amendments will thus enable contractors to plan cash flow better, address instances of poor performance and potentially improve liquidity by reducing the costs of servicing debt. They are intended to benefit small businesses in particular.

30. Competition assessment shows that the construction industry is already extremely competitive. There is no dominant firm is the construction sector, and competition is healthy to the point of sometimes being extremely fierce and even affecting profitability. Many firms report low margins. Similarly, there is no small key group of dominant firms in any sub-sector, other than perhaps some small specialist interests. The legislation does not set up barriers to entry to any sectors or to the construction industry, and it is unlikely to affect the size or number of firms; however, it may reduce the churn that is brought about by the combination of insolvencies and new firms being established.

31. The Chairperson: Robin, how much more time do you require for your presentation?

32. Mr McKelvey: I am finishing now.

33. With the Committee's approval to proceed, the Department intends to launch consultation as soon as possible. Since the consultation period might take place during the summer, we propose to extend it from 12 weeks to at least 14 weeks.

34. Ms Purvis: Thank you for your presentation. I have a couple of points of clarification. I am not familiar with the legislation, and I take your point that you are trying to improve the adjudication process and the payments process. Does the payment process include transactions between those who have exchanged contracts for work where difficulties may arise with, for example, the quality of workmanship or the late delivery of the product?

35. Mr McKelvey: Non-performance under contract could give rise to the payer seeking to issue a withholding notice. Contracts will provide for certain amounts of money to be paid at different stages during the course of a contract; however, withholding notices can be issued where there has been a breakdown in performance. The legislation is geared to affect parties to construction contracts rather than having any effect on Government.

36. Ms Purvis: You mentioned adjudication as a key issue. You said that adjudicators were often challenged because an entire contract was not in writing and that there was a proposal to delete article 6 of the Construction Contracts (Northern Ireland) Order 1997 that contracts must be in writing. Surely the opposite is true: having the full contract in writing protects both parties.

37. Mr McKelvey: I appreciate the point. However, the difficulty with building contracts, which are frequently complex, is that although a contract may start off in writing, the many changes to it during the course of the construction work may not be in writing. Many jurisdictional challenges have been made to adjudications because something that started off in writing did not end up in writing and, therefore, the adjudicator had no authority to act. Cases with plenty of merit on behalf of the referrer have been thrown out when they reached adjudication on the technicality that not enough of the material points were in writing. The proposal to delete that requirement is intended to broaden the adjudicator's role to deal with all aspects of contracts.

38. Ms Purvis: Is there no way of broadening the adjudicator's role other than by removing article 6?

39. Mr McKelvey: I do not think so. During the first consultation, which was carried out by the former Department of Trade and Industry, there was no such provision. There was a firm intention to ensure that all contracts, to be fair to adjudication, would have to be in writing. As a result of the second consultation, and in the operation of the sounding board that DTI published afterwards, the proposal was broadened to include oral or partly oral contracts.

40. Ms Purvis: Does that apply solely to the adjudication process?

41. Mr McKelvey: Yes.

42. The Chairperson: That seems to be a recipe for increasing the number of disputes.

43. Mr McKelvey: It can certainly cause difficulty for the adjudicator to work out the basis of the agreement or the material points to which the parties agreed. However, at least it removes the problem of a worthy case being dismissed on a technicality.

44. The Chairperson: I understand how that problem could arise and that one response to it is to delete article 6. However, another response would have been to require written agreement on any additional works so that a written contract would form the basis for any possible adjudication process. Why was that not considered? If additional works were required, the

original contract could be amended to include them and it would be signed off by both parties. That would provide a legal basis for dispute resolution.

45. Mr McKelvey: That might be considered good practice, but it is not the custom and practice across the industry. The amendment results directly from the public consultation. If the same public consultation were to be carried out in Northern Ireland, it would be interesting to see the reaction that it might generate among consultees here.

46. The Chairperson: Should the consultation not give people options and let them make a judgement on which option represents best practice?

47. I know the issues and the history of the industry — people like to leave themselves plenty of wriggle room. However, I envisage endless disputes and endless adjudication in the future.

48. Ms Purvis: Does the amendment relate to the adjudication process rather than to the written contract? One can still have a written contract, but it cannot be used as an excuse not to enter the adjudication process. Is that correct?

49. Mr McKelvey: Yes.

50. The Chairperson: Yes. However, the adjudication process is being hamstrung by a legal technicality that is being used to challenge the remit of the adjudicators, which is the use of oral agreements. Is that correct?

51. Mr McKelvey: Construction is a complex business, especially considering the length of some supply chains and the informality at the lower end of such chains that involve smaller contractors and suppliers. That is the real point.

52. There was some concern that the provision would encourage people to make more oral contracts. Apparently, however, that has not been the case.

53. Mr Storey: Paragraph 9 of your written submission referred to proposals to have a statutory framework in place for adjudication costs. How do cost and expenses of the parties involved compare to the costs involved in small claims court cases or the normal dispute process?

54. Mr McKelvey: I cannot give you a specific answer. Adjudication, as an alternative dispute resolution method, is reputed to be much cheaper than any other.

55. If it is a small claim, and the issues are clear, the small claims court may suffice. However, that is intended to provide what has been described as a “quick and dirty solution" to a particular type of dispute.

56. The Chairperson: Is that a legal term?

57. Mr McKelvey: [Inaudible due to mobile phone interference.]

58. The Chairperson: Someone has not turned off their mobile phone.

59. Mr Storey: Paragraph 10 of your submission refers to the “sum due". Does that amount include additional works carried out by the payee due to unforeseen circumstances, emergencies or delays?

60. Mr McKelvey: It may; it depends on the form of contract being used and what provision exists in it for variation. The intention is to ensure that every contract includes a provision to calculate the sum due at any stage. If the contract does not contain sufficient provision to meet the conditions that are described in the Order, the scheme for construction contracts will provide a default provision specifying mandatory rules, which have a statutory basis. Those rules are so rigorous that people usually try to provide their own, rather than relying on the default provision.

61. Mr Weir: Thank you for your presentation. You mentioned that the next step is consultation, the likely result of which will be fine-tuning of the current system; indeed, that is the preferred option. What are the time frames for the consultation and the implementation of its result?

62. Mr McKelvey: We expect the public consultation to take place over the summer. As I mentioned, we want to extend the minimum consultation period to allow for people being away on trade holidays and so forth. After that, we will analyse the results of the consultation and ensure that whatever changes we had intended reflect properly what people want. The first draft is then provided to the Office of the Legislative Counsel, and finally the draft legislation is introduced to the Assembly.

63. Mr Beggs: You said that you propose to go out to consultation shortly. Has consultation already taken place in GB, or will that happen at the same time as here?

64. Mr McKelvey: We have the benefit of being able to look at two consultations in England and Wales and another that took place in Scotland. The Scottish consultation largely mirrored the second in England and Wales. Therefore, the Department can draw on the distillation of three separate consultations, the results gleaned from DTI's sounding board — which comprised prominent figures in the industry — and we can ask client groups to provide further advice on the proposals that formed the basis of the second consultation.

65. Mr Beggs: I imagine that it will be much more interesting when the Committee examines the responses to the consultation. You said that there are large numbers of vexatious challenges to adjudicators' appointments. How many are there?

66. Mr McKelvey: That is one of the questions that the consultation document seeks to answer. It is difficult to find the specific number of requested adjudications. We are working on the basis that anecdotal evidence suggests that a substantial number of adjudications fail because there is a question over the jurisdiction of the challenge and because too few cases are submitted in writing. Several cases have gone to court for appeal, and the growing body of case law establishes that.

67. Mr Beggs: We know that construction bodies and so on will represent their members, but who will represent the consumers in the consultation? Will the Consumer Council represent them?

68. Mr McKelvey: The Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 — which apply to groups across the construction industry — allow for many parties to the disputes to be members of the same team.

69. Organisations such as the Government Construction Clients' Group will also be interested in the public consultation. Indeed, we expect many interested parties to participate.

70. Mr Beggs: I appreciate that it is a complicated subject. Although it would be nice to have everything clarified in writing for every amendment, the nature of the construction industry and the fact that modifications have to pass through several hands would result, I suspect, in

worksites being closed down until such legal agreements were finalised. Therefore, I understand that it is a complex and messy issue, and I look forward to receiving further information following the consultation.

71. The Chairperson: That concludes the question session. I thank both witnesses for steering us through what is a complicated process. I am sure that for some — particularly those who are administering it — it must also be an ageing process. We look forward to both the consultation and its outcome. There may be issues that arise from that process, and perhaps we will talk again or correspond on those as the consultation concludes.

30 September 2009

Members present for all or part of the proceedings:

Ms Jennifer McCann (Chairperson)
Dr Stephen Farry
Mr Mitchel McLaughlin
Mr David McNarry
Mr Adrian McQuillan
Mr Declan O'Loan

Witnesses:

Mr Robin McKelvey Mr Stewart Heaney	Department of Finance and Personnel

72. The Chairperson (Ms J McCann): I welcome Robin McKelvey, construction initiatives manager in the Central Procurement Directorate (CPD), and Stewart Heaney, deputy director of the construction advisory division. We are running late today, so please keep your introductory remarks short because members may have questions to ask.

73. Mr Robin McKelvey (Department of Finance and Personnel): I take it that everybody has seen a copy of the report on the responses.

74. The Chairperson: It has been included in members' packs.

75. Mr McKelvey: I am not sure whether you wish me to go into any detail on it.

76. The Chairperson: Please give us a brief overview.

77. Mr McKelvey: We presented the proposal for a public consultation on 4 June 2008, which was agreed, and the Committee at that stage asked to be apprised of the outcome. A fairly disappointing number of responses were received, and only four of our questionnaires were returned completed. A further questionnaire, which was similar to the one used in GB, was returned in lieu, plus two responses that were simply comments from other representative bodies in the industry.

78. Generally, there was broad support for our proposals. There was a number of incidences in which some of the respondents offered some quite strongly expressed views. However, we feel that our proposals strike a balance. The industry is characterised by fairly diverse interests, and we are trying to get something that is in the middle and is balanced. I have a lot of information that I can provide.

79. The Chairperson: We will take some questions and the issues can be explored.

80. Mr McNarry: You are very welcome. You said that you were disappointed with the responses. Does that give you a sense that people are happy? How many responses did you expect?

81. Mr McKelvey: Because of the history and circumstances of the legislation, it is not terribly surprising that there were a small number of responses. A separate consultation exercise was carried out in Scotland, and 13 responses were received. The last time England and Wales had a consultation, 71 responses were received, one of which was from Northern Ireland.

82. The original legislation in GB was the Housing Grants Construction and Regeneration Act 1996, which was followed in Northern Ireland by the Construction Contracts (Northern Ireland) Order 1997, which, virtually word for word, replicated the GB provisions. I imagine because of the amendments that are being chased through Parliament at the moment in GB that a lot of people may be simply relying on the supposition that the same thing will happen here again; that whatever happens in GB will be replicated here.

83. Mr McNarry: Let us take a step back. How many responses did you expect to receive, given that you said that the number you received was disappointing and low?

84. Mr McKelvey: Seven or eight responses would have been a fair return for the population.

85. Mr McNarry: Is anyone likely to moan later on and say that they did not know about it?

86. Mr McKelvey: No. All representative bodies in Northern Ireland are usually affiliated to larger national bodies in GB.

87. Mr McNarry: Is it a case of seeing it through? It looks as though people are happy that you are following what is likely to happen in England and Wales. Will you be telling them that this is where we are, and asking them whether they are content with the situation?

88. Mr McKelvey: Yes; it is a fair assumption that those who responded are happy that Northern Ireland is following what is likely to happen in England and Wales. However, the Northern Ireland Assembly could decide to do something different. We carried out a public consultation in good faith, and if there were alterations or changes that people wanted to make here; we would have to consider those. However, there is a strong case for trying to support equality across the whole of the jurisdiction, simply to proclaim the commonality of case law in the event of there being any disputes arising.

89. Mr McNarry: That is useful. Did the Department carry out the consultation on an in-house basis?

90. Mr McKelvey: Yes.

91. Mr McNarry: So, you did not spend any money on consultants?

92. Mr McKelvey: No.

93. Mr McNarry: So, the expertise is there?

94. Mr McKelvey: Yes.

95. Mr McQuillan: How many questionnaires did you send out? If you were expecting only eight responses, you cannot have sent out many questionnaires.

96. Mr McKelvey: There is statutory provision for that. We issued about 130 questionnaires. Many of them went to people whom we did not imagine would have any pressing interest in replying.

97. Mr McQuillan: It was really then only a box-ticking exercise?

98. Mr McKelvey: There are many representative bodies in the industry and individuals who are interested in the professions and the industry. They might have returned questionnaires but may have elected to rely on what they had done in making replies to GB or to rely on us to do the right thing anyway.

99. Mr McQuillan: Could you put a cost on the exercise, even though it was done within the Department?

100. Mr McNarry: A fiver?

101. Mr McKelvey: I could not put a figure on it.

102. Mr Stewart Heaney (Department of Finance and Personnel): We will come back to the Committee on that point.

103. Dr Farry: Welcome gentlemen. I want to ask about the underlying rationale for the legislation. Is this simply good housekeeping on our part, as regards keeping up to date with legislation elsewhere? Have particular problems with contracts come to light in Northern Ireland in recent years that make this legislation central?

104. Mr McKelvey: I cannot give you chapter and verse on the range of issues on which people have come to us and said that our legislation is defective. There is a housekeeping element in that, if we wish to retain commonality of the legal basis for normal commercial practice, then we would be keen to have the amendments enacted.

105. Dr Farry: Are the adjudication functions in the case of disputed contracts conducted through the Department of Finance and Personnel?

106. Mr McKelvey: No. It is very much a matter of operations between private contracting parties. A Government Department could be involved, but there would be no significance to it.

107. Dr Farry: Is it like the reform of the tribunal system? There are amalgamations happening and consolidations under the Court Service. I wondered whether this is related to that in any shape or form.

108. Mr McKelvey: To my knowledge, there is no direct link. This is simply a matter of trying to find some way of, as it were, creating a summary justice means of resolving disputes during the course of building contracts. If there were a whole series of issues in dispute, such as a building contract that might last for several years, which paralysed the entire process and had people withdrawing from...

109. Dr Farry: Which body provides the adjudicators?

110. Mr McKelvey: Anyone within the legal profession, any of the building professions, or a member of the Chartered Institute of Building, for example, can establish himself as an adjudicator by taking training.

111. Dr Farry: Is it regulated in any way? Are there restrictions on who can and cannot do it?

112. Mr McKelvey: There is no chartered body of adjudicators, but there are a number of professional bodies that can nominate and set standards. If one satisfies their requirements, one can be appointed as an adjudicator from their lists.

113. In setting up a contract, the two parties to that contract can agree the name of someone who will resolve disputes that might occur; or they can nominate a body that they can refer to subsequently. The main point is that resolution is made within 28 days of an adjudicator being appointed, and that decision can then be opened up again for litigation or arbitration when the final job certificate has been issued.

114. Dr Farry: Are those adjudication results actionable through the courts if either of the two parties to the contract defaults?

115. Mr McKelvey: Yes.

116. Dr Farry: Presumably, the purpose of modernising the legislation is to reduce the number of disputes that go to court?

117. Mr McKelvey: Yes. It will ensure that the facility, which has been very much welcomed in the industry as a whole, is as open as possible, and that it includes as many forms of contracts as possible.

118. Dr Farry: Are the numbers of disputes that go to court monitored? Does the Department track those statistics?

119. Mr McKelvey: No.

120. Dr Farry: Presumably, the Court Service could readily provide that data?

121. Mr McKelvey: Yes.

122. Mr McLaughlin: I am interested in article 9(2) of the Order, which deals with the payment process. Who else, other than the payer, could issue the certification?

123. Mr McKelvey: It could be an architect or engineer who is appointed as a supervising officer on a contract.

124. The intention is to ensure that the Department is not being overly prescriptive and is not infringing on the right of parties to devise whatever form of contracts they desire. The employer or contractor could be the person who determines the amount for a certificate, and the point at which payment is made could be when an invoice is issued or when a certain milestone in the contract is reached.

125. Mr McLaughlin: Therefore, it would not necessarily be someone such as a quantity surveyor who would issue the certificate?

126. Mr McKelvey: It could be a quantity surveyor, but it could also be either party to the contract or indeed a third party who is not privy to it.

127. Mr McLaughlin: Could a building control officer issue the certificate?

128. Mr McKelvey: No. I do not think that building control officers would have any role to play.

129. Mr McLaughlin: Is this exercise an attempt to reduce the potential for disputes?

130. Mr McKelvey: The purpose is to take the heat out of disputes.

131. Mr McLaughlin: Exactly, or for purposes of adjudication —

132. Mr McKelvey: Yes. It will allow parties to a contract who encounter problems to resolve those problems without the situation getting out of hand.

133. Mr McLaughlin: Would the preliminary part of the contract negotiations identify who issues the payment notices? Would that be agreed at the start of the contract?

134. Mr McKelvey: Yes. That person or body would have to be nominated in any contract.

135. There is also a fall-back position, and although we are discussing the updating of the Construction Contracts (Northern Ireland) Order 1997, there is also the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999. The default provision is mentioned in the legal framework, and it provides for instances in which a contract exists between two parties who, for example, have never heard of the legislation and through ignorance or design have decided to create a contract without including that provision. In the event of a dispute occurring in those circumstances, the provisions of the scheme come into effect, and those provisions — known as a 9(2) notice — are fairly onerous with respect to what can or cannot be done with respect to adjudication of disputes or setting up a regime for payment.

136. Mr McLaughlin: Will that apply across the sector?

137. Mr McKelvey: Yes. However, it will not apply to domestic contracts.

138. Mr McLaughlin: No, I did not think that it would. In fact, I hope that it would not. [Laughter.]

139. In some cases the pair may not be in a position to make the valuation and could well be vulnerable to —

140. Mr McKelvey: There is flexibility, and that flexibility is intentional.

141. Mr McLaughlin: Thank you very much.

142. The Chairperson: With regard to adjudicators' costs, the 'Report on the Responses' states that:

"the courts should have jurisdiction to decide the reasonableness of adjudicators' fees and expenses".

143. How will that work in practice? Will there be standard fees and expenses, or will the courts always have to determine the costs?

144. Mr McKelvey: There would not be a standard referral to the courts. That would happen only in the event of there being a serious and sudden dispute that could not be resolved between the parties by any other means. They would have recourse to the courts in the final analysis. However, it is not intended to be an item for routine referral to, for example, a Court Master for calculation of expenses. Also, there would not be any standard fee set, although there might be notions of what a reasonable amount might be depending, perhaps, on the difficulties of the case or the size of the job.

145. The Chairperson: It sounds as though it would be more expensive if it were always referred to the courts to set adjudicators' fees.

146. Mr McKelvey: No.

147. The Chairperson: That would not be happening?

148. Mr McKelvey: That would not be part of any routine proposal.

149. The Chairperson: OK. Thank you very much for your presentation.

21 April 2010

Members present for all or part of the proceedings:

Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Mr Jonathan Craig
Mr Fra McCann
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Stewart Heaney Mr Robin McKelvey	Department of Finance and Personnel

150. The Chairperson (Ms J McCann): I welcome Stewart Heaney, divisional director of the construction and advisory division, and Robin McKelvey, construction initiatives manager. Please make some opening remarks, which will be followed by members' questions.

151. Mr Robin McKelvey (Department of Finance and Personnel): During our previous appearance before the Committee, we reported on the public consultation. Since then, the Bill's clauses have been prepared, as members will have seen in the submission that accompanied the explanatory and financial memorandum. The Executive approved the introduction of the Bill to the Assembly. I understand that you have copies of that.

152. In Great Britain, the Bill that amended the original legislation, from which our proposals are entirely derived, has received Royal Assent. At the heart of the initiatives that we were trying to propose were the concepts of partnering, collaboration and integrated teamworking on

construction projects. We have tried to eliminate any scope for lengthy disputes or poor payment practices, which have constantly bedevilled the industry. The Construction Act had been expected to enforce best practice to ensure a fair balance and commercial power throughout the demand and supply chain. Since it came into force, a number of difficulties came to light, and concerns were raised about the effectiveness of the legislation in improving the payment process. Those shortcomings were the catalyst for a series of reviews in England and Wales, which, eventually, led to the enactment last November of what became Part 8 of the Local Democracy, Economic Development and Construction Act 2009. Its aim was to introduce a better, more focused and effective regulatory framework.

153. The draft construction contracts (amendment) Bill is intended to amend the Construction Contracts (Northern Ireland) Order 1997 in line with the proposals set out in the public consultation, which we carried out, and, through that, to seek to replicate the legislative position now enacted in GB.

154. As a result of Parliament's acceptance of some minor amendments, our draft Bill differs slightly from what we had originally issued for public consultation. As originally proposed, the Department could exercise an all-or-nothing power to disapply certain types of contract in the provisions of the Construction Contracts (Northern Ireland) Order 1997. The change, following government amendments to the Local Democracy, Economic Development and Construction Act 2009, will allow the Department to disapply many, but not necessarily all, of the provisions of the 1997 Order, to ensure that many valuable features may continue to apply. Among those features are the right to stage payments and to allow flexibility to deal with the contractual innovation, should any arise.

155. There was also an amendment corresponding to the insertion of a new clause in the Housing Grants, Construction Regeneration Act 1996. That change relates to the prevention of parties in construction contracts entering into agreement about who should pay for the costs of adjudication before a dispute has arisen. A consequence of the change is that pre-dispute agreements between parties to the effect that an adjudicator can allocate fees and expenses as part of his or her decision can be excluded from this broad prohibition. To allow parties to agree in their construction contracts that the adjudicator has that power is considered to be current good practice and one which we want to maintain. As time is pressing, I will not go through the clauses. The Committee has the details.

156. The Chairperson: Yes, we have the paper in members' packs. I will open the floor to members' questions.

157. Ms Purvis: I have a couple of questions about clauses 1 and 2. Clause 1 paragraph 1 will repeal article 6 of the Construction Contracts (Northern Ireland) Order 1997, which refers to agreements that are partly in writing or wholly oral. Does that make it extremely difficult for the adjudicator if the contracts are wholly oral?

158. Mr McKelvey: Yes; there is an inherent difficultly in knowing what the parties agreed if the contract is not in writing. A lot of contracts will start off wholly in writing using any of the standard forms or even ad hoc arrangements, but because of the time it takes from cutting the first sod to cutting the tape there can be a lot of changes. Not all of those will be covered in writing.

159. The court case of RJT Consulting Engineers Limited v DM Engineering Northern Ireland Limited proves that a very strict view was taken of what was meant by the word "wholly". Any situation in which not everything had been agreed totally in writing was therefore excluded and precluded from being covered by any of the Act. That was an area of great concern in the consultation process in GB as others had raised the same question: was this going to encourage

parties not to use written contracts or was it going to provide any other limitation in that way. However, from the consultation that has taken place, it is not perceived to be a significant problem.

160. Ms Purvis: Can you review that after a certain period?

161. Mr McKelvey: We have very little information or feedback from the industry on whether the number of contracts that are not in writing was increasing, because we do not have any feedback on the number of contracts that there are.

162. Ms Purvis: Is there any feedback as to how that has affected adjudication?

163. Mr McKelvey: Yes; it has. In the absence of the amendment that we are trying to make, quite a number of disputes have been struck out because the adjudicator did not have the power to consider them because the contracts were not wholly in writing. They have taken that very strict, rigid interpretation.

164. Ms Purvis: The new insertion in clause 2 will allow the Department to disapply any or all of the previous Order. Why is it necessary to have such a power?

165. Mr McKelvey: The earlier articles in the Order set out the definitions of construction and what constitutes construction contracts. However, if there were a contract between contracting parties that was not covered by the Order, then none of the provisions that we are trying to introduce could apply to them with respect to stage payments or access to adjudication. If the amendment is accepted, it will mean that the Department can make arrangements through the proper procedures that those parts of the Order considered beneficial to the operation of such contractors can be employed. It is not an “all or nothing" situation; the baby will not be thrown out with the bathwater.

166. Ms Purvis: So, this is really just to allow an amendment of the principal legislation without your having to re-write the principal legislation?

167. Mr McKelvey: Yes.

168. Mr McLaughlin: The Committee was advised previously that the Bill aimed to encourage parties to resolve disputes through adjudication, rather than resorting to the courts, as that is ultimately in everybody’s interest because it is less time consuming and less costly. Have you established the prevalence of court actions in the North with respect to disputes? Is it a significant issue?

169. Mr McKelvey: We do not have any immediate feedback. There is no central register to show whether an adjudication has been established to determine a dispute between private contracting parties. We would have no knowledge of that.

170. Mr Stewart Heaney (Department of Finance and Personnel): The Royal Institute of Chartered Surveyors and other professional bodies train people as adjudicators. If parties in a contract decide to go to adjudication, they could go to a wide range of various organisations to fulfil that role.

171. Mr McKelvey: We do not have any central record of nominations or requests for nominations. We have asked all of the nominating bodies what nominations they have made over different periods of time. We received a very mixed response. Some did not respond at all; others gave us limited answers. Parties are able to name an adjudicator who is acceptable to

each party in the text of the contract, so there is no need in every instance for either party to approach a nominating body to get somebody appointed. The adjudicator will be named in the contract and will be known to both parties. He or she will only be called upon if required.

172. Mr McLaughlin: What is the rationale for amending the legislation and the role and function of adjudicators? You said that the adjudicator's decision had been set aside in some instances. You also said that you do not track every adjudication. So, what is the rationale for going forward? Does this save money for the industry?

173. Mr McKelvey: Where the facility for adjudication exists, it is being used to the benefit of the industry in general at present. The proposed steps will widen the accessibility of other forms of contract to the services of adjudication. In that sense, there should be a marginal, but not a massive, benefit to the industry as a whole because those who cannot use adjudication currently —

174. Mr McLaughlin: OK. So it is more widely —

175. Mr McKelvey: It will have a more widespread use.

176. Mr McLaughlin: Are all parties to a contract invited or required to identify adjudicators in the event of an arbitration process being required?

177. Mr McKelvey: Yes. If any form of contract is as defined — and it is a fairly wide-ranging list — then there is the requirement that there has to be a facility in the terms of the contract to have access to adjudication. Of course, if contracts do not have that provision, the statutory fallback position is the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999. Those will have to be amended in due course in light of whatever changes are made.

178. Mr McLaughlin: Will the costs of adjudication be calculated with reference to a prescribed schedule of standard fees and expenses, or will each case need to be considered individually?

179. Mr McKelvey: I do not know of any prescribed standard for that. It is a matter for the contracting parties to agree with the adjudicator whom they appoint.

180. Mr Heaney: It would be impossible to agree a fee given that contracts are so wide and varied. One adjudication may involve a multimillion-pound issue, whereas another one may involve a smaller amount.

181. Mr McLaughlin: What happens if there is a dispute about the fee charged? How is that adjudicated?

182. Mr McKelvey: Ultimately, there is recourse to the courts.

183. Mr McLaughlin: If one party activates the adjudicator, who carries out his function and may or may not resolve the issue, and the party has an issue with the bill or fee involved, what is the party's recourse?

184. Mr McKelvey: If the dispute involves the adjudicator, I imagine that the adjudicator would have to be paid and that the individual would then have to resort to the courts to recover the money.

185. Mr Heaney: The selection of the adjudicator is quite important. I do not think that we have any evidence of an adjudicator not being able to take a view and adjudicate. However, that is largely determined by the selection an appropriate adjudicator, who has expertise and knowledge in the relevant area.

186. Mr McLaughlin: In theory, at least — I do not know whether it happens in practice. If the intention is to encourage people, and I am trying to remember the term used for people who are parties in a contract, to opt for arbitration as opposed to litigation, we need to be able to give them some comfort about what will happen if they are dissatisfied with the fees that they are expected to pay.

187. Mr Heaney: The other key aspect of that is —

188. Mr McLaughlin: Do you see what I am getting at? Would that run counter to your original intention, or would people go to court because they are discouraged by the level of fees that they are being charged?

189. Mr McKelvey: The terms and conditions of the appointment of the adjudicator must be explicit.

190. Mr McLaughlin: Such as the daily fee —

191. Mr McKelvey: It is unlikely that anyone would view the appointment of an adjudicator as a blank cheque. Adjudication is, essentially, summary justice. The key to that element is to ensure that the progress of a job is not stopped while the parties wrangle. An adjudicator must be appointed within seven days of either party asking for an adjudicator to be appointed. The adjudicator must then give his decision within 28 days of being appointed, unless an extension is granted.

192. Mr McLaughlin: In preparing the amended legislation, has there been any experience of disputes over the actual fees charged in the arbitration process?

193. Mr McKelvey: I have no knowledge of any instances of that. There have been instances where adjudicators' decisions have been challenged on the grounds that they were not acting fairly or they were acting ultra vires, whereby they were resolving a dispute in which they were not due to act.

194. Mr McLaughlin: Has it worked in cost terms, more or less?

195. Mr McKelvey: Yes.

196. Mr McLaughlin: Are you aware of any challenges on that basis?

197. Mr McKelvey: No. Compared with arbitration or litigation, adjudication is a massively simplified means of dealing with disputes.

198. Mr O'Loan: I wish to ask you about the consultation process. You say that the response was modest. Sometimes response to a consultation can be meaningful and significant as well as being modest. Was that the case here?

199. Mr McKelvey: We did not receive anything that was strongly contrary to the proposals. We are seeking to ensure fair payment practice and achieve a proper balance in commercial power

between different parties to contracts. A large operator may not necessarily use commercial muscle to intimidate a smaller firm.

(The Deputy Chairperson [Mr McNarry] in the Chair)

200. There will be a winner and a loser. Therefore, such practices will only be ended by achieving a balance.

201. Mr O'Loan: Are you saying that you were proactive on the matter and were not just responding to a significantly displayed concern?

202. Mr McKelvey: We only received vigorous responses in respect of very small areas that we felt did not merit an attempt to alter the main thrust of the proposal.

203. Mr O'Loan: There are two sides involved; the client side and the construction industry. Did you get responses from both sides?

204. Mr McKelvey: One of the responses came from another Government Department, which acts as both a client and a practitioner. That response probably reflected both sides.

205. Mr O'Loan: The client side includes public and private sector bodies. On the public sector side of the client side, there is a significant structure, such as the CPD, COPES and so on. Did those bodies give you a response? Did you get any response from the private sector side of the client side?

206. Mr McKelvey: Our responses were from one Government Department and one legal firm that specialised in the field.

207. Mr Heaney: We did not receive any response from a private client.

208. Mr O'Loan: Did you take any steps to contact the key stakeholders?

209. Mr McKelvey: Obviously, we sent the documentation to people who we knew were interested.

210. Mr Heaney: The exercise was wide ranging. About 120 applications sent out, which were specifically targeted at industry groups and bodies.

211. Mr O'Loan: What was the actual number of responses?

212. Mr McKelvey: We received seven, two of which were not on our pro forma. They were in the form of comments.

213. Mr O'Loan: I do not dismiss those comments as they could be quite significant. Do you feel that you have fully dealt with the issues raised by those who responded, or are there other issues that merit further examination?

214. Mr McKelvey: One of the firms offered strong views in one respect. It indicated that, notwithstanding its views, it was mainly interested in achieving parity with GB, and to ensure that, regardless of what might happen with a further examination of the courts through case law, or even in the event of the setting up of commercial practice, it would be working on a level playing field and that there would be a degree of certainty in the outcome of any decisions handed down by the courts.

215. Mr Heaney: That same point was discussed at the Construction Industry Forum, which contains a number of companies from here that work in GB. Those companies have the added burden of having to deal with two sets of legislation. Although they had different views on aspects of the draft Bill, the overwhelming message was that we should maintain parity.

216. Mr O'Loan: I understand that point. From your answers, I draw the conclusion that you could have been a bit more proactive in seeking other methods of speaking to stakeholders, other than just popping paper questionnaires on doormats, which, among other post, may not get attended to. The people who did not respond may still have serious points that need to be heard.

217. Mr Heaney: The consultation was widely promoted through the Construction Industry Forum. That would not have necessarily stretched to private sector clients, but the draft Bill was widely publicised in and discussed at the forum by all the contractor representatives and the professional body representatives. They were strongly encouraged to highlight it and put it through, if you like, their communications network.

218. Mr McKelvey: What we are doing follows on from what has happened in GB, where there was extensive public consultation on the original proposals in 2005, and on the amended proposals in 2007 in light of reaction obtained, plus further specific consultations with interested groups to generate what eventually became Part 8 of the Local Democracy, Economic Development and Construction Act 2009. Almost all consultation that took place on that was circulated among local bodies as well. The subject has been mentioned extensively in the technical and professional press, with legal commentaries on what has been happening. It is highly unlikely that anybody will have been unaware that that was taking place.

219. The Deputy Chairperson of the Committee for Finance and Personnel (Mr McNarry): To follow on from Declan's question; are there outstanding issues on which there are voices of strong dissatisfaction? Arising from that, are you aware of a strong lobby that is likely to come forward on any particular issue on which there are strong voices?

220. Mr McKelvey: I am not aware of any areas of dissent.

(The Chairperson [Ms J McCann] in the Chair)

221. As we have already said, our emphasis was very much directed at maintaining parity with GB.

222. Mr McNarry: OK. That is fine. Paragraph 31 of the draft explanatory and financial memorandum states that the Bill:

"will reduce the administrative burden on businesses and provide greater statutory protection to small and medium-sized businesses trading with larger commercial concerns."

223. Will you elaborate on how those positive impacts will be realised?

224. Mr McKelvey: There was regulatory impact assessment in the original public-consultation document which was based very much on methodology that has been used by what, at that time, was the Department for Business, Enterprise and Regulatory Reform in GB. That methodology was employed for calculating and estimating the cost, for example, of the average adjudication against the cost to take an item to litigation. BERR carried out a number of estimates on the basis of what it supposed to be the number of adjudications that would be likely to be increased by the measures that it proposed.

225. Ms Purvis: Will you clarify what BERR is?

226. Mr McKelvey: It was the Department of Business, Enterprise and Regulatory Reform, which has been renamed BIS, the Department for Business, Innovation and Skills.

227. Mr McLaughlin: As soon as you got to understand it, it changed its name.

228. Mr McKelvey: It started off as DETI, the Department of Enterprise, Trade and Investment. I apologise for using an acronym.

229. This had indicated that there would be certain notional savings between litigation and adjudication and an estimate of the increase that could be expected in the number of adjudications due to increased accessibility. We took the volume of construction throughput in GB and compared it with throughput in Northern Ireland to reach a pro rata figure for here. We arrived at a modest figure, which is still significant with respect to the reduction in costs to the industry by having greater access to adjudication. This would favour the smaller firm against the larger firm with respect to maintenance of rights and achieving fair pay and practice.

230. Mr McNarry: Bearing in mind that procurement is a big issue in its own right; are there any procurement influences or issues in all of that?

231. Mr Heaney: From a public procurement perspective, the contracts that the public sector use all contain requirements that are consistent with, and in some aspects go beyond, the requirements in the Order. I do not think that there would be any particular procurement issues.

232. Mr McNarry: Is it a question of how the large treats the small and the medium?

233. Mr Heaney: There are issues with respect to other work that we are doing with the industry around fair payment practices concerning procurement, but not in relation to this Order.

234. Mr McKelvey: The issue is that in the absence of an Order, the mere desire to have fair payment practice can be eliminated by the contracting parties simply agreeing to set aside any of the necessary clauses to insist upon that. If the scheme provides a default position that, in the absence of clauses which meet the requirements of the statutory position, then that default position will kick in to ensure that there is adequate protection for fair payment practice.

235. Mr McNarry: Is there such a scheme?

236. Mr McKelvey: Yes. In due course, the present scheme will have to be tweaked to reflect amendments made to the Order by the Bill.

237. The Chairperson: I thank the witnesses for coming along. There are no further questions.

15 September 2010

Members present for all or part of the proceedings:
Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Mr Paul Frew
Mr Paul Girvan
Mr Simon Hamilton
Mr Daithí McKay
Mr Mitchel McLaughlin

Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Stewart Heaney Mr Robin McKelvey	Department of Finance and Personnel

238. The Chairperson (Ms J McCann): I welcome DFP officials Stewart Heaney, divisional director of the construction and advisory division in the central procurement directorate, and Robin McKelvey, construction initiatives manager in the central procurement directorate. The DFP briefing paper is included in members' folders. I remind members that the purpose of the session is to conclude the evidence gathering on the Bill ahead of the clause-by-clause consideration. I invite the officials to make a brief introduction, and members may then ask questions.

239. Mr Robin McKelvey (Department of Finance and Personnel): The position is, essentially, as the research officer has just described in his briefing. We have had public consultation, and the reaction to that was fairly muted but generally supportive. There was some disagreement on a number of minor issues, particularly in reaction to how the House of Lords' decision on Melville Dundas v George Wimpey should be handled. Our aim was to provide something that was a simplification and which could be readily understood by the building industry. The Melville Dundas v George Wimpey decision produced a 3:2 majority in the House of Lords, and the case raised very difficult and complex issues. The intention was to try to find something that would provide clarity and ease of understanding so that the industry would know where it stands in dealing with the decision. We think that the proposed measures do that and that they try to provide a balanced view that is going to suit most of the industry rather than one particular bit of it.

240. I am happy to answer any questions.

241. Mr Stewart Heaney (Department of Finance and Personnel): What we have set out in our paper to the Committee simplifies as best we can, from a non-legal perspective, the implications of the case and how those are dealt with in the Bill.

242. The Chairperson: As members have no questions, the session will be short and sweet. Thank you very much.

29 September 2010

Members present for all or part of the proceedings:
Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Mr Paul Frew
Mr Paul Girvan
Mr Simon Hamilton
Mr Adrian McQuillan
Mr Declan O'Loan

Witnesses:

Mr Stewart Heaney Mr Robin McKelvey	Department of Finance and Personnel

243. The Chairperson (Ms J McCann): We will commence the formal clause-by-clause scrutiny of the Bill. Officials from the Department of Finance and Personnel (DFP) are available to respond to any queries or points that members may have as we work through this. I remind members that this is their last opportunity to comment on each clause. I ask the Committee Clerk to speak to the secretariat briefing paper, which is in members' Bill folders.

244. The Committee Clerk: Paragraphs 1 to 6 of the secretariat briefing paper provide a bit of background to the Committee's scrutiny of the Bill to date and the Committee Stage. As outlined in the paper, the Bill replicates as closely as possible the originating legislation in GB. The reforms are essentially aimed at further improving payment practices and addressing restrictions with regard to access to adjudication of contractual disputes in the construction industry. At Committee Stage, the Committee placed a public notice calling for evidence, as is standard practice. However, it received no written evidence or responses to that call for evidence, and no comments were made on any of the clauses during the Committee's public consultation.

245. Over the summer, the Assembly Research and Library Service prepared a briefing paper that examined the outcome of the consultation in GB. That was done to establish whether any issues raised in that consultation were of relevance to Northern Ireland, and, if there were any such issues, to raise those with DFP. That paper was forwarded to the Department, and DFP officials provided a response, which members considered on 15 September. The only issue on which it appeared that the consultation responses were in disagreement was in relation to a House of Lords judgement. The Committee will come to that when it considers the Bill clause by clause.

246. The briefing paper summarises the rationale behind each clause and the outcome of the related DFP and Committee consultations in respect of each clause. Stewart Heaney and Robin McKelvey are here to briefly describe the purpose or rationale of each clause as the Committee considers the Bill clause by clause. A composite question on whether the Committee is content with clauses 1 to 9 will be asked at the end. Before considering each clause, the Committee should consider whether it is content with the long title of the Bill, which is actually quite a short title.

Long title

247. The Committee Clerk: The long title simply explains that the purpose of the Bill is to amend the Construction Contracts (Northern Ireland) Order 1997.

Question, That the Committee is content with the long title, put and agreed to.

Long title agreed to.

248. Mr Girvan: There is quite a bit of emphasis in the Bill on the payment process and how that is dealt with. I have recently encountered a problem that affects subcontractors. A contractor might be paid by whoever has contracted the work, but, unfortunately, the contractor does not necessarily pass that across to the subcontractor who has been brought on board. The Bill does not mention how subcontractors will be protected. A number of subcontractors have gone to the wall because of that practice. The main contractor has not gone to the wall, but the subcontractor has done so because he has not received his payments. There is no provision in the Bill for how subcontractors should be dealt with in a contract.

249. The Chairperson: That issue relates to clause 5. When we come to that clause, I am sure that you will want your points to be noted. That issue is a big problem, and it has been raised at Committee before.

250. The Committee Clerk: That issue came up in the procurement inquiry. In fact, the Department has advised of a new code of practice in relation to that. We can dig out the correspondence from the Department and copy you into that,
Mr Girvan.

251. Mr Girvan: Thank you.

252. The Chairperson: I now ask the Committee Clerk to take us through the Bill clause by clause. We will hear members' comments on each clause as we go, and I will then put the question.

Clause 1 (Requirement for construction contracts to be in writing)

253. The Committee Clerk: As stated in paragraph 9 of the secretariat briefing paper, there was unanimous support for this proposal, and no issues were raised in the evidence to the Committee. However, DFP officials may wish to remind members, very briefly, of the purpose and rationale behind clause 1.

254. Mr Robin McKelvey (Department of Finance and Personnel): We have found that a high proportion of subcontract agreements are not executed wholly in writing or even in a recognised form of contract. Such arrangements, which, unfortunately, remain common practice in the construction industry, effectively mean that a large number of firms, many of which are small and medium-sized enterprises (SMEs), are excluded from the benefits of the Order. For example, because contracts are not wholly in writing, those firms are excluded from accessing the benefits of adjudication and fair payment procedures, which are inherent in the original Order and the amended version. It is unlikely that the amendments to the Order will affect the preference of any supply chain members for written or oral contracts. We expect that the benefits will apply to contracts in either format.

255. The Chairperson: Stewart and Robin, we have a lot of new members on the Committee, and that is why I am asking you to give a brief clause-by-clause overview. Some members will not have been here during previous evidence sessions.

256. Mr Hamilton: It is useful for the old members too.

257. The Chairperson: It is useful to be reminded. That is true.

Clause 2 (Power to disapply provisions of the 1997 Order)

258. The Committee Clerk: Again, no issues were raised in the evidence to the Committee.

259. The Chairperson: The power in clause 2 is an unusual one, in that it allows for primary legislation to be amended through secondary legislation. Will you briefly remind us why that is necessary?

260. Mr McKelvey: Currently, an exclusion order can disapply only the whole of the 1997 Order. It is an all-or-nothing power. In 1999, an exclusion order was used to exclude a range of forms of contract; for example, anything within the PFI. Although there are no proposed changes to the definition of construction operations in the 1997 Order, the Bill introduces the ability for the Department to disapply part or all of the Order from a particular class or type of construction contract. That change will ensure that many of the Order's valuable features — fair payment, procedural access to adjudication, the right to suspend, etc — continue to apply, while giving the Department flexibility to deal with any specific issues of direct concern. It will also enable the

legislation to respond proportionately to future contractual innovation that may or may not occur.

Clause 3 (Adjudicator's power to make corrections)

261. The Committee Clerk: Respondents to the DFP consultation broadly welcomed this provision, and no issues were raised in the evidence to the Committee.

262. Mr McKelvey: Generally, the adjudicator's decision in the adjudication process is final and can be overturned only by legal proceedings, arbitration or agreement. Therefore, without clause 3, an error would effectively be locked in and could potentially render the decision meaningless, unfair or not as intended. The clause makes provision for a slip rule and, in respect of an adjudicator's decision, puts on a clear statutory footing an adjudicator's ability to amend any obvious error in his or her decision.

Clause 4 (Adjudication costs)

263. The Committee Clerk: No issues were raised in the evidence to the Committee. During DFP's consultation, strong but not unanimous support was shown, with one respondent disagreeing with the provisions in the clause.

264. Mr McKelvey: Clause 4 will make an agreement about the allocation of the cost of adjudication ineffective unless certain conditions apply.

Clause 5 (Determination of payments due)

265. The Chairperson: I know that Paul wants to comment on clause 5.

266. Mr Girvan: Clause 5 has no teeth. What happens between other parties is not necessarily included as part of the head contract and it is difficult to deliver. Some subcontractors will be paid only at the end of the total build, whatever that may be, and I know that a number of them are held right to the very end before they receive their payment. Some subcontractors are going to the wall, because they have not got the cash flow to keep going.

267. Mr McKelvey: That is precisely the sort of abuse that the original Order was designed to put a stop to. For that reason, if a head contract failed to have the appropriate conditions compliant with the statutory provision, we moved to the scheme for construction contracts, which is a default provision. Therefore, if the original contract between a main contractor and a subcontractor or, indeed, an employer and a contractor fails to have provisions for staged payments and an adequate mechanism, as defined in the statute, that default provision will set aside anything that is in the original contract, and the subcontractor can rely on the scheme as, in effect, the clauses and measures in his contract.

268. Mr Frew: Who funds that scheme?

269. Mr McKelvey: There is no need to fund it. The scheme is simply a document and a statutory instrument that was approved and became effective in 1999. If the Bill is successful in the House, we will need to amend the provisions of the 1999 Order in light of the changes that we propose to make to the original Order, but it will be updated in line with that. The scheme does have real teeth, and any subcontractor who has been prevented from or is not receiving interim, staged payments — whether such an arrangement is absent from a contract or is in a contract but being ignored — can revert to and ask for payments to be made under the scheme's provisions. That is a very firm measure.

270. Mr Frew: I hear what you say. I agree with Paul that this is endemic in the construction industry at present. When companies, subcontractors or even sub-subcontractors go to the wall, it is not because of a lack of work; it is because of cash flow. It is due to the fact that contractors, some of them very mighty, have not paid their subcontractors on time. I could give many examples of that, and we are talking about not thousands of pounds but hundreds of thousands of pounds. For example, a company asked a contractor for, say, £170,000 that was owed, only to be handed a cheque for £30,000 and to be told that that was all that the contractor could give. That is the problem in the construction industry now. The problem with "full-teeth" legislation is that a subcontractor who invokes the provision could have their company scarred throughout the wider construction industry. How do we get round that? How do we get to the point of encouraging subcontractors to use the legislation?

271. Mr Stewart Heaney (Department of Finance and Personnel): The member is absolutely right. The issue of non-payment of subcontractors has been a major discussion point for the Construction Industry Forum. The difficulty is that a stigma is attached to a subcontractor taking on a main contractor in Northern Ireland; no subcontractor wants to do that.

272. As regards public sector contracts, we have identified that issue and put in place measures whereby the individual project manager on a contract will seek from the main contractor information on what payments they have made to subcontractors. The main contractor will confirm that information, and the project manager will do periodic random checks to make sure that, when a contractor says that he has paid a subcontractor, he has done so. So, for public sector contracts, we are dealing with that issue through the centre of procurement expertise. Because of the economic downturn, the non-payment of subcontractors has become much more of a problem than it has been in the past. That brings us back to the scheme, and the fact that legislation exists. However, subcontractors are reluctant to take it forward simply because of the stigma that might be attached to them in the future.

273. Mr McKelvey: There is also a risk that, if they successfully challenge the main contractor through the mechanisms that exist, which are practical and workable, they will nevertheless end up suffering by not having any further work from that source.

274. Mr Frew: They will suffer whether they succeed or fail as regards the legislation. There will still be that branding throughout the industry.

275. The Chairperson: We can reflect our concerns when we are writing our report. We can include that aspect.

276. Mr McQuillan: It was said that the project manager would get information about when payments were made. Is the project manager not employed by the main contractor?

277. Mr Heaney: No. The project manager is employed by the public sector client.

Clause 6 (Notices relating to payment)

278. The Committee Clerk: There was broad support for this proposal from the DFP consultation, and no issues were raised in the Committee's consultation.

279. Mr McKelvey: This provision amends the original legislation relating to payment notices and provides for the giving of similar notices by the payee. The provision makes it clear that a payment notice, which is a notice that sets out what is owed, must be served even when the amount owed is nil, and it removes restrictions on who can serve such a notice and allows for a third party, for example, an architect or engineer, to issue such a notice.

Clause 7 (Requirement to pay notified sum)

280. The Chairperson: There were some issues in relation to this clause.

281. The Committee Clerk: A House of Lords judgement was highlighted in the Assembly research paper. The DFP officials may wish to refer to that. A response from DFP was also provided to members.

282. Mr McKelvey: This provision substitutes a new article 10 in the original Order and, in doing so, replaces the provision of the 1997 Order in respect of “withholding notices" with a requirement on the part of the payer to pay the sum set out in such a notice. The new article 10 makes provision for the sum in such a notice to be challenged or revised by the giving of a type of counter-notice.

283. The provision also limits the effect of the House of Lords decision in relation to insolvency in the case of Melville Dundas versus George Wimpey, as regards the circumstances in which a notice of the payer’s intention of withholding payment is not necessary. That attracted some objections, particularly from the National Specialist Contractors’ Council, which felt that there should be no circumstances in which payment should not be made. However, that was in conflict with the view expressed by the House of Lords in its judgement. We are trying to steer a middle course with something that provides a balanced view, because, in these circumstances, it is not possible to satisfy all interests completely and fully. It is a matter of finding something that represents the middle ground and good practice.

284. Clause 8 (Suspension of performance for non-payment)

285. The Committee Clerk: The DFP proposal was welcomed by all the respondents to the Department’s consultation. No issues were raised in the Committee’s call for evidence.

286. Mr McKelvey: This clause strengthens the rights of a party to whom payment is due to suspend performance of their obligations under a construction contract in the event of non-payment. That, of course, reads directly back to the line but does not answer the question of the stigma that was mentioned. It also makes the party in default liable to pay the contractor’s costs for stopping work. That includes, for instance, the reasonable costs of redeploying staff, removing plant and equipment, and re-mobilising in the event of work starting again.

Clause 9 (Short title and commencement)

287. The Chairperson: Clause 9 is on the short title and commencement.

Question, That the Committee is content with clauses 1 to 9, put and agreed to.

Clauses 1 to 9 agreed to.

288. The Chairperson: A draft report will be prepared for our consideration on 13 October, and we can reflect in that some of the concerns that were raised earlier. I thank Stewart and Robin for coming. If there are any other issues, we will be in touch.

Appendix 3

Memoranda and Papers from DFP

DFP briefing Construction Contracts Order - Submission to the Committee

Proposal to Amend the Construction Contracts Order (Northern Ireland) 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999

From: Norman Irwin
Date: 30 May 2008

Summary	
Business Area:	Central Procurement Directorate (CPD)
Issue:	The Department for Business, Enterprise and Regulatory Reform (BERR) is seeking to amend the provisions of the Housing Grants, Construction Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 within its draft Legislative Programme for 2008-09. The equivalent legislation in Northern Ireland requires corresponding amendment.
Restrictions:	None
Action Required:	To consider draft proposals for amending the Construction Contracts Order (Northern Ireland) 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 and agree to consult publicly on these proposals.

Background

Need for Legislation

1. Sir Michael Latham's Report 'Constructing the Team' (1994) recommended the introduction of the statutory right to refer construction disputes to adjudication. Latham's overall approach to improving performance of the construction industry was subsequently reinforced by Sir John Egan in his report 'Rethinking Construction' (1998) and 'Accelerating Change' (2002).

2. At the heart of all these initiatives are partnering, collaboration and integrated team working on construction projects which leave no place for lengthy disputes or poor payment practices. It was against this background that the Housing Grants, Construction and Regeneration Act 1996 ('the Construction Act') came into being in England and Wales. Part II of the Construction Act deals specifically with construction contracts and where a contract does not include agreement on payment terms the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 apply.

3. In response to Part II of the Construction Act, the Construction Contracts Order (Northern Ireland) 1997 was introduced together with the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

4. At the time of the Construction Act's introduction, in England and Wales in 1996, it was expected to enforce best practice and ensure a fair balance in commercial power throughout the

demand and supply chain. However, since coming into force, a number of difficulties has come to light and concerns have been raised about the effectiveness of the legislation in improving the payment process and these have been the catalyst for the current review in England and Wales.

5. BERR is seeking to amend Part II of the Housing Grants Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 to introduce a better, more focused and effective regulatory framework by:-

- improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to manage cash flow better; and
- encouraging the parties in dispute to resolve their differences through adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation.

6. It is proposed that the corresponding Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 are amended in line with the changes proposed in England and Wales.

Key Issues

Adjudication Process

7. Adjudicators are frequently challenged on the basis that the entire contract is not in writing and therefore they may have no jurisdiction to decide the dispute.

The proposal is to delete the existing Article 6 requirement that contracts need to be in writing. This proposal will allow access to adjudication for more disputes thereby reducing the cost and time. More importantly, it will remove large numbers of vexatious challenges to an adjudicator's appointment that can often increase the cost of adjudication unnecessarily.

8. "A trustee account" is where the sum awarded by the adjudicator is paid into an account other than that of the payee pending final determination of the dispute by arbitration or litigation. This makes adjudication ineffective in improving cash flow when a payment is disputed.

The proposal is to prevent the use of trustee accounts and similar agreements.

9. a. One disincentive to organisations from referring disputes to adjudication has been the financial cost in doing so. Parties can draw up an agreement that the "loser" pays, or even that, win or lose, the referring party bears all the costs. This creates a disincentive to refer disputes to adjudication and can encourage the other party to escalate costs.

b . The proposal is to have a statutory framework in place for adjudication costs which:-

- ensures that the parties should pay their own legal and other costs thereby providing an incentive to reduce costs
- provides that agreements regarding payment of costs between the parties are only valid if made in writing after the appointment of the adjudicator;
- provides a statutory entitlement for the adjudicator to recover fees and expenses; and
- provides the parties with a right to go to court where the adjudicator's fees and expenses are unreasonable.

Payment Framework

10. The Construction Contracts (Northern Ireland) Order 1997 (“the Order") sets out a payment framework to improve communication between contracting parties on what will be paid, why and when. It has proved ineffective or unduly burdensome in a number of respects and in certain instances has failed to achieve the original intention of the Order.

a. The meaning of the “sum due" (the notional amount derived from the contract from which sums can be withheld for poor quality of workmanship or for damages) is unclear. This greatly reduces the effect of the withholding notice requirement(s) (Article 10) and can impede a party’s ability to access the right of suspension (Article 4) or claim payment effectively through adjudication, litigation or arbitration.

The proposal is to introduce a clearer statutory definition of the “sum due". We propose to state that the “sum due" represents the amount that would have been paid if the payee had properly carried out his work under the contract regardless of any withholding. This amount must be notified by the payer in a revised notice setting out the starting figure from which amounts are withheld.

b. The Order requires the payer to issue an Article 9(2) payment notice advising a payee what he will be paid on the final date for payment even where that amount has been certified by a third party in a certificate. This is duplication.

The proposal is to remove the duplication, by making provision for the payment notice to be issued as a certificate by a third party instead of the payer.

c. The Order contains no fallback provision where the payer fails to issue the payment notice (Article 9(2)). As a result this notice is frequently not served and the communication early in the payment cycle does not happen.

The proposal is to introduce a provision that, in the absence of an Article 9(2) payment notice, the payee will be able to submit a claim (invoice) which will determine the “sum due". The payer would still be able to withhold money from the amount to be paid, but would need to serve an Article 10 withholding notice in accordance with the contract.

d. The current Order makes “pay when paid" clauses ineffective. However, payers can use so-called “pay-when-certified" clauses to achieve the same effect. “Pay-when-certified" is a term that refers to the practice of making payment under one contract dependent on the issue of a certificate (e.g. Project Manager’s Certificate) under another contract. The ability to do this introduces considerable uncertainty into the payment framework.

The proposal is to make “pay-when-certified" clauses ineffective.

e. The proposed amendments to the Order to improve the certainty of the “sum due" may increase the use of “final and conclusive" clauses as a way of avoiding adjudication on interim payments. These “final and conclusive" clauses are already a considerable source of concern to the construction industry.

The proposal will ensure access to adjudication by preventing the application of “final and conclusive" clauses to interim (e.g. monthly) payments.

The Right to Suspend Performance

11. The Order creates a statutory right to suspend performance in cases of late or non-payment. Its effect is limited as the Order currently only provides for an extension of time until the disputed amount is paid. The suspending party is unable to claim for the additional cost (and time) of, for example, moving heavy plant off and back onto site.

The proposal is to allow the suspending party to claim the reasonable costs of suspension and also to claim a reasonable amount of time for remobilisation.

Next Steps

12. We now wish to obtain agreement to seek the views of the construction industry and its clients in Northern Ireland through this public consultation process to help ascertain:

- whether this package of proposals properly and adequately addresses the weaknesses in the existing framework; and
- how we might evaluate the costs and benefits of the package.

Proposals to Amend the Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999

From: Norman Irwin
Date: 22 September 2009

Summary

Business Area:	Central Procurement Directorate
Issue:	To apprise the Committee of the responses to the public consultation on the proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and the associated Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.
Restrictions:	None
Action Required:	To note

Background

1. The historical reasons for amending the Construction Contracts (Northern Ireland) Order 1997 and the associated Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 are set out in Annex A: Background to the need for legislation.

2. The Departmental Committee, at its meeting on 4 June 2008, approved the proposal to launch a public consultation on DFP's proposed amendments to the legislation and asked to be apprised of the outcome of the consultation when this exercise was complete.

3. The Executive gave its approval on 20th November 2008 to the proposed full public consultation and the consultation document, “Improving Payment Practices in the Construction Industry in Northern Ireland", was launched on 8 April 2009 with a closing date for responses of 3 July 2009.

4. “Improving Payment Practices in the Construction Industry in Northern Ireland", which is enclosed as Annex B, set out the measures by which DFP was proposing to amend the existing legislation and sought from consultees their comments on, (i) the measures themselves, (ii) their effect in respect of equality issues and (iii) the anticipated regulatory impact. The format of the consultation followed closely on the content of earlier consultations in GB carried out by the now Department for Business, Innovation and Skills (BIS) and the Scottish Government.

5. In GB, the proposed amending legislation, on which DFP’s proposals are based, is set out as Part 8 of the Local Democracy, Economic Development and Construction Bill, which is now before Parliament. This Communities and Local Government Bill was introduced in the House of Lords on 4 December 2008. It has now completed its Committee Stage in the House of Commons and is currently expected to obtain Royal Assent on 13 December 2009.

Key Issues

6. Central Procurement Directorate’s (CPD’s) report on the responses to the consultation exercise is enclosed as Annex C.

7. The number of responses was modest with just seven replies being received. Of these only four respondents actually completed DFP’s questionnaire and one other, while not returning the questionnaire, offered instead a copy of its original response to the very similar BIS consultation of 2007. The remaining two respondents offered detailed comments on DFP’s proposals with statements of their respective organisations’ viewpoints.

8. Generally, the proposals were welcomed and essentially supported, although some differing and sometimes strongly held views were expressed. The divergence of opinion offered in some of the responses on specific points serves to underline the continuing need to deliver a balanced outcome to reflect the complexity, diversity and the range of commercial interests represented within the construction industry. There was emphatic support for the need to maintain parity with the corresponding legislation in GB.

9. The relatively small number of questionnaires returned (when the Scottish Government carried out a similar exercise, they received 13 responses) may possibly reflect a perception that the issues involved are being effectively debated and resolved at a national level.

Next Steps

10. Following the Departmental Committee’s consideration of the report it is intended to place it on the consultation zone of the Department’s website, where it will be accessible to the public.

11. CPD is seeking the Committee’s views on proceeding with the further development of the proposals and the preparation of the policy memorandum for the approval of the Executive.

List of Annexes:

Annex A	Background to the need for legislation.

Annex B	Improving Payment Practices in the Construction Industry in Northern Ireland: March 2009 Consultation on proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.
Annex C	Improving Payment Practices in the Construction Industry in Northern Ireland: September 2009 Report on Consultation on proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

Annex A

Background to the need for legislation

1. Sir Michael Latham's Report 'Constructing the Team' (1994) recommended the introduction of the statutory right to refer construction disputes to adjudication. Sir Michael's overall approach to improving performance of the construction industry was subsequently reinforced by Sir John Egan in his report 'Rethinking Construction' (1998) and 'Accelerating Change' (2002).

2. At the heart of all these initiatives is partnering, collaboration and integrated team working on construction projects which leaves no place for lengthy disputes or poor payment practices. It was against this background that the Housing Grants, Construction and Regeneration Act 1996 ('the Construction Act') came into being in England and Wales. Part II of the Construction Act deals specifically with construction contracts and, where a contract does not include agreement on payment terms, the relevant provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 would apply.

3. In response to Part II of the Construction Act, the Construction Contracts Order (Northern Ireland) 1997 was introduced together with The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

4. At the time of the Construction Act's introduction in England and Wales, it was expected to enforce best practice and ensure a fair balance in commercial power throughout the demand and supply chain. However, since coming into force, a number of difficulties has come to light and concerns have been raised about the effectiveness of the legislation in improving the payment process and these have been the catalyst for the current review in England and Wales.

5. BIS is seeking to amend Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 to introduce a better, more focused and effective regulatory framework by:-

- improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to manage cash flow better; and
- encouraging the parties in dispute to resolve their differences through adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation.

6. It is proposed that the corresponding Construction Contracts (Northern Ireland) Order 1997 and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 are amended in line with the changes proposed in England and Wales.

Annex B

Improving Payment Practices in the Construction Industry in Northern Ireland

Consultation on proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999

March 2009

Contents

Foreword - Draft

The construction industry is one of the largest in Northern Ireland and plays a vital role in the economy. Given the importance of the industry, I regard it to be essential that we therefore have in place fair payment practices. While the introduction of the Construction Contracts (Northern Ireland) Order now almost ten years ago did bring significant benefits, it has since become apparent that we now require further improvements in the legislative framework.

I am delighted that I am now able to launch this consultation on our proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and The Scheme

for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

The measures proposed are intended:

- to encourage parties to resolve disputes by adjudication;
- to improve transparency and clarity in the exchange of information relating to payments, thereby enabling parties to construction contracts to manage cash flow better; and
- to improve the right to suspend performance under the contract.

I am however proposing proportionate amendments to existing provisions rather than radical change. I believe that guidance must remain our preferred option to improve the operation of construction contracts and have considered further legislative intervention only where I believe it to be absolutely necessary.

The proposals will create a better defined and a more effective regulatory infrastructure intended to reinforce the measures contained in the current Construction Contracts Order and so help maintain a fine balance across the range of interests represented within the industry. The proposals comprise a number of amendments, each specifically aimed to address particular identified weaknesses in the current operation of the Order. The proposed changes are also intended to keep pace with proposed amendments to the Construction Act currently being developed in Great Britain to maintain parity of legislation and commercial opportunity.

I believe the amendments we are proposing will bring benefits overall to all participants in the industry and I look forward to this consultation generating a healthy discussion with a constructive response.

Nigel Dodds OBE, MP MLA,
Minister for Finance and Personnel

dd March 2009

Executive Summary

Background

This consultation is about amendments we are proposing to make to the Construction Contracts Order (Northern Ireland) 1997 ('The Construction Contracts Order') and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 ('The Scheme').

The Construction Contracts Order and The Scheme became effective in 1999 in the wake of the originating legislation in GB, Part II of the Housing Grants Construction Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 ('The Construction Act' and 'The Scheme').

Proposals to amend this legislation in England and Wales and in Scotland are currently in progress through Parliament following extensive public consultation. To make the same improvements and so maintain parity of legislation across the United Kingdom, we are proposing to make similar amendments to the NI legislation.

The Review of the Construction Act in England and Wales was announced in the 2004 Budget. Nigel Griffiths, then Parliamentary Under Secretary of State for Construction, Small Business and Enterprise, asked Sir Michael Latham to undertake a review of the Act.

Sir Michael's report, published in September 2004, concluded that while the Construction Act generally was working well, some improvements would be helpful. According to various industry surveys, poor payment practices continued to be a major issue for many in construction.

In March 2005 the then Department of Trade and Industry (DTI), (since June 2007, the Department for Business, Enterprise and Regulatory Reform, or BERR) and the Welsh Assembly jointly published a consultation paper - 'Improving Payment Practices in the Construction Industry'. In January 2006 they issued a consultation analysis, which set out a proposed way forward. During the remainder of that year, other members of a DTI appointed sounding board, working with Sir Michael Latham, developed detailed proposals.

On 20 June 2007 a second Consultation Document was issued jointly for England and Wales taking account of the responses to the first consultation. This considered proposed amendments to Part II of the Housing Grants, Construction and Regeneration Act 1996, which would be taken through the UK Parliament and would affect both England and Wales.

The Scottish Government embarked on a separate consultation on 29 August 2007 relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (Scotland) Regulations 1998. Subsequently the Scottish Government agreed to make common purpose with England and Wales and the proposed legislation will now also apply to Scotland.

Proposals

We believe prompt and fair payment practice throughout construction supply chains will better enable the industry routinely to adopt integrated working as the norm.

We are proposing to:-

- encourage parties in dispute in construction contracts to resolve their differences through adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation;
- improve transparency and clarity in the exchange of information relating to payments to enable cash flow to be managed better; and
- improve the facility to suspend performance under the contract.

We are proposing to do this by:

On adjudication:

- improving access to the right to refer disputes for adjudication by:
- applying the legislation to oral and partly oral contracts;
- preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes;
- ensuring the costs involved in the process are fairly allocated.

On payment:

- preventing unnecessary duplication of payment notices;
- clarifying the requirement to serve a Article 9 (2) payment notice;
- clarifying the content of payment and withholding notices;
- ensuring the payment framework creates a clear interim entitlement to payment; and
- prohibiting the use of pay-when-certified clauses.

On suspension:

- improving the statutory right to suspend performance by allowing the suspending party to claim the resulting costs and delay.

The proposals are not wholesale change, but proportionate reforming amendments to the existing framework intended to address specific issues that have arisen during the nine years the Construction Contract Order has been in operation. Guidance remains the preferred route to improve the operation of construction contracts and further legislative intervention has only been considered where we believe it to be absolutely necessary.

We are now seeking the views of the construction industry and its clients, through this consultation process, on:

- whether this package of proposals properly and adequately addresses the weaknesses in the existing framework; and
- how we might evaluate the costs and benefits of the package.

Introduction

Construction is one of the pillars of the NI economy. Figures derived from the Northern Ireland Annual Business Inquiry (NIABI) show that construction accounts for 16.1% of national gross value added in Northern Ireland. Its economic importance is wider. Well-managed and successfully delivered construction projects improve public services (health, education and transport), business productivity (offices, communications and retail) and housing, cultural and public spaces.

There are more than 10,000 enterprises active in construction contracting and consulting in Northern Ireland, of which 98.9% are small or micro enterprises. Characteristically, profit margins in the industry are low and insolvencies are high compared to the economy as a whole. The supply team on a construction project often includes a large number of firms.

The context for the Construction Act in GB and its Northern Ireland derivative, the Construction Contracts Order, was originally set by Sir Michael Latham's 1994 report 'Constructing the Team'. Latham's overall approach to improving the performance of the construction industry - greater collaboration and integration - was subsequently reinforced by Sir John Egan in 'Rethinking Construction' (1998) who recognised that a successful, collaborative commercial arrangement cannot be supported by poor payment practices.

The Construction Contracts (Northern Ireland) Order 1997

Since The Construction Act in GB and the Northern Ireland Construction Contracts Order came into force, a number of difficulties has come to light and concerns have been raised about their effectiveness. These difficulties have prompted the current review.

How the Order Works

The Construction Order has two main aims:

- to allow swift resolution of disputes by way of adjudication; and
- to ensure prompt cash flow.

The Order currently promotes this by:

- providing a statutory right to refer disputes to adjudication. The adjudicator's decision is binding until finally determined by legal proceedings or arbitration (where there is an arbitration agreement) - Article 7;
- providing the right to interim, periodic or stage payments - Article 8;
- requiring that contracts should provide a mechanism to determine what payments become due and when, and a final date for payment - Article 9 (1);
- requiring that the payer gives the payee early communication of the amount he has paid or proposes to pay - Article 9 (2);
- providing that the payer may not withhold money from the sum due unless he has given an effective withholding notice to the payee - Article 10;
- providing that the payee may suspend performance where a sum due is not paid in full by the final date for payment - Article 11; and
- prohibiting pay-when-paid clauses which link payment to payments received by the payer under a separate contract - Article 12.

Other sections of the Order do the following:

- define the scope of construction contracts - Article 3;
- define the meaning of construction operations including exemptions - Article 4;
- exempt residential occupiers - Article 5;
- restrict the application of the Order to contracts in writing - Article 6;
- provide a power to make a scheme for construction contracts - Article 13; and
- make provision on service of notices, calculation of periods of time and application to the Crown - Articles 14 – 16.

Background to this consultation

The Chancellor announced a review of the Construction Act in the Budget in March 2004:

"Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants Construction and Regeneration Act in order to identify what improvement can be made."

Nigel Griffiths, then Parliamentary Under Secretary of State at DTI (now BERR), asked Sir Michael Latham to review the legislation. Sir Michael's findings were published in September 2004. His report concluded that the Construction Act is generally working well, but that some improvements would be helpful, if means could be found, which would not impact adversely on other parties, or other elements of payment processes, to deliver them.

Following the publication of Sir Michael Latham's report, DTI published a consultation paper, 'Improving Payment Practices in the Construction Industry', in March 2005. This first consultation document considered a number of proposals under the following headings:

- improving the ability of parties to a construction contract to reach agreement on what should be paid and when;
- improving the ability of parties to a construction contract to manage cash flow and enable completion of work on the project; and
- reducing disincentives to referring disputes to adjudication.

An analysis of the consultation responses was published in January 2006 and subsequently, DTI held industry-wide, post-consultation events - a series of discussions with its sounding board of key industry figures. It also conducted an informal consultation with the Construction Umbrella Bodies Adjudication Task Group to develop a more detailed consultation on specific proposals.

On 20 June 2007, the DTI and the Welsh Assembly jointly issued a second Consultation Document for England and Wales, which further considered amendments to Part II of the Housing Grants Construction and Regeneration Act 1996. It was proposed that these would be taken through the UK Parliament and would affect both England and Wales. This consultation also covered amendments to The Scheme for Construction Contracts (England and Wales) Regulations 1998.

The Construction Act also applies in Scotland and policy responsibility for the Act in Scotland and The Scheme for Construction Contracts (Scotland) Regulations 1998 is a matter for the Scottish Executive. The Scottish Government also carried out its own consultation exercise relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (Scotland) Regulations 1998. This essentially replicated the proposals in the consultation issued jointly by DTI and the Welsh Assembly.

While the Scottish Government had embarked on a separate consultation with a view to making its own legislative proposals, it subsequently agreed to make common purpose with England and Wales and the legislation now under consideration in Parliament, and reflecting Scottish input, will also apply to Scotland.

Peter Robinson, then Minister of Finance and Personnel in the Northern Ireland Executive, gave his approval on 15 June 2007 for the Northern Ireland Legislative Programme to commence amendments to the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 to correspond with the changes then proposed in England and Wales (and now in Scotland).

Chapter I – Adjudication framework

1. Removing the requirement that the Construction Order should apply only to contracts in writing.

Background

At present the Construction Order applies to contracts in writing only. This requirement is defined broadly to include an agreement “recorded in any form". As interpreted by the courts[1], the requirement is applied to all the non-trivial terms of the agreement creating grounds for the adjudicator’s jurisdiction to be challenged. The effect of this can be as follows:

A dispute is referred to adjudication under the Order and one of the parties alleges that a contractual provision is not in writing (or that the contract has been varied by an oral agreement). The adjudicator can then decide either:

- that the contract is in writing and he has jurisdiction, or
- that not all the agreement is in writing and he does not have jurisdiction.

Where the adjudicator decides he does have jurisdiction, he will continue with the adjudication. However his decision will not be enforced on an application for summary judgement, if the court considers that the adjudicator did not have jurisdiction, or that there is an arguable dispute as to his jurisdiction.

Where the adjudicator decides he has no jurisdiction, the adjudication of the dispute will come to an end.

Either outcome involves time and expense, not least the consideration of the challenge itself.

Current legislation

Article 6 has the following structure:

- Article 6 (1) – Restriction of the application of the Order to contracts in writing. Any other agreement is also only effective for the purposes of the Order if agreed in writing.
- Article 6 (2) – Definition of an agreement in writing (Article 3 states that a construction contract is an agreement). The courts have found that all three of the possible ways in which an agreement might be in writing must apply to the whole agreement (i.e. all of the contract terms must be in writing, agreed in a written exchange or “evidenced" in writing).
- Article 6 (3) – An agreement by reference to written terms is an agreement in writing.
- Article 6 (4) – An agreement recorded by a party or third party with the consent of the parties is an agreement evidenced in writing.
- Article 6 (5) – An agreement alleged by one party and not denied by the other in adjudication, arbitration or court is an agreement in writing for the purposes of the application of the Order subsequently.
- Article 6 (6) – An agreement recorded by any means is in writing.

Proposal

We are proposing to remove the restriction of the application of the Construction Order to contracts in writing only. The effect will be that the Order will apply to construction contracts which are agreed wholly in writing, only partly in writing, entirely orally, or which have been varied by oral agreement.

However, certain important contractual provisions required by the Order, such as provisions relating to a contractual adjudication scheme, will continue to need to be in writing. Where this is not the case, the relevant provisions of The Scheme will apply. The contract will still be a 'construction contract' for the purposes of the Order.

The Scheme

We believe that the various references to 'agreements', whether written or oral, between the parties in The Scheme, will be understood to refer to any agreement following the amendments proposed above. We will therefore specify in The Scheme that such agreements must be made in writing. We consider the agreement of an adjudicator under Part 1 paragraphs 2 and 5(2) must be made in writing.

The references in The Scheme to written notices and notices in writing are unhelpful and we propose to remove them. Article 14 makes clear that notices under the Construction Order are intended to be in writing, whether or not this is specified explicitly.

Discussion

The practical difficulty of agreeing a full written contract has acted as a barrier to the referral of disputes. Our proposal extends the application of the Construction Order to oral and partly oral construction contracts. Large numbers of construction contracts contain orally agreed terms.

Adjudication is strongly supported throughout the industry and increasing access to it is a clear benefit of our proposal.

This proposal is not intended to encourage more oral or partly oral contracts, nor is it likely to do so. There are wider business benefits to contracting on a clearly recorded basis which act as a clear incentive to do so.

There is a paucity of data on the extent of adjudication in Northern Ireland. However, Glasgow Caledonian University's August 2005 report on adjudication in GB suggested that the incidence of jurisdictional challenge may be reducing the effectiveness of adjudication and increasing its cost, finding that challenges to the adjudicator's appointment featured in some 40% of adjudications. Of these, 3% related specifically to whether the contract was in writing. A further 7% related to unspecified challenges to the adjudicator's jurisdiction, which are likely to include challenges alleging an oral agreement. Many of these then lead to enforcement proceedings.

The annual reports of the Technology and Construction Court (in England and Wales only) for 2005 and 2006 suggest that, on average, approximately 100 claims for enforcement of adjudications are submitted each year. The Technology and Construction Solicitors' Association has found that, of 154 enforcement cases they considered, 23 (or 15%) related to whether the construction contract was in writing. 'Improving Payment Practices in the Construction Industry' found that on average this may cost £12,500. The total approximate cost is therefore 100 x 15% x £12,500 = £187,500.

Based upon Glasgow Caledonian University's reports, we believe it is reasonable to assume that approximately 1,750 adjudications are conducted each year in England and Wales. This is an estimate based on construction output in England and Wales as a proportion of that in the UK and taking an average of 2,000 adjudications per year in the UK based upon the survey. The average cost of enforcement proceedings per adjudication is therefore 187,500 / 1,750 = £107. We presume that this estimate of average cost is also applicable in Northern Ireland.

2. Prohibiting agreements that interim or stage payment decisions will be conclusive

Background

Prior to the introduction of adjudication under the Construction Contracts Order, it was rarely possible to resolve payment disputes via litigation or arbitration during the project. As adjudication is a quick form of dispute resolution, interim or stage payment disputes can now be resolved before the project has come to an end. However, construction contracts often provide that a payment decision will be conclusive of the amount of an interim or stage payment. The effect of such clauses is to prevent the referral of disputes relating to an interim or stage payment decision to adjudication, the initial decision having already effectively concluded the matter.

The ability of the parties to agree that such decisions are conclusive of the payment amount is reflected at paragraph 20(a) Part I of the Schedule to The Scheme, which provides that an adjudicator may not open up, revise, or review any decision, or certificate, if the contract states that the decision or certificate is final and conclusive.

Current legislation

Article 7 of the Construction Contracts Order provides the right to refer a dispute under a construction contract to adjudication. The contract must provide a process whereby a party may give notice at any time of its intention to refer a dispute to adjudication.

Article 8 of the Construction Contracts Order requires all construction contracts of duration 45 days, or more, to provide for payment by instalments, stage payments, or other periodic payments.

Paragraph 20(a) of Part I of the Schedule to The Scheme provides that an adjudicator may not open up, revise or review any decision by any person if the contract states that the decision or certificate is final and conclusive.

Proposal

We are proposing to provide that:

- an agreement that a decision will be conclusive as to the amount of an interim payment, whether an instalment, stage or other periodic payment, will be ineffective. Decisions as to the amount of a final payment (which are often governed by clauses making them conclusive after a period of time) are excluded;
- the parties may agree that a payment decision is conclusive of the amount of an interim payment after the decision of the amount of the interim payment has been taken and notified to them (an effective agreement); and
- a decision as to the amount of an interim payment will include any decision which relates to work performed under the contract to the extent that it affects the amount of the payment.

This proposal reinforces the combined effects of Articles 7 and 8 of the Construction Order by providing a right to stage or interim payments which are properly determined in accordance with the contract.

The Scheme

Following the above amendment, parties will no longer be able to agree that interim decisions will be final and conclusive as to the amount of the payment unless that agreement is entered into after the parties have been notified of the amount of the interim payment. We therefore propose to provide that the adjudicator's ability to "open up, revise and review a decision" applies, unless the parties have made an effective agreement to the contrary.

Discussion

Following the consultation in England and Wales, 'Improving Payment Practices in the Construction Industry', we have concluded that:

- the current incidence of agreements that interim or stage payment decisions should be conclusive is high (responses to the consultation suggested 15% of contracts provide for conclusive decisions that are only of substance to interim payments);
- this can be viewed as a means of avoiding the referral of interim payment disputes to adjudication and is contrary to the intention of the Act in GB (and of the Construction Contracts Order in Northern Ireland);
- the adjudicator's power to open up conclusive interim, or stage, payment decisions should extend to decisions about the work done in relation to the interim payment; and
- though it can be argued that some stage payments are finally decided at the completion of a stage of work, this is rare as there is often a reappraisal of the valuation of all stages at the completion of the contract.

BERR statistics for GB suggest that 15,000 contracts are of a duration of less than 45 days and that the remaining 85,000 in the industry are therefore subject to the statutory right to interim payments. Interim payments are usually monthly so assuming that each contract provides for a final payment at its completion and an interim payment at the completion of each whole month during the contract, in GB some 492,000 interim payments are made each year across the industry. Of these payments, 85%, that is some 418,200, are subject and may be referred to adjudication.

The joint DTI / Construction Industry Council (CIC)[2] survey of adjudicators in GB found that 50% of disputes referred to adjudication relate to interim payments, while the remainder relate to final payments or other matters. The survey also found that resolving payment disputes at the interim stage reduced the cost of adjudication by approximately 10%, or £2,000. This would indicate that approximately 875 adjudications in England and Wales relate to interim payments. If adjudication of interim payment disputes was encouraged by increasing the number that may be referred by a factor of 100 / 85, this would represent an additional 154 interim payment adjudications. Compared to adjudication of the final account, this would result in an approximate reduction in cost of £308,000, or £176 per adjudication, on average. Any arbitration or litigation cases that were also averted would increase this figure. It is estimated that similar savings could be expected to apply in Northern Ireland.

The more significant benefit resulting from the prompt payment of the correct sum following the adjudication is more difficult to quantify, as the dispute may be decided in favour of either party.

3. Introduction of a statutory framework for the costs of adjudication

Background

The Construction Contracts Order provides that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication.

One of the disincentives to parties to a contract in referring disputes to adjudication is the financial cost in doing so. Parties can agree in the contract that the 'loser' will pay the costs of the adjudication, or even that, win or lose, the referring party[3] will bear all the costs. This creates a disincentive to the party which would thus become liable for costs to refer disputes to adjudication and can conversely encourage the other party to escalate costs.

Current legislation

Article 7 provides a statutory right to refer disputes to adjudication. It also sets out the basic requirements of the adjudication scheme to be contained in the contract such as the timetable for securing the appointment of the adjudicator.

Following a consultation by the Department of the Environment, Transport and the Regions in 2001, DTI developed proposals for a statutory framework in relation to the costs of the adjudication which:

- ensures that the parties should pay their own legal and other costs thereby providing an incentive to reduce costs, unless they agree otherwise after the adjudicator is appointed;
- provides that agreements about payment of costs between the parties are only valid if made in writing after the appointment of the adjudicator; and
- provides a statutory entitlement for the adjudicator to recover his fees and expenses.

Proposal

We are proposing to include new provisions in the Construction Contracts Order so that the following agreements are valid only if made in writing and after the appointment of the adjudicator:

- agreements that a party should pay the whole or part of the costs of the adjudication (the legal or other costs of the parties and the fees and expenses of the adjudicator); and
- agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication;

Where the parties have made a valid agreement as described above and unless the parties have agreed which costs of the adjudication will be recoverable, the adjudicator will be required to award:

- a reasonable amount only in respect of costs reasonably incurred by the parties; and
- such reasonable amount as the adjudicator shall determine by way of fees for work reasonably undertaken and expenses reasonably incurred.

We also intend that, notwithstanding the adjudicator's contractual entitlement to his fees and expenses, the parties shall be jointly and severally liable for the adjudicator's reasonable fees and expenses (the formula above). This "backstop" is intended to ensure the adjudicator can recover his reasonable fees when:

- he decides the dispute; or
- his appointment is brought to an end for reasons other than his default or misconduct.

We have considered whether the Construction Contracts Order could include a similar provision requiring the adjudicator to make an allocation of his fees and expenses between the parties. This is not possible if the parties are to be jointly and severally liable for fees. An allocation by the adjudicator appears to be no more than a statement of the proportions in which he will seek to recover them from the parties. It is not binding on him, as he is not a party to the dispute.

We will provide that in general the decision of the adjudicator as to the costs of the adjudication is final and binding, other than in cases where:

- the parties agree that the adjudicator shall make a decision as to their reasonable legal and other costs and he fails to do so; or
- the adjudicator claims or decides his reasonable fees and expenses under the new provisions.

In these cases we will provide the courts with powers to determine the matter.

The Scheme

Having made full statutory provision for the costs of the adjudication in the amendments to the Construction Contracts Order, we intend to remove all provisions as to the costs of the adjudication from Part 1 of the Schedule to The Scheme. These are:

- the provisions entitling the adjudicator to his fees when his appointment is revoked under paragraph 11; and
- the provisions entitling the adjudicator to his fees when he decides the dispute under paragraph 25.

We are also proposing to remove the provisions entitling the adjudicator to payment where he resigns in certain cases, where, for example, he does not have jurisdiction to decide the dispute. As The Scheme does not apply in these situations, the terms of the adjudicator's appointment would determine his payment in this case.

Discussion

We are proposing a framework which will provide greater access to the adjudication process for those in the construction industry who would otherwise be reluctant to go through this process because of the costs involved. Our proposal will, to a degree, allow all parties to compete on a 'level playing field'.

We will provide that the parties may not agree before a dispute has arisen and an adjudicator has been appointed, that one party will be liable for all or part of the costs of the adjudication. This provision will remove a disincentive to refer disputes, whilst at the same time reducing any incentive to refer frivolous disputes.

In addition, we believe we are encouraging parties to keep costs at a reasonable level by providing that, where the adjudicator is to make a decision as to who shall pay the costs of the adjudication, he shall only award a reasonable amount to reflect costs reasonably incurred. This will also encourage the parties to keep costs at a reasonable level and result in disputes being resolved more promptly.

The parties in dispute will share liability for the adjudicator's fees and expenses. This will ensure the adjudicator can secure payment of his fees and expenses and reduce the possible financial cost to him if he is not paid. This proposal will also ensure that the adjudicator's allocation is impartial because he will not be tempted to allocate his fees to the party better able to pay.

The adjudicator will also not need to ask the parties to sign an 'adjudication agreement' upon his appointment to secure his fees and expenses.

The joint DTI / CIC survey in GB of adjudicators suggested that both parties' combined legal and other costs in an adjudication amount together to approximately £15,000. The same survey found that the adjudicator's fees and expenses are on average approximately £5,000. The total costs of an adjudication may therefore be approximately £20,000, on average. Statistics from the CIC in 2001 suggested that the incidence of agreements that the referring party should pay all of the costs of the adjudication arises in 3% of adjudications. Results from the DTI / CIC survey were unclear and the extent of the problem is considered as part of this consultation. However, if these clauses arise in 3% of the 1,750 adjudications each year in England and, in each one, on average half of the costs are unfairly allocated at a total cost of £525,000, this would indicate a cost on average of some £300 per adjudication. It may be supposed that similar cost profiles pro rata would apply in Northern Ireland.

Chapter 2 – Payment framework

Overall Background

To help achieve its objective of ensuring prompt cash flow and allowing the swift resolution of disputes by way of adjudication, the Construction Order sets out a payment framework:

- Article 8 introduces a right to instalment, stage or periodic payments;
- Article 8 (2) provides that the parties are free to agree the amounts of the payments and the intervals and circumstances in which they become due;
- Article 9 (1) requires the contract to have an adequate mechanism for determining what will become due and when;
- Article 9 (2) provides that the payer gives the payee early communication of what will be paid;
- Article 10 provides that the payer may not withhold money unless he has effectively communicated this to the payee;
- Article 11 provides that a payee may suspend performance when the amount due is not paid by the final date for payment; and
- Article 12 prohibits so called "pay-when-paid" clauses.

This payment framework creates the means of crystallising the amount to be paid on, or before, the final date for payment for each instalment, stage or periodic payment. It does this by introducing the concepts of 'sum due' and 'due date' together with a requirement to issue

notices during the payment period to communicate the basis on which the amount paid, or proposed to be paid, has been calculated.

- The due date is the contractually agreed milestone which starts the payment period.
- The payment period is the time between the due date and the final date for payment. The length of this period is a matter for contract.
- The sum due is a notional amount determined by the contract which begins the process of crystallising the amount payable on the final date for payment.
- The final amount for payment is the sum due minus deductions – some of which are required to be set out in Article 10, withholding notices.

The problems associated with the operation of the payment framework have been considered at each stage of the review of the Construction Order. The proposals in this chapter have resulted from consideration with BERR's sounding board. We have revisited the conclusions of 'Improving Payment Practices in the Construction Industry' and the proposals made in the January 2006 analysis of BERR's consultation, particularly in respect of the potential roles of the payer and payee in 'certifying payments'. We have tried to identify the most appropriate balance between effective regulation and reducing the regulatory burden, particularly in respect of the notice requirements Articles 9 (2) and 10.

1. Prevention of unnecessary duplication of payment notices

Background

Article 9 (2) requires the payer to issue a payment notice setting out the payments made or proposed to be made not later than five days after the date on which a payment becomes due. However, under most contracts with certificates, the information in the payment notice only duplicates the information already contained in the certificate. For those contracts, this represents a needless duplication.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if:

(a) the other party had carried out his obligations under the contract; and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

Proposal

The intended purpose of the proposal is to prevent unnecessary duplication by allowing a notice, or certificate from a third party, to act as an Article 9 (2) payment notice.

The Construction Order

This proposal relates primarily to the drafting of Article 9 (2) of the Order. We consider that, as well as the party from whom payment is due, certain other people should be able to issue a payment notice complying with Article 9 (2). We propose that, where the contract provides, the Order should allow the notice to be issued by:

- a person identified in the contract; or
- a person who has been identified in a notice to the payee.

The Scheme

We propose to amend paragraph 9 of Part II of The Scheme to make provision for a payment notice in accordance with the new provisions in Article 9 (2) of the Order. Under The Scheme a payment notice cannot be issued by a named individual, so we propose that it should be issued either by:

- the person from whom payment is due; or,
- a person who has been identified in a notice to the payee.

Discussion

The current framework creates notice requirements which duplicate certification procedures. Under approximately 60% of main contracts, a certificate is issued by an architect, engineer or surveyor to determine the sum due. Shortly afterwards the payer must issue a payment notice stating the amount to be paid. The payer is usually happy to pay the sum due as certified and the information in the notice only duplicates that in the certificate. There is a significant financial cost associated with the administrative inconvenience of complying with both requirements. DTI statistics suggest that 396,000 main contract payments are made each year in GB. Responses to 'Improving Payment Practices in the Construction Industry' reckon that the cost of issuing a payment notice is approximately £25 per payment. Overall this gives us an estimated reduction of 396,000 x 60% x £25, that is, some £5.94 million per year. The relative size of the construction output in Northern Ireland would therefore suggest a reduction in cost to the industry of the order of £191,800.

2. Clarification of the requirement that a Article 9 (2) payment notice should be served

Background

Article 9 (2) requires a payment notice to be served in certain circumstances. The simplest of these is where a payment is due. The other is where the payment would have been due had a combination of circumstances arisen. We do not consider that the drafting of these provisions is ideal: specifically, it is not clear that the obligation to issue a payment notice continues even where no payment is due because of abatement or set-off under the contract at issue.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if:

(a) the other party had carried out his obligations under the contract; and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made, or proposed to be made, and the basis on which that amount was calculated.

Proposal

The intended purpose of the proposal is to make clear that a payment notice is always required if a payment would have become due under the contract. That will be the case even where there is no obligation to make any payment because the work has not been carried out, or there has been set-off under the contract, or one or more other contracts, or abatement under the contract.

The Construction Order

We are proposing to amend Article 9 (2) so that a payment notice will be required where a payment would have been due if:

- the party performing work under the contract had carried out his obligations under the contract;
- no set-off was permitted by reference to any sum claimed under the contract or one or more other contracts; and
- no abatement was permitted in respect of the work.

The Scheme

We will amend the payment notice provision in Part II paragraph 9 of The Scheme to reflect the amended requirements in the Order.

Discussion

The current drafting of Article 9 (2) may lead the payer mistakenly to conclude that he need not issue a payment notice because of certain deductions from the sum that would otherwise have been due. Payment notices are an important tool in ensuring early communication of payments made, or proposed to be made. Such notices are therefore important, even where no payment is proposed because the work has not been carried out, or there are set-offs, or abatements, that mean the payer is not obliged to pay.

3. Clarity of the content of payment and withholding notices

Background

The Construction Order introduced the requirement that the payer should serve Article 9 (2) payment and Article 10 withholding notices to the payee. There is confusion in the industry about how they relate to each other, what each should contain and how they create a sum due. This lack of clarity can lead to the needless issue of two separate notices when a single payment notice would suffice.

Clearly, measures to improve the clarity of notice content will help address some of the issues relating to a sum becoming due and these are considered in Section 4 of this chapter.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five days after the date on which a payment becomes due from him under the contract, or would have become due, if:

(a) the other party had carried out his obligations under the contract; and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made, or proposed to be made, and the basis on which that amount was calculated.

Article 10 (1) requires a party withholding payment after the final date for payment of a sum due to give an effective withholding notice.

It also provides that a Article 9 (2) notice may be an effective withholding notice if it complies with Article 10.

Article 10 (2) describes an effective withholding notice. It must specify:

(a) the amount proposed to be withheld and the ground for withholding payment, or,

(b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.

Article 10 (3) allows the parties to agree the prescribed period and provides that in the absence of agreement the period is that provided in The Scheme.

Proposal

The intended purpose of the proposal is to:

- introduce clarity as to the content of the payment and withholding notice framework;
- prevent unnecessary duplication by making clear provision on how a Article 9 (2) notice can act as a withholding notice; and
- align the information required in Article 9 (2) payment notices and Article 10 withholding notices.

The Construction Order

We are proposing that the payer must set out in the payment notice the amount (if any) that he has paid, or proposes to pay.

Where this is different from the amount that would have been paid had:

- the payee carried out his obligations under the contract;

- no set-off was permitted by reference to any sum claimed under the contract, or one or more other contracts; and
- no abatement was permitted in respect of the work,

We propose that the payer will have to set out the grounds for paying less than the amount calculated in accordance with the above formula. Where there is more than one ground for making deductions from that amount, the payer will be required to set out each ground and the amount attributable.

Further, we are proposing to require that all withholding notices should be in the same format as an Article 9 (2) notice with the effect that the withholding notice becomes a revision of the payment notice.

Once the 'prescribed period' under Article 10 (3) has passed, the payer cannot revise the amount in the notice any further.

We propose to make clear that the withholding requirement is in respect of any amount (i.e. including abatement) and not just the withholding "of a sum due" as at present (which is thought by many to relate to sets-off only).

The Scheme

We will make changes to align The Scheme with the above in respect of payment notices.

Discussion

Our proposal creates a clear connection between the information in the Article 9 (2) notice and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present routinely submit both a payment notice and a withholding notice where only one is necessary.

Our proposal sets out a framework where a withholding notice should take the form of a revised payment notice. This single format creates clarity and simplicity, though in places, additional information is required.

The proposal that the withholding notice would be required to state the amount of the payment made, or proposed to be made, was supported in 'Improving Payment Practices in the Construction Industry' in 2005. Though that proposal had initially been rejected following consultation, further consideration has led us to conclude that it would allow the payment and withholding notice requirements to work more effectively and economically.

Administrative cost

It is arguable that this proposal will increase the number of Article 10 withholding notices that must be issued under contracts without certificates. It is possible to estimate the cost to the construction industry of this change using DTI's estimate that 356,400 payments are made each year (in GB) under contracts without certificates (40% of main contract payments and an additional 50% as an estimate for the number of payments made under sub-contracts). Based on the relative scale of construction output in Northern Ireland proportionate to GB output, these assumptions would suggest that some 11,500 payments are made under certificates in Northern Ireland.

We are seeking responses from consultees on the proportion of payments that are subject to abatement after the payment notice deadline. If it is one monthly payment every two and a half years and the cost of a withholding notice is £25, we estimate that the additional inconvenience will cost the construction industry in Northern Ireland 11,500 x £25 / 30, that is, approximately £9,600 per year.

4. Clarity of the sum due

Background

In the Construction Order the sum due is the cornerstone on which the rest of the payment framework is built.

The concept of what constitutes the sum due is clear where the contract provides for certification of work by a third party (such as an architect). In these cases the courts have upheld the position that the sum due is the amount in the certificate.

However, in contracts without certificates, the position is less clear and the current payment framework can fail to create a clear understanding between the parties as to what is the sum due. As a result, the Order can fail effectively to crystallise the amount to be paid on, or before, the final date for payment, or allow access to the right of suspension.

Proposal

The Construction Order

We are proposing that, where the payer has issued a payment notice as described in Section 3 of this Chapter, this amount becomes the sum due, which can then be subject to withholding. Non-payment of the remainder will provide the payee with the right to suspend performance.

We would then provide that:

- where the payment notice is not issued, the sum due is determined by a new fall-back provision. The sum due would then be the amount in a claim by the payee issued before the final date for payment; and
- where that claim determines the sum due, but is issued after the due date, the payment period would then run from the date of the claim to allow the payer time to issue a withholding notice.

We would also provide that, like the current provision in Article 10 (4) for amounts to be withheld, the amounts to be paid under a payment notice could be referred to adjudication and the payment delayed until a week after the date of the adjudicator's decision.

The Scheme

We are proposing that the fall-back provision whereby the sum due is determined by a claim by the payee should take effect as a statutory fall-back, rather than a requirement that the contract should provide this fall-back. As such, no corresponding provision is necessary in The Scheme.

Discussion

Article 9 (2) requires the contract to provide for the payer to notify the payee of “the amount (if any) of the payment made or proposed to be made". There are two practical problems with this:

- it is not clear how the amount specified in the notice relates to the sum due. The sum due is not then clear for the purposes of Articles 10 and 11; and
- failure to issue the notice may be no more than a minor breach of contract. This is because nothing in Article 9 (2) compels the payer to issue it. ‘Improving Payment Practices in the Construction Industry’ found that the notice is only issued for about 40% of payments.

Where these problems arise, their effect on Articles 10 and 11 of the Construction Order raises the following issues:

Article 10 enables a payer to withhold payment from a sum due where he has issued a withholding notice. In the absence of a withholding notice, the payer must pay the whole sum due. However, the lack of transparency about what constitutes the sum due (whether or not he has received an Article 9 (2) payment notice) can leave the payee with less payment than expected. This can result in costly legal proceedings to determine the ‘sum due’. It can often be argued that no notice is needed as the abatements were never due. Generally, sets-off should be notified, though this may differ under certain contracts. In any respect, the majority of contractors cannot distinguish one form of deduction from the other.

Article 11 provides a right to suspend performance where the payer fails to pay the sum due (subject to any withholding under Article 10). However the lack of transparency about what constitutes the sum due acts as an effective barrier to the exercise of this right.

We therefore intend to introduce much greater transparency about the sum due by providing a statutory definition.

5. Prohibiting the use of pay-when-certified clauses

Background

As part of the proposal to create a clear understanding of the sum due under a construction contract, we have concluded there may be value in restricting the use of pay-when-certified clauses. This ensures that there is clarity about when payments become due, as well as to what is the due sum.

Current legislation

Article 9 (1) of the Construction Order provides that “every construction contract should provide an adequate mechanism for determining what payments become due under the contract, and when". This provision allows payment to be triggered by the timing of a decision which is conditional on work under a separate contract.

Article 12 of the Construction Order states that, “A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective". This prohibition of pay-when-paid clauses also does not appear to affect a clause making the timing of payment conditional on a decision about payment from a third person.

Proposal

The Construction Order

As part of a new payment framework, we are proposing to ensure that a certificate covering work under one contract cannot act as a mechanism to determine the timing of payment for work done under another contract. In effect we propose to prohibit pay-when-certified clauses.

The Scheme

No amendment to The Scheme is necessary

Discussion

Respondents to 'Improving Payment Practices in the Construction Industry' suggested that pay-when-certified clauses were a way for the main contractor to shift the burden of non-payment to the sub-contractor. The sub-contractor has no way of knowing whether a main contract certificate has been issued, or of its contents, or whether the payer has grounds under the pay-when-certified clause to withhold payment.

Although prohibiting pay-when-certified clauses may have the result that the main contractor pays the sub-contractor before he himself is paid, it is in keeping with the purpose of the Order for funds to be distributed promptly through the construction supply chain.

Our proposal is seeking to ensure that, provided a sub-contractor has completed the work he has been engaged to do and, upon the issue of his invoice, the payer must pay regardless of whether or not a certificate has been issued under the main contract.

This will ensure that money flows through the supply chain thereby reducing the need for companies to service loans/debts. The benefit to the whole supply chain is that firms can improve the management of their cash flow. We would also expect there to be fewer disputes.

In assessing the impact of this proposal, we are proposing to consider its effect on standard forms of sub-contract only. We understand that traditional civil engineering sub-contracts continue to include pay-when-certified clauses. DTI statistics suggest that 11,400 payments are made each year in GB under civil engineering sub-contracts. As these will no longer become due under a pay-when-certified clause, the terms of The Scheme will apply and the payment will become due following the expiry of the relevant period, or upon the issue of a claim by the payee, whichever is the later. The payer will then have to issue a payment or withholding notice. Assuming a main contract certificate has not been issued, this will require additional administration by the payer. Assuming a cost of £25, the total cost in GB will be £285,000. Again by applying scaling factors reflecting the relative construction outputs in GB and NI, the cost in Northern Ireland is estimated to be some £9,200.

Overall benefits of the revised payment framework

We believe the revised framework will:

- improve communication between the parties;
- enable cash to flow through the supply chain and improve liquidity and reduce costs of servicing debt; and
- enable the parties to address problems that give grounds for withholding payment.

Additional: Simplification of payment notices - £191,800

Less: Clarity as to the sum due - £ 9,600

Pay when certified - £ 9,200

Total - £173,000

The reduced burden of the revised payment framework is therefore estimated to be approximately £173,000.

The broader benefit of the new framework is the creation of clear entitlements to payment which may be reviewed at adjudication in an arrangement that is comparable to interim certification under many forms of construction contract. This will enable disputes to be resolved at an early stage in any given payment period. We believe this will reduce financial costs for both the payer and the payee prioritising the need for payment to crystallise and change hands at an early stage rather than being delayed by the determination of the amount legally payable irrespective of the delay. This is of considerable benefit to the industry and its customers.

Quantifying the saving to the construction industry and its clients in terms of reduced cost and improved productivity and efficiency is difficult. However, research recently commissioned by the Office of Government Commerce in support of the Fair Payment Charter, which indicated that improvements to the payment framework to ensure contracts create clear and timely entitlements to interim payment, are estimated to save 1% – 1.5% on the average project. If this were reflected across construction in Northern Ireland, it would represent potential savings of some £3.25 – 5.0 million.

To identify overall the savings that result specifically from our proposals we have considered the comparison between the operation of contracts with certificates and of contracts without certificates. In future, the Article 9 (2) payment notice will act like a certificate in creating an entitlement to payment subject to withholding under Article 10 and final determination by adjudication, arbitration or litigation. In the absence of a payment notice, a claim by the payee will determine the sum due on the same basis. A similar system also operated on the Joint Contracts Tribunal “With Contractor’s Design" contract until its revision in 2005. Statutory support for this approach would be likely to ensure its effective operation.

Chapter 3 – Improving the right to suspend performance

Background

The Construction Order provides a statutory right for the payee to suspend performance under the contract. This right:

- is a powerful sanction in cases of non-payment, and
- allows the payee to reduce his expenditure on the project during a period when he is not being paid.

However, there is a number of disincentives to the exercise of this right which centre on the costs of suspending performance.

Current legislation

Article 11 (1) gives a statutory right to the payee to suspend performance of obligation to the payer in cases of non-payment of a sum due (less any amounts properly withheld);

Article 11 (2) provides that the right can only be exercised if the suspending party has given the payer in default seven days notice of his intention to suspend work stating the reasons why work will be suspended;

Article 11 (3) provides that the right to suspend work ends when the outstanding amount is paid in full; and

Article 11 (4) provides that there should be a readjustment to the contract to compensate for the time lost during a period of suspension.

Proposal

We intend to make the existing right to suspend performance a more effective remedy by reducing the burden on the party who exercises this right. We will:

- make clear that a party need not suspend all of his obligations to the party in default when exercising the statutory right;
- provide a statutory right for the suspending party to be compensated for reasonable losses caused by the suspension; and
- provide an extension of time for any delay caused by the exercise of the right to suspend.

Discussion

Our proposals are intended to make the right of suspension more accessible and effective. The measures are not intended to alter radically the process and should decrease the costs of suspension to the suspending party. Without access to the statutory right of suspension, the payee cannot secure prompt payment, or take steps to reduce his expenditure, when he is not paid.

The following disincentives upon the suspending party result from the current legislative framework:

- the costs of suspending and remobilising performance under a construction contract: these are the inherent costs involved in exercising the right of suspension and then remobilising when payment is made. These costs, which may include damaged materials while clearing site, storage charges, additional management costs and the cost of retaining sub-contract labour and hired plant and equipment all fall to the suspending party (the payee). The possibility of incurring additional costs for remobilisation when the payer later makes the outstanding payment is also a burden. The current legislation requires the payee to remobilise immediately upon payment which can impose additional cost;
- the inconvenience and cost of remobilising immediately upon payment of the outstanding debt: currently, the Construction Order makes no allowance for any delay for the suspending party to remobilise. The suspending party is required to be prepared to remobilise immediately when payment is made as the contract may also impose a

sanction. Given the uncertainty about whether the payment will be made, and if so when, and to reduce the costs of suspension, the payer may have transferred labour and equipment to a different project; and

- the inconvenience and cost of having to suspend all obligations under the contract: we believe that the right of suspension can be exercised in respect of suspension of any or all of the payee's obligations under the contract. However this view is not shared throughout the whole construction industry and there is support for some clarification.

In 'Improving Payment Practices in the Construction Industry', consultees were asked how frequently the right to suspend performance was exercised and how frequently it was believed it would be exercised following the proposed amendments. While the majority of respondents thought it was exercised in fewer than one in 100 cases of defaulted payment at present, almost half thought that this would lead to increases of between 1 in 100 and 1 in 10 cases of defaulted payment in the future.

Though there might be a modest increase in the use of the statutory right to suspend performance following the amendments proposed above, we also intend that improving access to the right should ensure that payment is made on time more often in future. We are considering the extent of any improvement in payment as a result of these proposals as part of this consultation.

Chapter 4 – Other issues

1. Minimising Divergence

It is desirable that, although responsibility for Part II of the Housing Grants, Construction and Regeneration Act 1996 has been transferred to the Northern Ireland and Scottish administrations, where possible the cross-border administrations should work together to minimise divergences. It is accepted however that certain legal distinctions between the Law in Northern Ireland and England and Scottish Law may continue to necessitate modest differences in approach. The Northern Ireland Executive hopes to keep these to a minimum and is working with colleagues in BERR and the Scottish Government to achieve this aim of maintenance of parity of legislation across the United Kingdom for the construction industry.

This consultation seeks your views on the need to minimise any divergence across the United Kingdom (see Consultation Response Form – Annex B).

2. Introduction of 'slip rule' to enable the correction of error

An outcome of the Scottish Executive's consultation in 2003 on 'Improving Adjudication in the Construction Industry' was the suggested need for a "slip rule". The Scottish Executive's report on that consultation proposed that a "slip rule" should:

"... give adjudicators powers to correct their decisions so as to remove any clerical, or arithmetic, mistake or error that has arisen from an accidental slip or omission; and they should be permitted to do this at the request of any party to the adjudication, and where the adjudicator becomes aware of such an error. It is also proposed that adjudicators should be empowered to correct any other aspects of their decisions where the parties are in agreement that they should do so.

“Any corrections of clerical or arithmetic errors are likely to be relatively straightforward, and so the timescale for notifying the adjudicator, and for making corrections, need not be particularly lengthy, bearing in mind the need to achieve relatively quick resolution of disputes. It is proposed, therefore, to amend the Scheme to provide that adjudicators may make corrections as soon as possible and by not later than seven calendar days after the date of issue of their decisions or such longer period as the parties may agree. This should allow sufficient time for corrections to be made without unduly delaying the process.

“Consideration has been given to whether there is a need to set a time limit for parties to request an error to be corrected. It is felt that by setting a time limit on the period allowed for correcting a decision, and giving adjudicators discretion on whether or not they make a correction, there should not be a need to set a time limit within which the error must be brought to the adjudicator’s attention."

In this consultation we are seeking the views on whether, or not, the Northern Ireland Executive should work with BERR to develop proposals further for a slip rule. In particular we are seeking your views on whether the slip rule should provide the adjudicator with:

“...power to correct a clerical or arithmetic error, or any other matter that the parties may agree, for 7 days after the adjudicator’s decision, or such longer period as the parties may agree."

In England and Wales, it has not been necessary to introduce a slip rule as the courts have implied such a rule by reference to the Arbitration Act 1996. However, if provision were to be introduced in Northern Ireland, this legislation would remove the courts’ current discretion as to the time limits and applicability of a slip rule.

3. Expenses (but not adjudicators’ fees)

The Scottish Executive’s consultation in 2003 on Improving Adjudication in the Construction Industry had also asked whether there was a problem in Scotland with regard to the award of expenses and what the nature of any problem was. Respondents indicated that there did appear to be some uncertainty amongst the users of adjudication about whether adjudicators can award expenses under The Scheme. Chapter 1, Adjudication Framework, covers this area and replicates the proposals in the Scottish and England/Wales consultations.

4. The judgement of the House of Lords in Melville Dundas -v- George Wimpey

Background

This judgement relates to a Scottish case. However, it concerns the interpretation of the Construction Act as it applies in England and Wales (and as the Construction Order in Northern Ireland) as well as Scotland. It is likely to be followed across the UK. It has since been referred to in the case of Pierce Design International Limited against Mark Johnston and another (EWHC1691 TCC). We are seeking the views of consultees on:

- whether the judgement raises an issue which must be addressed via a legislative amendment; and
- what options there are for addressing those issues.

The case

In the case, Wimpey employed Dundas to construct a housing development. On 2 May 2003, Dundas applied for an interim payment. There was no dispute that this payment was due. The final date for payment was 16 May (14 days after Dundas' application). On 30 May 2003, Wimpey terminated the contract due to the appointment of an administrative receiver to Dundas. The contract provided that where Wimpey terminated the contract, it was not obliged to pay any payment due which accrued less than 28 days before the earliest date that Wimpey could have first given notice to terminate the contract (22 May).

Dundas sought to enforce the payment in the Outer House of the Court of Session in Scotland claiming that the payment ought to have been made on or before the final date for payment, notwithstanding the termination of the contract. No withholding notice had been issued in accordance with section 111 of the Construction Act before the 11 May contractual deadline. Lord Clarke refused to enforce the payment, stating that the payment had not been withheld, but that the final date for payment had been delayed while a final payment following termination was calculated. This was overruled by the Inner House of the Court of Session (Appeal Court in Scotland). On 25 April 2007, by a majority of 3 to 2, the House of Lords restored Lord Clarke's original judgement, though for different reasons.

The judgement

The reasoning of the prevailing judgements in the House of Lords can be summarised as follows:

- the Construction Act is intended to balance the parties' freedom of contract with the need for clarity as to amounts of payments under the contract and any amounts to be withheld. This was intended to balance the interests of the payer and the payee;
- section 111 should apply to interim payments, where these become due by virtue of the statutory right to interim of stage payments in section 109 of the Act. So long as the contract is in operation, a notice would be required for these to be withheld via set-off as a result of a cross-claim;
- it was not clear that section 111 applied to withholding under the standard determination clause in the contract because:
- The determination clause was already drafted in a standard contract so as to balance the interests of the payer and payee;
- it allowed the payment to be withheld in cases of administration in the same way as would apply under the legislative framework for cases of bankruptcy and liquidation; and
- after the payment was withheld, a final payment would be determined taking into consideration all of the parties respective entitlements. The effect was that the interim payment that had been due was no longer due, and instead a final payment would become due;
- in the absence of clear provision in the Act, the Inner House should not have insisted on the payment being made, but should have found that the determination clause applied; and
- the two dissenting Law Lords found that the only way systematically to apply the withholding notice requirement in the Act was to find, as the Inner House did, that, in the absence of a withholding notice, the determination clause did not apply. The Act did not provide an exception to the application of section 111.

Issues raised

We consider that the judgement raises two areas of uncertainty:

- whether section 111 applies in cases where the contract is determined, or only where it is determined in cases of insolvency; and
- whether section 111 applies to other grounds for withholding in respect of final payments.

Policy

From a policy perspective, we consider that:

- section 111 should not apply in cases of insolvency. Currently the courts will not enforce the decision of the adjudicator in accordance with section 108 of the Construction Act in cases where the payee is insolvent. The House of Lords considered that the application of section 111 was comparable; and
- section 111 should apply in all other cases. We consider that section 111 should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as “payments by instalments, stage or other periodic payments" which become due in accordance with section 109 of the Construction Act) while a construction contract is in operation. It appears clear to us that this was the original intention.

The consultation response form at Annex B asks you for your view as to whether:

- the House of Lords judgement is likely to be followed by the lower courts so as to have the effect that we consider should apply;
- the Order should expressly provide a corresponding exception to section 111 in the Act in cases where the payee is insolvent (section 113 already provides an example of an exception for insolvency), or leave this exception to be decided by the courts; and whether
- the Order should be correspondingly amended to make clear that its equivalent provision for section 111 of the Act applies to all other grounds for withholding in respect of all payments.

Chapter 5 – Partial Regulatory Impact Assessment

Proposals to amend Construction Contracts (Northern Ireland) Order 1997 (‘The Order’) and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (‘The Scheme’)

1. Objective

Disputes under construction contracts can jeopardise the effective delivery of projects on time and within budget. They can also threaten the viability of individual businesses and can undermine the longer-term health of the construction industry. The proposals being considered in this Regulatory Impact Assessment (RIA) seek to improve the statutory framework set out under the Construction Order to reduce the incidence and impact of these disputes.

We are seeking to introduce a better, more focused and effective regulatory

framework by:

- improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to better manage cash flow; and
- encouraging the parties to resolve disputes by adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation.

The proposals are proportionate amendments to the existing framework which has, in large part, worked well, rather than wholesale reform.

In considering the responses to this consultation we will bear in mind:

- the need for improvement in payment practices under the legislation for all concerned;
- the need to respect the principle of freedom of contract, keeping intervention only for those situations where it is deemed essential;
- the possibility of guidance to address certain issues as an alternative to regulation; and
- the continuing development of case law on adjudication and the payment provisions of the Construction Contracts Order in NI.

2. Background

The Chancellor announced in the 2004 Budget Report that:

"Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants Construction and Regeneration Act in order to identify what improvement can be made."

It was from this Act that the Northern Ireland Construction Contracts Order was derived.

In April 2004, the then Construction Minister, Nigel Griffiths MP, appointed Sir Michael Latham to undertake the first stage of the review. The purpose of this first stage was to identify the extent, for all sectors of the industry, to which the Act:

- was working well;
- needed improvement; and
- what might be the potential impact of proposed improvements on other parties or processes.

Sir Michael's report to Nigel Griffiths (September 2004) concluded that the industry had come a long way since the Construction Act was introduced in 1996 and that it was indeed generally working well. However, the report identified some areas where further progress was desirable. The DTI and Welsh Assembly Government's March 2005 Consultation exercise, 'Improving Payment Practices in the Construction Industry', explored some of these in more detail.

Over the course of this review, the Government has considered a wide range of proposals to change the operation of the adjudication and payment provisions in the Construction Act. The outcome of the process was published in July 2008 in The Analysis of the 2nd Consultation on proposals to amend Part 2 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 and the legislative proposals arising are set out in Part 8 of the Local Democracy, Economic Development and

Construction Bill currently in passage through Parliament. The corresponding changes to the Northern Ireland Order are set out in this document (see paragraph 4 below).

3. Rationale for Government intervention

Sir John Egan, Chair of the Construction Task Force said in the Foreword to Rethinking Construction (1998):

"A successful construction industry is essential to us all. We all benefit from high quality housing, hospitals or transport infrastructure that is constructed efficiently. At its best the UK construction industry displays excellence. But, there is no doubt that substantial improvements in quality and efficiency are possible. Indeed, they are vital if the industry is to satisfy all its customers and reap the benefits of becoming a world leader."

Disputes under construction contracts can pose a major threat to the effective delivery of projects on time and on budget. At the broader industry level, the culture evidenced by such disputes can only undermine the industry's ability to achieve the performance improvements set out in Rethinking Construction (1998) and Accelerating Change (2002).

As Sir Michael Latham's report in 2004 confirmed, the Construction Act has been generally welcomed since it came into force in GB on 1 May 1998 and the Construction Contracts Order in Northern Ireland on 1 June 1999. The adjudication process in particular appears to have reduced the number of disputes reaching the courts. However, payment practices in the construction industry continue to cause concern. Problems of disputed, late, or non-payment issues continue to be commonplace.

4. Consultation

The development of BERR's proposed changes to the Housing Grants Construction Regeneration Act 1996, which form the basis of our proposals for amendment to the NI legislation, has involved extensive formal and informal consultation with the construction industry, its clients, Government and other stakeholders in GB.

Within Government

BERR has had discussions with:

- The Cabinet Office
- Office of Government Commerce
- HM Treasury
- The Department for Communities and Local Government
- Department for Constitutional Affairs; and
- Devolved Administrations

With industry

Consultation with the industry has included:

- The review undertaken by Sir Michael Latham in 2004;

- The first consultation 'Improving Payment Practices in the Construction Industry' in 2005;
- The analysis of 'Improving Payment Practices in the Construction Industry', 2006;
- Industry stakeholder events organised by the DTI Construction Sector Unit in June 2005 and February 2006;
- Industry stakeholder events organised by the umbrella bodies during the 2005 consultation period; and
- A pre-consultation exercise on adjudication in autumn 2006

DTI/BERR also established a sounding board. Sounding board members did not represent specific sectors of the industry, but were asked to assist in view of their personal knowledge, experience and access to industry networks. The sounding board was recognised as invaluable in assisting BERR with the preparation of the proposals. Its members were Richard Bayfield, Chris Dancaster, Richard Haryott, Sir Michael Latham, HH Humphrey Lloyd QC and Peter Rogers CBE.

5. Options

One of the options considered was to maintain the legislation as it stands and take forward a voluntary process of improving construction contract and payment practices through guidance.

Government and all parts of the industry have a good track record on working together to improve adjudication. An example of this has been the work of the Construction Umbrella Bodies Adjudication Task Group (CUBATG) in preparing guidance in response to a number of issues and concerns raised during a previous review of the operation of the adjudication provisions of the Construction Act. This guidance is available from the Construction Industry Council Website

(http://www.cic.org.uk/services/adjudication.html)

BERR sought to maintain and build this existing positive relationship with CUBATG in developing its proposals to amend legislation on adjudication and to develop suggestions for areas where further guidance would be helpful.

Throughout the process of this review a number of issues was raised where it has been decided that 'doing nothing' is the best option. The reasons for taking this approach in those cases have been set out in the public information which accompanies this Review. The key documents are:

- Nigel Griffiths' letter of 21 October 2004 to Sir Michael Latham;
- 'Improving Payment Practices in the Construction Industry';
- March 2005 Consultation Document;
- January 2006 Analysis of Consultation Responses; and
- July 2008 Analysis of the 2nd Consultation report.

These are available on the construction pages of BERR's website:

http://www.berr.gov.uk/sectors/construction

A. Targeted regulation

In developing the payment and adjudication proposals we have chosen to go down the 'targeted regulation' route, i.e. to intervene where it is clear that the legislation is not meeting the original

objectives effectively. We are seeking to ‘fine tune’ rather than re-invent the existing statutory framework.

Through this approach we have identified a package of legislative measures to address weaknesses and improve the clarity of operation and effectiveness of the existing legislation. Many of these measures are technical and have low regulatory impact. They are outlined below.

Proposals

Prompt and fair payment practice throughout construction supply chains will better enable the industry to adopt integrated team working as the norm.

The amendments to the Construction Order will:

- improve the transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;
- encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and
- improve the right to suspend performance under the contract.

This will be done by:

On adjudication

- improving access to the right to refer disputes for adjudication;
- applying the legislation to oral and partly oral contracts;
- preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes; and
- ensuring the costs involved in the process are fairly allocated.

On payment

- preventing unnecessary duplication of payment notices;
- clarifying the requirement to serve a Article 9 (2) payment notice;
- clarifying the content of a notice;
- ensuring the payment framework creates a clear interim entitlement to payment; and
- prohibiting the use of pay when certified clauses.

On suspension

- improving the statutory right to suspend performance by allowing the suspending party to claim the resulting costs of delay as well as direct costs.

This is not wholesale reform. These proposals are intended to be light touch and proportionate amendments to the existing framework to address specific issues that have arisen during the decade the Construction Order has been in operation. Guidance remains the preferred route to

improve operation of construction contracts and we have only considered further legislative intervention where we believe it is absolutely necessary.

B. Extensive regulatory intervention

Another option which is not being pursued is that of ‘extensive regulatory intervention’. As the review of the Construction Order has progressed, some proposals have been suggested which, in our view, would undermine the compromises that were reached in 1997, or would fundamentally alter the existing statutory framework. Throughout the review process, we have been mindful of the finely balanced compromise that was struck by the original legislation. Our guiding premise therefore has been only to intervene where it has been considered that the legislation has shown to not have delivered its original objective. We have only intervened in ways which do not undermine the existing structure of the legislation. Such proposals as we do wish to make are targeted interventions to “fine tune" the existing statutory framework.

Following a more regulatory route would be to change fundamentally the Construction Order and the contracts it regulates. At the very least this would impose considerable transitional burdens on the industry and its customers. For instance the large number of standard forms of contract (as an example the Joint Contracts Tribunal has some 20 contracts) would need to be revised extensively as the transition was made from one statutory framework to another with the resultant additional costs and disruption that entails.

6. Costs and benefits

The proposals we are seeking to introduce to amend the Construction Order will:

- improve access to the adjudication system by applying the legislation to oral and partly oral contracts and ensuring the costs involved in the process are allocated fairly;
- improve the operation of the payment framework in the legislation by removing the duplication between statutory payment notices and contractual payment certificates; and
- ensure the payment framework operates effectively to create a clear interim entitlement to payment which can be finally determined through arbitration or adjudication if necessary.

The costs and benefits of each of these proposals are summarised in the following table:

Proposals	Benefits	Costs	Net Benefit
Prevention of unnecessary duplication of payment notices	A significant reduction in the number of payment notices that need to be issued by the payer. This reduction in the requirement for Article 9(2) notices will save the industry approximately £173,000		▪ Our proposals create a clear connection between the information in the Article 9(2) notices and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present

Proposals	Benefits	Costs	Net Benefit
			routinely submit both a payment notice and a withholding notice where only one is necessary.
Clarification of the requirement that a Article 9(2) payment notice should be served	At present there is no clear link between the “sum due" under the contract and the amount notified in a Article 9(2) notice; this creates a range of problems under contracts without certificates, as the payee does not have a clear entitlement to payment. This measure brings the following benefits under these contracts: ▪ It will not be possible to withhold payment without notice; and ▪ It will be much clearer when the payee is entitled to suspend performance.		▪ The current drafting of Article 9(2) may lead the payer to conclude that he need not issue a payment notice because of certain deductions from the sum that would otherwise have been due.
Clarity of the Content of Payment and Withholding Notices	Our proposal creates a clear connection between the information in the Article 9(2) notice and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present routinely submit both a payment notice where only one is necessary. Our proposal sets out a framework where a withholding notice should take the form of a revised payment notice. This single format creates clarity and simplicity, though in places additional information is required.	This proposal will increase the number of Article 10 withholding notices that must be issued under contracts without certificates as the obligation is extended to all deductions. It is possible to estimate the cost to the construction industry of this change using DTI’s estimate that 356,400 payments are made each year under contracts without certificates (40% of main contract payments and an additional 50% as an estimate for the number of payments made	

Proposals	Benefits	Costs	Net Benefit
		under sub-contracts). Based on the relative scale of construction output in Northern Ireland proportionate to GB output, these assumptions would suggest that some 11,500 payments are made under certificates in Northern Ireland. We are seeking responses from consultees on the proportion of payments that are subject to abatement after the payment notice deadline but, if it is one monthly payment every 2½ years, and the cost of a withholding notice is £25, we estimate that the additional inconvenience will cost the construction industry in Northern Ireland 11,500 x £25 / 30, that is, approximately £9,600 per year.	
Clarity of the sum due	By introducing much greater transparency about the sum due by providing a statutory definition. We believe this will: ▪ Improve communication between the parties; ▪ Enable cash to flow down the supply chain; ▪ Enable contractor to plan cash flow and address poor performance; and	There will be an additional cost which will be borne by the payer as the Article 9(2) payment notice does not make it clear whether the payer needs to account for abatements and/or set- offs. This is an administrative inconvenience which the industry has chosen to deal with by issuing separate notices under Articles 9(2) and 10.	

Proposals	Benefits	Costs	Net Benefit
	▪ Potentially improve liquidity and reduce costs of servicing debt.		
Preventing 'pay when certified'	Improves the predictability of cash flow and provides the supply chain with a degree of certainty about what sum they will receive and when.	We understand that traditional civil engineering sub-contracts continue to include pay when certified clauses. Based on DTI statistics that suggest 11,400 payments are made each year in GB under civil engineering sub-contracts and, by applying scaling factors reflecting the relative construction outputs in GB and NI, this would indicate some 370 payments in NI each year. As these will no longer become due under a pay-when-certified clause, the terms of The Scheme will apply and the payment will become due following the completion of the work or upon the issue of a claim by the payee, whichever is the later. The payer will then have to issue a payment or withholding notice. Assuming a main contract certificate has not been issued, this will require additional administration by the payer. Assuming a cost of £25 the total cost will be some £9,200.	▪ Improves communication between the parties; and ▪ Ensures money flows down the supply chain.

Proposals	Benefits	Costs	Net Benefit
Enhancing the existing right to suspend performance where there has been non- payment	This proposal creates a statutory right for the payee to receive compensation for losses caused by the suspension. The payee will also have a sufficient length of time to remobilise on site. Threat of having to pay the additional costs of suspension incurred by the payee is intended to incentivise the payer to administer payment in a fair way.	This proposal does not introduce any overall increase in costs.	Suspension is a remedy of last resort and the current incidence of its use is low. The limitation to only loss and expense reasonably incurred creates the correct balance between enabling the payee to utilise the right to suspend and the new obligations which will fall on the payer. Prompt payment is essential to ensure an effective construction industry.
Introduction of a statutory framework for the costs of the adjudication	Greater access to adjudication for all.	Each party to a dispute is encouraged to be responsible for their own legal and other costs. Parties will also need to pick up the adjudicator's fees.	Legal and other costs will be kept low. Prompt resolution of disputes. Still cheaper and quicker than going to court.
To prevent the application of "final and conclusive" clauses to interim	The joint DTI/CIC survey of adjudicators in GB found that 50% of adjudication disputes relate to interim payments while the remainder relate to final payments or other matters. The survey also found that resolving payment disputes at the interim stage reduced the cost of adjudication by approximately 10% or £2,000. This means that approximately 875 adjudications in England and Wales relate to interim payments. If adjudication of interim payments was encouraged by increasing the number that may be disputed from 418,200 to 492,000 (i.e., by 17.5%) this would represent an additional 150 interim payment adjudications. Compared to adjudication of the final account, this would result in an approximate reduction in the average cost of £306,000 or £175 per adjudication on average. Any arbitration or		

Proposals	Benefits	Costs	Net Benefit
	litigation cases that were also averted would increase this figure. It is assumed that similar savings could be applicable to Northern Ireland.		
Deleting the existing Article 6 requirement that contracts need to be evidenced in writing	A large number of construction contracts contain orally agreed terms. Our proposal extends the application of the Construction Order to oral and partly oral construction contracts and so provides greater access to adjudication for more varied forms of construction contracts.	Responses to the joint DTI/CIC survey of adjudicators in GB revealed that the additional complexity of adjudicating on oral contracts would not lead to a significant increase (<5%) in the cost of adjudication.	

7. Small firms impact test

The proposed amendments will apply to all construction contracts within the scope of the Construction Contracts (Northern Ireland) Order 1997 including mechanical, electrical, civil engineering, groundworks and professional services.

A table showing some key statistical data on these sectors for Northern Ireland is set out below. Where information is not available for 2008, the most recent information is provided.

	Construction Contracting1	Construction Professional Services2	Total % of Whole Economy
Number of Enterprises IDBR: March 2008	9,608	857	(17.2%)
No of micro/small Enterprises (<50 emps) and % of total IDBR3: March 2008	9,498 (98.9%)	847 (98.8%)	
Total Turnover4 NIABI: 2006	£6,003 million	£286 million	12.4%5
Net Output6 QCE: 2007	£3,435 million	N/A	N/A
Employment7 CoE 2007 and LFS 2007	73,100	7,760	9.6%
Total Net Capital8 Expenditure NIABI: 2006	£340 million	£8 million	12.0%5
Number of company Insolvencies	27 (provisional)		

Background Notes

1. Construction activity is as defined in the Standard Industrial Classification code (SIC 2007) Section 45.

2. Professional Services are defined as the Standard Industrial Classification codes 74201 to 74204 (i.e. Architecture, including Urban Planning and Landscaping, Quantity Surveying and Engineering consultancy and design activities.

3. The Inter Departmental Business Register (IDBR) is the sampling frame used for the NIABI. The register consists of companies, partnerships, sole proprietors, public authorities, central government departments, local authorities and non-profit making bodies in the UK that have registered for VAT or are operating a PAYE scheme. The reporting units on IDBR hold the addresses to which the NIABI form is sent and may cover one or more local units. A local unit is an individual site (factory, shop, office etc) at which business is conducted.

4. Turnover is defined as total sales and work done. This is calculated by adding to the value of sales of goods produced, goods purchased and resold without further processing, work done and industrial services rendered and non industrial services rendered. The value of turnover includes intermediate consumption from within the construction industry and elsewhere.

5. The Northern Ireland Annual Business Inquiry (NIABI) results cover most sectors within the NI economy. The main areas excluded are public administration and defence. Health and social work, education, agriculture, forestry and fishing, and financial intermediation have also been excluded from publication. From 2002, all construction companies employing fifty or more employees are selected to contribute. Businesses falling below the threshold of complete enumeration are selected on a random stratified basis.

6. Quarterly Construction Enquiry net output is defined as turnover minus the value of intermediate consumption from within the construction sector.

7. Estimates of employment are derived by summing employee jobs sourced from the NI Census of Employment and Self-employed estimates from the Labour Force Survey.

The Census of Employment is a statutory enquiry of all employers in Northern Ireland, carried out biennially under the Statistics of Trade and Employment (Northern Ireland) Order 1988. The Census of Employment counts the number of jobs rather than the number of persons with jobs. Therefore a person holding both a full-time and a part-time job, or someone with two part-time jobs, will be counted twice. The Census of Employment does not include agriculture (but includes animal husbandry service activities and hunting, trapping and game propagation), the self employed, HM armed forces, private domestic servants, homeworkers and trainees without a contract of employment (non-employed status).

Estimates of self-employment jobs in the Construction sector are sourced to the Labour Force Survey (LFS) 2007 annual dataset. The figures include those persons that are self-employed in their main job and those who have a second job that has self-employed status. LFS self employed estimates for Construction Professional services are derived by using the employee jobs apportionments to provide an estimate of the appropriate 5 digit disaggregation. The division between employees and self-employed in the LFS is based on the survey respondents' own assessment of their employment status. Please note that since the LFS is a sample survey, all estimates obtained from it are subject to sampling error.

8. Net capital expenditure is calculated by adding to the value of new building work, acquisitions less disposals of land and existing buildings, vehicles and plant and machinery.

Engagement of small firms

As with the previous consultations in GB, we are inviting stakeholders of all sizes, in particular those in Northern Ireland, to voice their concerns/views either through their federations, trade associations, or as individuals.

Given this general industry context, the engagement of small firms, at all points in the supply chain, has been fundamental to the development of these proposals.

Among the many proposals considered, was whether “the payment framework under the Construction Order would benefit from the inclusion of a definition of what should constitute an adequate mechanism for payment?" The responses received to this suggestion indicated it would provide clarity for smaller firms and make clear on what date payment was due.

Likewise, support was also forthcoming for the proposal to “introduce a fallback provision should the payer not issue the advance notice of payment (Article 9 (2) Notice)". The payer is already duty bound by the existing legislation to notify the payee of the amount they will be paid and of any deductions being made.

The cost of monitoring cash flow, negotiating credit, as well as the financing costs and administration, information and legal cost involved in disputes can bear disproportionately on smaller businesses. Not only does this constrain development by increasing relative costs and reducing the ability of small businesses to compete but it can also divert resources from training, innovation and management.

Late payment is a particular issue for all in construction, particularly among SMEs. This is borne out from a recent Small Business Survey in GB, which reported that 46% of construction firms saw late payment as a major obstacle. It was also reported in the same survey that late payment also significantly had a detrimental impact on cash flow.

This survey also reported that 31% of construction firms have had to resort to the courts as a result of late payment.

The benefits of the proposed amendments to small and micro businesses are:

- introducing greater transparency and clarity into the payment framework to assist in the management of cash flow;
- increasing access to a simple mechanism for resolving disputes;
- improving communication between payer and payee on what will be paid and when;
- encouraging prompt administration and communication of payment and improving the efficiency and productivity in the industry; and
- enabling the parties to continue to work together effectively to deliver high quality construction projects on time and on budget.

8. Equality Impact Assessment (EQIA)

Any policy developed by the Department of Finance and Personnel must have due regard to the need to promote equality of opportunity among nine categories of persons, namely among persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

The aim of an Equality Impact Assessment is to determine whether any of the nine groups defined above are significantly affected, either positively or negatively, by a change in government policy: does the policy under consideration create differential impacts between groups within each Section 75[4] category? Is this impact adverse or beneficial?

While the Department of Finance and Personnel has carried out a preliminary cast among interested bodies within the industry and this did not identify any anticipated impact on any of the Section 75 groups, we wish to ask you whether you have any views on the relative impact of our proposals on the different Section 75 groups.

The proposed amendments to the Construction Order affect contracts between businesses and self employed individuals. They will apply equally to all businesses and individuals drawn from all ethnic groups, age groups and to men and women alike. We believe our proposals are unlikely to have a greater impact on any group as compared to another. The amendments all put in place regulatory reform that will remove burdens by:

- improving the operation of the existing legislation by introducing greater clarity and transparency and reducing disincentives to use adjudication where appropriate;
- helping to maintain a level playing field in a competitive market with a large proportion of small firms; and
- underpinning existing best practice in the industry.

These amendments will better enable contractors to plan cash flow, address poor performance, and potentially improve liquidity and reduce the costs of servicing debt. They are intended to benefit small businesses in particular.

9. Human Rights Assessment

The Department of Finance and Personnel considers that the proposals set out in this consultation are fully compliant with the Human Rights Act 1998.

10. Competition Assessment

The construction industry is extremely competitive. There is no dominant firm in the construction sector. Many firms report very low margins. Competition is healthy to the point of sometimes being extremely fierce and affecting profitability.

Similarly, there is no small key group of dominant firms in any sub-sector other than perhaps some very small specialist fields. The legislation does not set up barriers to entry to any sectors or to the construction industry and is unlikely to affect the size or number of firms, though it may reduce the churn brought about by the combination of insolvencies and new firms being established.

11. Enforcement, monitoring and sanctions

There is no proposal to change the enforcement mechanisms introduced through the original legislation. The main enforcement mechanism for the legislation other than the courts or arbitration is the adjudication process, which the legislation provides. The decision of the adjudicator is binding on the parties and enforceable through summary judgement in court.

The only sanction being introduced is where an application for payment becomes due if the payer fails to issue a payment notice. No other sanctions are proposed.

12. Implementation and delivery plan

I am proposing to introduce the amendments through an Assembly Bill. Following an assessment of the responses to the consultation on the proposed amendments, I will introduce legislation as soon as Assembly time is available.

13. Summary

This package of measures seeks to strike a fine balance between:

- the need to improve the effectiveness of the Construction Order on the one hand by:
- Improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to better manage cash flow; and
- Encouraging the parties to resolve disputes by adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation; and
- On the other hand, the important principle of not upsetting the compromise between all sectors of the construction industry which underpinned the introduction of the original legislation in 1997.

Chapter 6 – How to respond to this consultation

Responding to this Consultation Paper

We are inviting your written responses to our proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1998 and Partial Regulatory Impact Assessment. Responses must be submitted by dd mmm 2009.

The consultation response form is included at Annex B. This form contains questions on each section of the consultation paper and respondents are asked to indicate clearly in their response which questions, or parts of the consultation paper, to which they are responding, as this will greatly aid our analysis. Where a particular issue or proposal is of specific interest or concern, respondents are encouraged to feel free to make as many additional comments or suggestions as they feel is appropriate.

The questions on regulatory impact are important as they will help us to carry out the Impact Assessment that will be needed if we proceed with legislation. We would be very grateful if you would answer as many of these questions as you are able. Your responses will enable us to assess whether the proposals would deliver better payment practices than are supported by the legislation as it currently stands. Where no data have been available for Northern Ireland, we have, where necessary, based our calculations on nationally available statistics, interpolating pro rata.

The consultation response form also covers the amendments that will need to be made to The Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1999. Generally we intend only to make minimal consequential amendments to The Scheme. However

where we believe we have exercised some discretion in policy terms as to how to amend The Scheme, we have included questions on the proposals in the response form.

Handling your response

The Department of Finance and Personnel will publish a summary of responses following the completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear which organisation you are representing.

Though we cannot respond individually to each submission, we will publish an analysis of the consultation following completion of this exercise.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the introduction of the proposed amendments to Construction Contracts Order and The Scheme for Construction Contracts in Northern Ireland. We aim to issue a report on this consultation process by September 2009, with a view to pursuing legislative changes in 2010.

Response address

The response form can be downloaded from the consultation pages of the Department of Finance and Personnel website:

http://www.dfpni.gov.uk/index/about-us/consultation-zone.htm

Alternatively you can respond by letter or fax to:

Department of Finance and Personnel
Central Procurement Directorate
Construction Initiatives Branch
Clare House
303 Airport Road West
Belfast
BT3 9ED

Fax: 028 9081 6555
E-mail: consult.constructorder@dfpni.gov.uk

We will not be able to accept responses after the consultation deadline.

Help with queries

Questions about the policy issues raised in the consultation document should be addressed to:

John Quin
Central Procurement Directorate
Department of Finance and Personnel
Clare House
303 Airport Road West
Belfast
BT3 9ED

Email: john.quin@dfpni.gov.uk
Tel: 028 9081 6850
Fax: 028 9081 6555

Comments and complaints

If you have any other observations, or wish to make a complaint about the substance or conduct of this consultation exercise, please contact:

Business Planning and Co-ordination Branch,
Central Procurement Directorate
Department of Finance and Personnel
Clare House
303 Airport Road West
Belfast
BT3 9ED

E-mail: businessplanning.cpd@dfpni.gov.uk

Annex A – List of Consultees

Association for Consultancy and Engineering
Belfast Solicitors' Association
Catholic Bishops of Northern Ireland
Civil Law Reform Division
Clerk of Petty Sessions, Laganside Courts, Belfast
Community Relations Council
Confederation of Associations of Specialist Engineering Contractors
Confederation of British Industry Northern Ireland Branch
Constructing Excellence NI (CEni)
Construction Confederation
Construction Employers Federation Northern Ireland
Construction Industry Council
Construction Industry Forum Northern Ireland
Council of the Inn of Court of Northern Ireland
Equality Commission for NI
Federation of Small Businesses
Food Standards Agency
HM Council of County Court Judges
HM Revenue and Customs
Human Rights Commission
Institute of Professional Legal Studies
Isle of Man Government
Law Centre (NI)
Ministry of Defence

National Specialists Contractors Council
NI Association of Citizens Advice Bureaux
NI Resident Magistrates' Association
Northern Ireland Chamber of Commerce and Industry
Northern Ireland Chamber of Trade
Northern Ireland Committee, Irish Congress of Trade Unions
Northern Ireland Council on Disability
Northern Ireland Council for Voluntary Action
Northern Ireland Court Service
Northern Ireland Federation of Housing Associations
Northern Ireland Government Departments
Northern Ireland Housing Executive
Northern Ireland Judicial Appointments Commission
Northern Ireland Law Commission
Northern Ireland Local Government Association
Northern Ireland Ombudsman
Northern Ireland Quarry Products Association
Participation & the Practice of Rights Project
Royal Institution of Chartered Surveyors
Royal Society of Ulster Architects
Scottish Executive
Society of Local Authority Chief Executives
Specialist Engineering Contractors' Group
Technology and Construction Solicitors' Association (TecSA)
The Construction Clients Group
The Department for Business, Enterprise and Regulatory Reform (BERR)
The General Consumer Council for Northern Ireland
The Head of School of Law, Queen's University Belfast
The Head of School of Law, University of Ulster
The Law Society of Northern Ireland
The Procurement Practitioners' Group
Translink
Welsh Assembly

[1] See RJT Consulting Engineers Ltd –v-DM Engineering Ltd (2002) EWCA Civ 270, 8 March 2002

[2] Joint DTI/CIC Survey took place between January through to March 2007

[3]These agreements first arose in the case of Bridgeway Construction -v- Tolent Construction (11 April 2000) and were a particular concern of respondents to Improving Adjudication in the Construction Industry (Department of the Environment, Transport and the Regions 2001) and 'Improving Payment Practices in the Construction Industry' (DTI and the Welsh Assembly Government 2005).

[4] The Northern Ireland Act 1998, Section 75.

Annex B – Consultation Response Form

We should be very grateful if you would answer these questions on the proposals in this consultation paper and on their potential impacts. Please give reasons for your answers where you think it may be helpful. You should also feel free to suggest alternative approaches, or make whatever additional comments or suggestions you think are appropriate.

Name.....

Organisation.....

Address.....

E-mail.....

Chapter 1 – Adjudication framework

1. Removing the requirement that the Construction Order should only apply to contracts in writing

(a) Do you agree that Article 6 the Construction Contracts (Northern Ireland) Order 1997 should be removed so that the application of the Construction Order is not restricted to contracts where all the terms are in writing?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree with us that the terms of an adjudication Scheme required by Article 7 of the Construction Order should only be effective if agreed in writing?

Yes ☐ **No** ☐

Comments:.....

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(c) Do you agree with us that the removal of the requirement that the parties must agree a contract in writing in order for the Construction Order to apply is unlikely to encourage the agreement of more oral or partly oral contracts?

Yes ☐ **No** ☐

Comments:.....

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(d) What proportion of contracts as a whole do you consider contain non-trivial terms, which have been subject to oral agreement or variation?

(i) 0% - 10% ☐
(ii) 10% - 25% ☐
(iii) 25% - 50% ☐
(iv) 50% - 75% ☐
(v) 75% - 90% ☐
(vi) 90% - 100% ☐

Please select one from (i) to (vi)

(e) Do you agree with us that an agreement under paragraph 2 or 5(2) of Part I of The Scheme, as to who should act as adjudicator, should only be effective if agreed in writing?

Yes ☐ **No** ☐

Comments:.....

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2. Prohibiting agreements that interim or stage payment decisions will be conclusive

(a) Do you agree that the Construction Order should be amended to prohibit agreements that decisions as to the amounts of payments whether by instalment, stage or other periodic payments are conclusive?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree that the prohibition of agreements that decisions are conclusive should include:

(i) Decisions as to the amounts of stage payments (i.e. for completed stages of work)? **Yes** ☐ **No** ☐

ii) Decisions which relate to the work that has been performed under the construction contract to the extent that it affects the amount of the payment?

Yes ☐ **No** ☐

...but that it should exclude:

(iii) Decisions as to the amount of final payment?

Yes ☐ **No** ☐

(iv) Payment decisions that have already been taken and notified to the parties?

Yes ☐ **No** ☐

Comments:.....

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3. Introduction of a statutory framework for the costs of adjudication

(a) Do you agree with our proposal to prohibit agreements as to the allocation of the costs of the adjudication until after the adjudicator is appointed?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree with our proposal to provide that the adjudicator should have no jurisdiction as to the costs of the adjudication unless the parties have made an agreement to that effect after the adjudicator is appointed?

Yes ☐ **No** ☐

Comments:.....

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(c) Do you agree that adjudicators should be statutorily entitled to claim a reasonable amount in respect of fees for work reasonably undertaken and expenses reasonably incurred?

Yes ☐ **No** ☐

Comments:.....

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(d) Do you agree that the courts should have jurisdiction to decide whether:

(i) The fees and expenses claimed by the adjudicator are reasonable when they are claimed under the proposed statutory right?

Yes ☐ **No** ☐

(ii) The legal or other costs of the parties are reasonable when the parties have agreed that the adjudicator should make a decision as to legal or other costs and that the parties should be jointly and severally liable for this amount?

Yes ☐ **No** ☐

Comments:.....

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(e) What proportion of contracts do you think contain an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

(i) Less than 0.1% ☐
(ii) 0.1% – 0.5% ☐
(iii) 0.5% – 1% ☐
(iv) 1% – 5% ☐
(v) 5% – 10% ☐
(vi) More than 10% ☐

Please select one from (i) to (vi)

(f) What proportion of adjudications do you think are conducted under contracts containing an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

(i) Less than 0.1% ☐
(ii) 0.1% – 0.5% ☐
(iii) 0.5% – 1% ☐
(iv) 1% – 5% ☐
(v) 5% – 10% ☐
(vi) More than 10% ☐

Please select one from (i) to (vi)

Chapter 2 – Payment framework

1. Prevention of unnecessary duplication of payment notices

(a) Do you agree that the Construction Order should be amended so that a certificate from a third party supervising officer under a construction contract, which makes a valuation of the work done, may function as a Article 9 (2) payment notice? **Yes** ☐ **No** ☐

Comments:.....

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(b) Do you agree that the Construction Order should allow the contract to provide that a Article 9(2) payment notice may be issued either:

(i) By the payer? **Yes** ☐ **No** ☐

(ii) By a person identified in the contract? **Yes** ☐ **No** ☐

(iii) By a person identified in a notice to the payee? **Yes** ☐ **No** ☐

Comments:.....

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(c) Do you agree that The Scheme should provide that a payment notice under Part II paragraph 9 may be issued either:

(i) By the payer? **Yes** ☐ **No** ☐

(ii) By a person identified in the contract? **Yes** ☐ **No** ☐

Comments:.....

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2. Clarification of the requirement that a Article 9(2) payment notice should be served

(a) Do you agree that the drafting of the provision in Article 9 (2) of the Construction Order on when it is necessary to issue a Article 9 (2) payment notice should be improved to make clear that:

(i) a payment notice should be issued whenever the payment has been set-off, whether under another contract or the contract in question?

Yes ☐ **No** ☐

(ii) allowance need only be made for abatement of the sum due under the contract in question and not another contract?

Yes ☐ **No** ☐

Comments:.....

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(b) Responses to 'Improving Payment Practices in the Construction Industry' in 2005 suggested that a Article 9 (2) payment notice is only issued for 40% of payments. What proportion of cases where the notice is not issued do you think can be explained by the current deficiencies in the requirement in Article 9 (2) of the Order?

(i) Less than 10% of cases where the notice is not issued (less than 6% of payments as a whole)? ☐

(ii) Between 10% and 33% of cases where the notice is not issued (between 6% and 20% of payments as a whole) ☐

(iii) Between 33% and 66% of cases where the notice is not issued (between 20% and 40% of payments as a whole) ☐

(iv) Between 66% and 90% of cases where the notice is not issued (between 20% and 54% of payments as a whole) ☐

(v) More than 90% of cases where the notice is not issued (more than 54% of payments as a whole)? ☐

Please select one of (i) to (v)

3. Clarity of the content of payment and withholding notices

(a) Do you agree that Article 9 (2) of the Construction Order should be amended to require that, in addition to the amount of the payment made or proposed to be made, and the basis of calculation, payment notices should also state:

(i) the amount(s) withheld, where the payment is less than the amount that would have been due had the payee performed all his obligations under the contract and there were no set-off or abatement?

Yes ☐ **No** ☐

(ii) the grounds for withholding where amounts have been withheld?

Yes ☐ **No** ☐

(iii) the basis of calculation of any amounts withheld?

Yes ☐ **No** ☐

Comments:.....

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(b) If we introduce a requirement that payment notices should be in the format described above, do you agree that Article 10 should be amended to require that withholding notices should be in the same format?

Yes ☐ **No** ☐

Comments:.....

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(c) Responses to 'Improving Payment Practices in the Construction Industry' in 2005 suggested that a Article 9 (2) payment notice is only issued for 40% of payments. In what proportion of cases where the notice is issued do you believe it is later supplemented by a separate Article 10 withholding notice because the payer is unclear about how the Article 9 (2) notice should act as a Article 10 withholding notice?

(i) Less than 10% of cases where the notice is not issued (less than 4% of payments as a whole)? ☐

(ii) Between 10% and 30% of cases where the notice is not issued (between 4% and 12% of payments as a whole)? ☐

(iii) Between 30% and 70% of cases where the notice is not issued (between 12% and 28% of payments as a whole)? ☐

(iv) Between 70% and 90% of cases where the notice is not issued (between 28% and 36% of payments as a whole)? ☐

(v) More than 90% of cases where the notice is not issued (more than 36% of payments as a whole)? ☐

Please select one of (i) to (v)

4. Clarity of the "sum due"

(a) Do you agree that the Construction Order should be amended to ensure that
the payer and the payee both know the sum due for the purposes of:

(i) Article 10 – so that deductions (whether by set-off or abatement) can only be made from that sum by issuing a withholding notice?

Yes ☐ **No** ☐

(ii) Article 11 – so that they both know the amount that must be paid if the payer is to avoid the possibility that the payee will suspend performance?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree that this should be achieved by providing that:

(i) the sum due under a construction contract should be the amount paid or proposed to be paid as specified in a Article 9 (2) payment notice?

Yes ☐ **No** ☐

(ii) the amount in a claim by the payee should become due if no payment notice is issued?

Yes ☐ **No** ☐

Comments:.....

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(c) For the purposes of this consultation, we have assumed that on average across the industry, one in 30 payments that are (or should have been) notified under Article 9 (2) are later abated. Do you consider that this proportion:

(i) is about right? ☐

(ii) should be less than half of this (i.e. less than one in 60 payments)? ☐

(iii) should be more than twice this (i.e. more than one in 15 payments)? ☐

Please choose one of (i) to (iii)

(d) Do you agree that the overall cost to the payee of securing payment under the payment framework in the Construction Order can best be measured as a percentage of each payment made under the contract?

Yes ☐ **No** ☐

Comments:.....

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(e) Notwithstanding your answer to question (d) what percentage of the amount of each payment finally due under a construction contract do you consider is lost on account of the cost and delay involved in obtaining proper payment?

(i) Less than 1% of each payment? ☐

(ii) Between 1% and 2.5% of each payment? ☐

(iii) Between 5% and 10% of each payment? ☐

(iv) Between 10% and 15% of each payment? ☐

(v) Between 15% and 25% of each payment? ☐

(vi) More than 25% of each payment? ☐

Please select one answer from (i) to (vi)

(f) If changes to the payment framework were introduced as proposed in this chapter, what percentage of the amount of each payment finally due under a construction contract do you consider would be lost on account of the cost and delay involved in obtaining proper payment?

(i) Less than 1% of each payment? ☐

(ii) Between 1% and 2.5% of each payment? ☐

(iii) Between 5% and 10% of each payment? ☐

(iv) Between 10% and 15% of each payment? ☐

(v) Between 15% and 25% of each payment? ☐

(vi) More than 25% of each payment? ☐

Please select one answer from (i) to (vi)

(g) If, as proposed, the sum due under a construction contract were to be viewed in law as the amount paid or proposed to be paid as specified in a Article 9 (2) payment notice, (with the amount in a claim for payment becoming due if no notice were issued), what effect do you think this would have on the cost of resolving payment disputes at adjudication?

(i) The cost would not be subject to a significant reduction (i.e. less than 5%)? ☐

(ii) The cost would be reduced by 5% to 15%? ☐

(iii) The cost would be reduced by 15% to 35%? ☐

(iv) The cost would be reduced by 35% to 65%? ☐

(v) The cost would be reduced by more than 65%? ☐

(vi) The cost would be increased? ☐

Please select one answer from (i) to (vi)

Comments:.....

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(h) Do you agree that the overall cost to the payee of securing payment can best be anticipated based upon recent experience of securing payments under:

(i) interim payment certificates following the introduction of the Construction Order?

Yes ☐ **No** ☐

(ii) the JCT "With Contractors Design" form of construction contract?

Yes ☐ **No** ☐

Comments:.....

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5. Prohibiting the use of pay-when-certified clauses

(a) Do you agree that the Construction Order should be amended to make clear that pay when certified clauses are not an adequate mechanism for determining when payment becomes due?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree with our understanding that:

(i) Pay-when-certified clauses are only used in Civil Engineering subcontracts?

Yes **No** ☐

Comments:.....

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(ii) Instalment, stage and other period payment decisions are not conclusive in any of the standard contract forms?

Yes ☐ **No** ☐

Comments:.....

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Chapter 3 – Improving the right to suspend performance

(a) Do you agree that Article 11 of the Construction Order should be amended to include a provision allowing the suspending party to claim a reasonable amount in respect of his costs caused by the exercise of the right to suspend from the party in default of payment (this would include the reasonable costs of remobilisation if this is required)?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree that Article 11 of the Construction Order should be amended to include a provision allowing the suspending party to claim an extension of time for meeting any deadlines in his contract with the party in default of payment for any delay to the completion of work caused by the exercise of the right to suspend?

Yes ☐ **No** ☐

Comments:.....

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(c) Do you agree that Article 11 of the Construction Order should be amended to clarify that the suspending party may suspend any or all of his contractual obligations to the party in default of payment?

Yes ☐ **No** ☐

Comments:.....

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☐

(d) What would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

(i) Less than 5% of an average monthly interim payment? ☐

(ii) 5% to 15% of an average monthly interim payment? ☐

(iii) 15% to 50% of an average monthly interim payment? ☐

(iv) 50% to 100% of an average monthly interim payment? ☐

(v) 100% to 200% of an average monthly interim payment? ☐

(vi) More than double an average monthly interim payment? ☐

More than double an average monthly interim payment.

Please select one of (i) to (vi)

(e) What would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

(i) Less than 5% of an average monthly interim payment? ☐

(ii) 5% to 25% of an average monthly interim payment? ☐

(iii) 25% to 50% of an average monthly interim payment? ☐

(iv) 50% to 100% of an average monthly interim payment? ☐

50% to 100% of an average monthly interim payment.

Please select one of (i) to (iv)

(f) What would you estimate to be the reasonable costs of remobilising performance on a typical construction project?

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

Please select one of (i) to (vi)

Do you consider that your answers to questions (d), (e) and (f) would be changed if the suspending party was not required to be ready to remobilise immediately, as at present, when the defaulted payment is eventually made, but was allowed an additional extension of time for any delay caused by the exercise of the right of suspension.

(g) Please select which of (i) to (vi) in question (d) you think would apply following the proposed amendment.

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 15% of an average monthly interim payment. ☐

(iii) 15% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

(h) Please select which of (i) to (iv) in question (e) you think would apply following the proposed amendment.

(i) Less than 5% of an average monthly interim payment ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(i) Please select which of (i) to (vi) in question (f) you think would apply following the proposed amendment.

(i) Less than 5% of an average monthly interim payment? ☐

(ii) 5% to 25% of an average monthly interim payment? ☐

(iii) 25% to 50% of an average monthly interim payment? ☐

(iv) 50% to 100% of an average monthly interim payment? ☐

(v) 100% to 200% of an average monthly interim payment? ☐

(vi) More than double an average monthly interim payment? ☐

As well as covering the regulatory impact of the proposals described in this chapter on the costs of suspension, the following questions also cover the impacts of the proposal in Chapter 2 on the transparency of the sum due and its effect on the right to suspend.

In reading questions (j) to (i), consultees should bear in mind the finding of *'Improving Payment Practices in the Construction Industry'* that the right to suspend performance is exercised in fewer than one in a 100 cases of defaulted payment at present.

(j) Following the introduction of both:

☐ our proposals to reduce the costs of suspending performance in cases of non-payment; and

☐ our proposals to improve the transparency of the sum due,

how frequently do you believe the right to suspend performance would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(k) Following the introduction of only our proposal to reduce the costs of suspending performance in cases of non-payment how frequently do you believe the right to suspend performance would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(l) Following the introduction of only our proposal to improve the transparency of the sum due in respect of the right to suspend performance, how frequently do you believe the right would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(m) What do you consider is the incidence of non-payment of a sum due in the construction industry?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(n) What do you consider would be the incidence of non-payment following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and
- our proposals to improve the transparency of the sum due?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(o) What do you consider would be the incidence of non-payment following the introduction of only our proposals to reduce the costs of suspending performance?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(p) What do you consider would be the incidence of non-payment following the introduction of only our proposals to improve the transparency of the sum due in respect of the right to suspend performance?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

Chapter 4 – Other Issues which we are considering as part of this consultation

1. Devolution

(a) Do you agree that, so far as is possible give the differences between the Law in Northern Ireland, England and in Scotland, that the Northern Ireland Executive, BERR and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Order in Northern Ireland and the Act in GB given that responsibility for the issue has been devolved to the Northern Ireland Assembly?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree that, so far as is possible give the differences between the Law in Northern Ireland, England and in Scotland, that the Northern Ireland Executive, BERR and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of The Schemes in Northern Ireland and GB?

Yes ☐ **No** ☐

Comments:.....

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2. Correction of errors

(a) Do you consider that BERR and the Northern Ireland Executive should work with the Scottish Executive to develop a "slip rule" with the intention, so far as is possible, of introducing the same rule in Northern Ireland, England, Scotland and Wales to ensure it is applied in a uniform way by the courts in Northern Ireland, England and Wales and in Scotland?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree with the suggestion in the Scottish Executive's report of its consultation on '*Improving Adjudication in the Construction Industry*' that a slip rule should provide the adjudicator with:

(i) Power to correct a clerical or arithmetic error or any other matter that the parties may agree...

Yes ☐ **No** ☐

Comments:.....

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(ii) for one week after the adjudicator's decision or such longer period as the parties may agree?

Yes ☐ **No** ☐

Comments:.....

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3. The Judgement of the House of Lords in Melville Dundas v George Wimpey

NB The references in square brackets represent the Articles in the Construction Contracts (Northern Ireland) Order corresponding to the sections in the Housing Grants Construction Regeneration Act 1996.

(a) Do you agree that section 111 [Article 10] should not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes ☐ **No** ☐

Comments:.....

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(b) Do you agree that sections 110 and 111 [Articles 9 and 10] should apply in all other cases (i.e. to final payments as well as to "payments by instalments, stage or other periodic payments" which become due in accordance with section 109 of the Construction Act [Article 8 of the Construction Order])?

Yes ☐ **No** ☐

Comments:.....

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(c) Do you consider that the judgement of the House of Lords in Melville Dundas -v- George Wimpey will have the effect which we have proposed the Construction Order should have in our view, when it is applied by the lower courts, so that:

(i) section 111[Article 10] will not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes ☐ **No** ☐

Comments:.....

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(ii) section 111 [Article 10] will apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as "payments by instalments, stage or other periodic payments" in accordance with section 109 of the Construction Act [Article 8 of the Construction Order])?

Yes ☐ **No** ☐

Comments:.....

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Please answer (Yes / No) to questions (i) and (ii)

(d) Do you consider that:

(i) the Act [Order] should expressly provide an exception to section111 [Article 10] in cases where the payee is insolvent (section 113 [Article 12] already provides an example of an exception or insolvency), or leave this exception to be decided by the courts through case law following the House of Lords' judgement?

Yes ☐ **No** ☐

Comments:.....

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(ii) the Act [Order] should be amended to make clear that section 111 [Article 10] should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as "payments by instalments, stage or other periodic payments" which become due in accordance with section 109 [Article 8 of the Construction Order])?

Yes ☐ **No** ☐

Comments:.....

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Chapter 5 – Partial Regulatory Impact Assessment

1. Equality Impact Assessment (EQIA)

The title of the proposed policy is:

Proposed amendments to Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

The aims of the policy are:

within the context of construction industry related contracts:

- to improve transparency and clarity in the exchange of information relating to payments to enable cash flow to be better managed;
- to encourage parties in dispute to seek resolution of their differences through adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and
- to facilitate the right to suspend performance under a construction-related contract.

Section 75 refers to the Northern Ireland Act 1998, Section 75 which sets out nine categories of persons, namely:

- persons of different religious belief;
- political opinion;
- racial group;
- age;
- marital status;
- sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

The aim of an Equality Impact Assessment is to determine whether any of the nine groups defined above are significantly affected, either positively or negatively, by a change in government policy, that is, does the policy under consideration create differential impacts between groups within each Section 75 category and, if so, whether this impact is adverse or beneficial.

Comments:.....

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Annex C

Report on the Responses to 'Improving Payment Practices in the Construction Industry in Northern Ireland'

Consultation on proposals to amend the Construction Contracts Order (Northern Ireland) 1997 and The Scheme of Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999

September 2009

Contents

Executive Summary

The Department of Finance and Personnel's consultation paper "Improving Payment Practices in the Construction Industry in Northern Ireland: March 2009" put forward the following proposals:

Adjudication

- Removing the requirement for contracts to be in writing for the Construction Contracts Order to apply;
- Prohibiting agreements that interim or stage payments decisions will be conclusive; and
- Introducing a statutory framework for the costs of adjudication.

Payment Framework

- Preventing the unnecessary duplication of payment notices;
- Clarifying when a payment notice should be served;
- Clarifying the content of payment and withholding notices;
- Clarifying what constitutes the sum due; and
- Prohibiting pay-when-certified clauses.

Suspension

- Improving the right of suspension.

Other Issues

The consultation also posed questions on:

- Parity of legislation within the UK;
- The introduction of a 'slip rule' (allowing adjudicators to correct obvious errors in their decisions); and
- The implications of the House of Lords judgement in Melville Dundas v George Wimpey.

The response to the consultation exercise was modest with just seven replies being received. Of these, only four respondents actually completed DFP's questionnaire and one other, while not returning DFP's questionnaire, offered instead a copy of its original response to the very similar consultationin GB in June 2007. The remaining two respondents offered comments on DFP's proposals with statements of their respective organisations' viewpoints.

Generally, DFP's proposals were welcomed and essentially supported, although some differing and sometimes strongly held views were expressed. The divergence of opinion offered in some of the responses on specific points serves to underline the continuing need to deliver a balanced outcome to reflect the complexity, diversity and the range of commercial interests represented within the construction industry.

The relatively small number of questionnaires returned may possibly reflect a perception that the issues are effectively being debated and resolved on a national basis. The limited response effectively precludes the practicality of any meaningful statistical analysis and this report has therefore sought to emphasise the qualitative rather than any quantitative aspects of the responses.

The responses to the proposals are summarised below:

On Adjudication

- Respondents were unanimous that the Construction Contracts Order should be amended to remove the requirement that the Order should apply only to contracts in writing.
- All respondents broadly welcomed the prohibition of agreements where decisions as to the amounts of interim payments are conclusive.
- There was broad, but not unanimous, support for DFP's proposal to prohibit agreements on the allocation of costs of adjudication until after the adjudicator is appointed.

On Payment

- Respondents agreed unanimously that that the Construction Contracts Order should be amended so that a certificate from a third party setting out a valuation of the work done may function as an Article 9 (2) payment notice and that an Article 9(2) notice may be issued by either the payer or a person identified in the contract.
- While most agreed with DFP's proposal to include provision in Article 9 (2) for greater clarity on when it is necessary to issue an Article 9 (2) payment notice, one respondent felt that guidance would be preferable to legislation.

- Broad support was offered for DFP's proposal to amend Article 9 (2) to require that in addition to the amount of a payment and the basis of its calculation, payment notices should state the amount of any sums withheld.
- All respondents accepted DFP's proposals that the Construction Contracts Order should be amended to ensure that both payer and payee should know the sum due for the purpose of Article 10 so that deductions can only be made by issuing a withholding notice and that, for the purpose of Article 11, both should know the amount to be paid if the payer is to avoid the possibility that the payee will suspend performance.
- All respondents agreed that pay-when-certified agreements should be prohibited.

On Suspension

- The proposal to improve the right to suspend performance was agreed unanimously.

On Other Issues

- All respondents agreed, some emphatically, that parity of legislation within the UK was highly desirable.
- There was unanimous support for the introduction of a 'slip rule' to allow adjudicators to correct obvious errors in their decisions, but there was one objection to the proposal to allow up to a week for such corrections to be made.
- Views expressed on proposals seeking to clarify matters following the House of Lords judgement in Melville Dundas v George Wimpey were sharply divided. In this landmark case, their Lordships decided, by a majority, that withholding notices as prescribed in Section 111 of the Construction Act do not always need to be served for payments to be withheld validly.

The context of the consultation

The consultation document, "Improving Payment Practices in the Construction Industry in Northern Ireland", set out the Department's proposals to amend the Construction Contracts Order (Northern Ireland) 1997 ('The Construction Contracts Order') and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 ('The Scheme').

The Construction Contracts Order and The Scheme became effective in 1999 in the wake of originating legislation in GB, in the form of Part II of the Housing Grants, Construction Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 ('The Construction Act' and 'The Scheme').

While the Construction Act was generally perceived to be working well, it was accepted that some improvements would be helpful. The wider context for DFP's proposals to amend the Construction Contracts Order therefore reflects the outcome of a number of public consultations carried out in GB[1] by the Department for Business Innovation and Skills (BIS) and subsequent consultation with a sounding board of key industry figures and the Construction Umbrella Bodies Adjudication Task Group. The Scottish Government had also carried out its own consultation, but later opted for inclusion within the proposals for England and Wales.

These lengthy and exhaustive exercises have led to proposed amendments to the Construction Act which are set out in Part 8 of The Local Democracy, Economic Development and Construction Bill currently in progress through Parliament.

DFP's consultation exercise sought responses from the construction industry and interested bodies, public and private, as well as the views of individuals to its proposals to amend the Construction Contracts Order (Northern Ireland) 1997. This consultation followed the similar exercises conducted by the BIS in England and Wales and by the Scottish Executive in 2007.

In the belief that prompt and fair payment practice throughout construction supply chains will better enable the industry routinely to adopt integrated working as the norm, DFP's proposals set out to:-

- encourage parties in dispute in construction contracts to resolve their differences through adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation;
- improve transparency and clarity in the exchange of information relating to payments to enable cash flow to be managed better; and
- improve the facility to suspend performance under the contract.

DFP is proposing to do this by:

On adjudication:

- improving access to the right to refer disputes for adjudication by:
- applying the legislation to oral and partly oral contracts;
- preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes; and
- ensuring the costs involved in the process are fairly allocated.

On payment:

- preventing unnecessary duplication of payment notices;
- clarifying the requirement to serve a Article 9 (2) payment notice;
- clarifying the content of payment and withholding notices;
- ensuring the payment framework creates a clear interim entitlement to payment; and
- prohibiting the use of pay-when-certified clauses.

On suspension:

- improving the statutory right to suspend performance by allowing the suspending party to claim the resulting costs and delay.

As such, DFP's proposals represent proportionate reforming amendments to the existing framework rather than wholesale change. Each is intended to address a specific issue that has arisen since the Construction Contract Order has been in operation. Guidance remains the preferred route to improve the operation of construction contracts and the further legislative intervention proposed has only been considered where it is believed to be absolutely necessary.

DFP sought the views of the construction industry and its clients, through this consultation process, on:

- whether DFP's package of proposals properly and adequately addresses the weaknesses in the existing legislation; and
- how DFP might evaluate the costs and benefits of the package of amendments.

Additional copies

You may make copies of this document without seeking permission, or by downloading from the consultation zone of the Department of Finance and Personnel website:

http://www.dfpni.gov.uk/index/about-us/consultation-zone.htm

Help with Queries

If you have any questions about the policy issues raised in this consultation exercise, these should be addressed to:

Robin McKelvey
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Comments and Complaints

If you have any other observations, or wish to make a complaint about the substance or conduct of this consultation exercise, please contact:

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Chapter 1: Adjudication

Consultation proposals:

1. Removing the requirement that the Construction Contracts Order should apply only to contracts in writing.

2. Prohibiting agreements that interim or stage payments decisions will be conclusive.

3. Introduction of a statutory framework for the costs of adjudication.

Responses:

1. Removing the requirement that the Construction Contracts Order should apply only to contracts in writing.

There was unanimous support for this proposal. It is believed that many parties to construction contracts, disproportionately SMEs, may be deterred from seeking resolution of disputes through adjudication where their contracts are not wholly in writing or, even if initially in writing, have subsequently been amended orally, especially following the Appeal Court judgement in RJT v DM Engineering (NI) Ltd.

One respondent commented,

“Although it is recognized that in the limited time frame available in adjudications, certainty and clarity of the contract terms upon which the Adjudicator is asked to make his decision is desirable, the benefits of not preventing the use of adjudication where the parties have not recorded in writing their contract and of avoiding unnecessary arguments about the Adjudicator’s jurisdiction, where it is not clear that all of the main terms have been recorded in writing, outweigh the disadvantages of the Adjudicator being asked to make a decision on a contract that is not or is not wholly in writing."

The proposal that the terms of an adjudication Scheme required by Article 7 of the Construction Contracts Order should only be effective if agreed in writing was also supported unanimously. One respondent suggested that the Scheme for Construction Contracts should be adopted as the one adjudication scheme for the industry, dispensing with the multitude of bespoke schemes currently in use.

None of the respondents felt that the proposal to include oral, or partly-oral, contracts would be likely to encourage parties to agree oral contracts resulting in more oral agreements, due to the wider commercial benefits of having written agreements.

Respondents offered estimates of the proportion of contracts they considered contained non-trivial terms which have been subject to oral agreement or variation. These ranged widely from (0% - 10%) to (50% - 75%).

All respondents supported the proposal that an agreement under paragraph 2, or 5(2), of Part 1 of The Scheme, as to who should act as adjudicator, should only be effective if agreed in writing.

2. Prohibiting agreements that interim or stage payments decisions will be conclusive.

All respondents agreed with the proposal that the Construction Contracts Order should be amended to prohibit agreements that decisions as to the amounts of payments whether by instalment, stage or other periodic payment are conclusive.

While some concern was expressed about the desirability of parties being free to contract as they see fit, instances where agreements include provision for interim payments to be conclusive

usually result from situations where one party is in a stronger negotiating position than the other, thus belying the notion of the parties' apparent freedom of contract.

All again agreed that the prohibition of agreements that decisions are conclusive should include decisions as to the amounts of stage payments and decisions relating to work that has been performed under the contract to the extent that it affects the amount of the payment.

Questions on whether final payment decisions and decisions on payment that have already been taken and notified to the parties should be excluded drew a mixed response. While some accepted DFP's proposal, one respondent expressed the view that the exclusion of final payments could adversely impact on sub-contractors through final payments, especially on sub-contracts of short duration, being undervalued.

2. Introduction of a statutory framework for the costs of adjudication.

There was strong, but not unanimous, support for the proposal to prohibit agreements on the allocation of the costs of adjudication until after the adjudicator was appointed. One respondent disagreed.

Strong support was also expressed for the proposal that the adjudicator should have no jurisdiction as to allocation of costs unless the parties have so agreed after the appointment of the adjudicator. Again, one respondent disagreed.

All respondents agreed that adjudicators should be statutorily entitled to claim a reasonable amount for fees and expenses.

DFP's proposals: (i), that the courts should have jurisdiction to decide the reasonableness of adjudicators' fees and expenses, when claimed under the proposed statutory right, (ii), that the legal and other costs of the parties are reasonable, where the parties have agreed that the adjudicator should make a decision and (iii), that the parties should be jointly and severally liable for this amount, met with a mixed, but essentially positive response.

For example, one respondent felt strongly that costs should be kept out of the adjudication process altogether, while another was unclear about the underlying intention:

"If the proposal is to reserve the quantum of costs to the master of the High Court in any circumstances where it is not agreed, then I do not support it. That would be extremely onerous. If the purpose is to ensure that the adjudicator deciding this is not finally binding then I would have thought that the general provision to allow it to be temporarily binding subject to litigation, arbitration or agreement (as his decision on substantive issues is) would be the best solution. However, I do maintain that we should follow what is decided in GB on this."

Chapter 2: Payment Framework

Consultation Proposals

1. Prevention of unnecessary duplication of payment notices;

2. Clarification of the requirement that an Article 9 (2) payment notice should be served;

3. Clarity of the content of payment and withholding notices;

4. Clarity of the sum due; and

5. Prohibiting the use of pay-when-certified clauses.

Responses

1. Prevention of unnecessary duplication of payment notices

Support was unanimous for the proposal that the Construction Contracts Order be amended so that a certificate from a third party supervising officer under a contract which makes a valuation of the work done may function as an Article 9 (2) payment notice.

There was also across-the-board support for the proposal that the Construction Contracts Order should allow the contract to provide that an Article 9 (2) payment notice may be issued by either the payer or a person identified in the contract. Broad support was given to this facility being extended to include a person identified in a notice to the payee.

All respondents agreed that The Scheme should provide that a payment notice under Part II paragraph 9 may be issued by either the payer or by a person identified in the contract.

2. Clarification of the requirement that an Article 9 (2) payment notice should be served

Broad support was offered for the proposal that the drafting of the provision in Article 9 (2) on when it is necessary to issue an Article 9 (2) payment notice should be improved to achieve greater clarity. However, one dissenting respondent opined that this issue should be addressed by more guidance rather than by legislation, while another, though supporting the proposal, expressed concern that it appeared in their view to promote cross-contract setting-off.

The consultation document stated that an Article 9 (2) payment notice may only be issued for some 40% of payments. Respondents were asked to gauge what proportion of cases, where the notice is not issued, can be explained by the current deficiencies in the requirement in Article 9 (2) of the Order. The responses received ranged from the 10% - 33% band to more than 90%.

3. Clarity of the content of payment and withholding notices

Again broad support was received for the proposal that Article 9 (2) should be amended to require that, in addition to the amount of the payment made, or proposed to be made, and the basis of calculation, payment notices should also state, (i), the amount withheld, where the payment is less than the amount that would have been due had the payee performed all his obligations under the contract and where there were no set-off or abatement, (ii), the grounds for withholding and, (iii), the basis of calculation of any amounts withheld.

However, one respondent disagreed, commenting that unless the payment notice and withholding notice are to be amalgamated into one notice, it does not seem appropriate to require details to be set out in the payment notice and that to do so may add confusion as to the purpose of the payment notice.

4. Clarity of the sum due

All respondents agreed with the proposal that the Order should be amended to ensure that the payer and payee should both know the sum due for the purpose of Article 10 so that deductions

can only be made from that sum by issuing a withholding notice and that both parties should know the amount that must be paid if the payer is to avoid the possibility that payee will suspend performance.

While all again agreed that the sum due under a construction contract should be the amount as specified in an Article 9 (2) payment notice, one respondent dissented from the proposal that, where no payment notice is issued, the amount due should be the amount claimed by the payee.

5. Prohibiting the use of pay-when-certified clauses.

All respondents agreed that the Construction Contracts Order should be amended to make clear that pay-when-certified clauses are not an adequate mechanism for determining when payment becomes due.

One respondent strongly supported this proposal while another acknowledged that although it may result in some hardship for those in the middle of a contractual chain, who are both awaiting payment as payee and having to pay out as payers, the principle established by the prohibition of 'pay-when-paid' clauses, that payment for work done should not be dependent on the actions (or inaction) of a third party, also applies to 'pay-when-certified'.

Chapter 3: Improving the right to suspend performance

Consultation Proposals

1. Provision that the suspending party may claim reasonable costs and extension of time following its exercise of the right to suspend and may suspend contractual obligations in default of payment.

Responses

DFP's proposals were agreed by all respondents. One emphasised that for the remedy to be effective, it would be necessary for the party suspending performance to be paid the costs of suspension, but that the rights so prescribed should be properly exercised and the costs reasonable and demonstrable.

Chapter 4: Other Issues which are being considered as part of this consultation

Consultation Proposals

1. Minimising divergence;

2. Introduction of 'slip rule' to enable correction of error; and

3. The judgement of the House of Lords in Melville Dundas v George Wimpey.

1. Minimising divergence

There was emphatic and unanimous agreement to the proposal to seek parity with GB legislation. The commonality of case law for reference in disputes and the desirability of maintenance of common commercial practice were cited as principal reasons.

2. Introduction of 'slip rule'

The proposal to introduce a 'slip rule' to enable correction of error was welcomed, but one respondent felt that a period of one week to allow an adjudicator to make a correction was too long, while another thought this period to be reasonable.

3. The judgement in Melville Dundas Ltd (in receivership) v George Wimpey and others, House of Lords, [2007] UKHL18

There were sharp differences in viewpoint in respect of DFP's proposals which are aimed at clarifying the legal position following this case. DFP is proposing that Article 10 of the Construction Contracts Order (which corresponds with Section 111 of the Construction Act) should not apply in cases of insolvency, but should apply in all other cases.

While one respondent stated its lack of support for this proposal and spoke of its conviction that withholding notices should be issued on every occasion with no exceptions to the rule, another expressed the view that the insolvency exception as proposed is necessary on the grounds of the hardship involved if payments to insolvent payees are required.

Chapter 5: Partial Regulatory Impact Assessment

None of the responses indicated concern that any of the nine categories of persons as set out in Section 75 of the Northern Ireland Act 1998 is likely to be adversely affected by, or suffer disadvantage through, implementation of the proposed amendments to the Construction Contracts Order.

The Way forward and the next steps

The responses to the consultation exercise which are summarised in this report will help inform DFP's detailed proposals to amend the Construction Contracts Order and the development of draft Bill clauses. In particular, in view of the unanimously expressed wish to secure parity with current proposals in GB, the progress of the amending legislation in GB will be closely monitored.

DFP wishes to express its thanks to all those who responded to the consultation exercise and for the valuable comments offered.

[1] The initial consultations in 2005 and 2007 were carried out in England and Wales in conjunction with the Welsh Government by the Department for Trade and Industry (DTI), which preceded the Department for Business, Enterprise and Regulatory Reform (BERR) before becoming the current Department for Business, Innovation and Skills (BIS).

Construction Contracts Bill - Follow Up

Assembly Section

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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
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Stormont

14 October 2009

Dear Shane

Construction Contracts Bill

At its meeting on 30 September 2009, the Committee for Finance and Personnel asked for the cost of the public consultation on the proposed Bill to amend the Construction Contracts (Northern Ireland) Order 1997.

The costs incurred to date in carrying out this consultation fall into three categories: firstly, the costs of preparation of the consutlation document itself, secondly, the costs of printing and postage and, thirdly, the costs of analysing the outcome. All costs in respect of the preparation stage and analysis have been incurred solely by Central Procurement Directorate staff, no consultants have been employed.

The total cost of the exercise, including the publication of the consultation, is estimated to be of the order of £20,600.

Yours sincerely,

NORMAN IRWIN

Pre-Introduction Briefing Paper – Construction Contracts (Amendment) Bill

From: Norman Irwin
Date: 7 April 2010
To: Finance and Personnel Committee

Summary

Business Area: Central Procurement Directorate

Issue: This paper provides an overview of the key features of the Construction Contracts (Amendment) Bill and includes the Bill along with the associated Explanatory and Financial Memorandum.

Restrictions: None

Action Required: The Committee is asked to note the content of the Construction Contracts (Amendment) Bill (Appendix A) and Explanatory and Financial Memorandum (Appendix B).

Construction Contracts (Amendment) Bill: Pre-Introduction Briefing

Background

1. This paper provides an update to the Committee on the progress of the Construction Contracts (Amendment) Bill and its proposed introduction to the Assembly.

2. As the Committee is aware, the Bill, which is concerned solely with the construction industry, proposes to amend the Construction Contracts (Northern Ireland) Order 1997. Its measures replicate as closely as possible the recent amendments to Part 2 of the Housing Grants, Construction Regeneration Act 1996 (HGCR Act), the originating legislation in GB. These amendments are set out in Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act), which received Royal Assent last November.

3. The HGCR Act 1996, known as 'the Construction Act', was intended primarily to allow swift resolution of disputes by way of adjudication and to improve payment practices to relieve issues that had long encumbered the construction industry. While it was considered that the Act was working well, it was widely recognised that some improvements would be welcome. Poor payment practices and restrictions with regard to access to adjudication continued to be problematic. However, the amendments now included in the LDEDC Act 2009 represent proportionate reform of the original legislation rather than wholesale change, with guidance remaining the preferred route to improved practice.

Progress of the Bill in the Assembly

4. With the approval of the Executive, the then DFP Minister, Nigel Dodds, launched a public consultation on proposals to amend the Construction Contracts (Northern Ireland) Order 1997 'Improving Payment Practices in the Construction Industry in Northern Ireland: March 2009'. The consultation, which ran from 8 April 2009 to 3 July 2009, put forward the following proposals:

On adjudication:

- Removing the requirement for contracts to be in writing for the Construction Contracts Order to apply;
- Prohibiting agreements that interim or stage payment decisions will be conclusive; and
- Introducing a statutory framework for the costs of adjudication.

On frameworks for payment:

- Preventing the unnecessary duplication of payment notices;

- Clarifying when a payment notice should be served;
- Clarifying the content of payment and withholding notices;
- Clarifying what constitutes the sum due; and
- Prohibiting pay-when-certified clauses.

On suspension:

- Improving the right of suspension

On other issues:

The consultation also posed questions on;

- The issue of parity of legislation within the UK;
- The introduction of a 'slip rule' (allowing adjudicators to correct obvious errors in their decisions); and
- The implications of the House of Lords judgement in Melville Dundas –v- George Wimpey. In this landmark case, their Lordships decided, by a majority, that withholding notices as prescribed in section 111 of the Construction Act do not always need to be served for payments to be withheld validly.

5. The response to the consultation exercise was modest. Generally, DFP's proposals were welcomed and essentially supported, although some differing and sometimes strongly held views were expressed. The divergence of opinion offered in some of the responses on specific points serves to underline the continuing need to deliver a balanced outcome to reflect the complexity, diversity and the range of commercial interests represented within the construction industry. Respondents, however, were emphatic in their endorsement of the proposal to maintain parity of legislation with GB.

6. DFP, with the agreement of the Committee, published a report on the response to the public consultation on 20 November 2009. This report has been placed, with the consultation document, on the Department's website.

Key Features of the Construction Contracts (Amendment) Bill

7. The Bill, which is comprised of nine clauses, includes provisions relating to the following:-

- Clause 1 removes the original limitation of the 1997 Order to contracts which were in writing;
- Clause 2 substitutes a new power allowing the Department to disapply any or all of the provisions of the 1997 Order;
- Clause 3 introduces a provision to facilitate the correction of clerical or typographical errors in an adjudicator's decision;
- Clause 4 makes an agreement about the allocation of the costs of adjudication ineffective, unless certain conditions apply;
- Clause 5 addresses the issue of making periodic payments under a construction contract conditional upon obligations under another contract and the issue of making the date a payment becomes due dependent upon the giving of a notice by the payer of the sum the payer proposes to pay;

- Clause 6 amends the original provisions relating to the notices which a payer gives of the sum which the payer proposes to pay and introduces provisions relating to the giving of notices by the payee;
- Clause 7 introduces (in most cases) a statutory requirement to pay sums specified in these notices; and
- Clause 8 amends the original provisions relating to a contractor's right to stop working when the contractor has not been paid.

8. On 10 March 2010, the Minister sought and obtained the Executive's agreement of the Bill and to its introduction into the Assembly.

Next Steps – Key Timetable Stages

9. The Bill will be introduced on 26 April 2010 followed by the second stage on 4 May 2010.

Recommendation

10. The Committee is asked to note the content of the Bill (Appendix A) and Explanatory and Financial Memorandum (Appendix B).

NORMAN IRWIN

Construction Contracts Bill - Response to issues

Assembly Section

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Mr Shane McAteer
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Committee for Finance and Personnel
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6 May 2010

Dear Shane

Construction Contracts (Amendment) Bill

Thank you for your letter of 23 April 2010 seeking clarification on a number of issues raised by the Committee for Finance and Personnel at its meeting on 21 April. I would offer the following replies:

1. Clause 2 provides the Department with a new power to disapply any or all of the provisions of the principal legislation, the Construction Contracts (NI) Order 1997.

- What type of Assembly control will apply to the orders implementing this power (e.g. negative, affirmative)?

As provided for under Article 16 (2) of the Construction Contracts (Northern Ireland) Order 1997, SRs made under the Order shall be subject to affirmative resolution.

2. Paragraph 4 of DFP's briefing paper states that guidance is the preferred route to improving adjudication and payment practices, and that the Bill is proportionate, rather than wholesale, reform of existing legislation.

- Are plans in place to review the effectiveness of the provisions of the Bill, after they have been in operation for a period of time?

The Central Procurement Directorate (CPD) is not planning any formal review of the operation of the Order to monitor the effectiveness of the provisions of this Bill. However after a period of time its impact can be considered at meetings of the Construction Industry Forum for Northern Ireland (CIFNI). CIFNI draws representation from a wide cross-section of the industry and would therefore be well-placed to ascertain industry views on its operation. On account of the greater incidence of commercial activity, CPD would first expect to become aware of industry reaction to the originating legislation in GB through the Department of Business, Innovation and Skills (BIS). CPD would of course welcome any Northern Ireland perspective on the Construction Contracts (Amendment) Bill and would contribute this local feedback to BIS for future review of the legislation.

3. The DFP briefing paper states that the corresponding legislation in GB received Royal Assent last November. As noted in the Explanatory and Financial Memorandum, this followed extensive public consultations in England and Wales over a number of years and separately in Scotland.

- Are there any early indications as to how the newly introduced provisions are working in GB?
- Have there been any differences of approach taken in Scotland as compared to England and Wales?

There are no indications yet as the new provisions have not been implemented. The amendments to Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act) as contained in Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) will not become effective until next year when corresponding amendments are made to the Scheme for Construction Contracts (England and Wales) Regulations 1998.

The Scheme is a set of default provisions provided for in Section 114 of the Construction Act which comes into effect should an agreement between parties to a construction contract not contain conditions in respect of provision for periodic payments and the right of access to adjudication to meet the requirements of the Act.

At present, BIS is carrying out a public consultation on its proposals to amend the Scheme to reflect the amendments to the Construction Act and expects that its proposals may be agreed by October-November this year, allowing a commencement date of April 2011 for the amendments set out in the LDEDCA.

Article 13 of the Construction Contracts (Northern Ireland) Order 1997 similarly provides that "the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999" set out its default provisions. If the current Bill is enacted, then corresponding amendments to the NI Scheme will be required in due course.

Scotland has adopted the same approach to the legislation as in England and Wales.

Yours sincerely,

NORMAN IRWIN

Prompt Payments of Subcontractors

Assembly Section

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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont

27 June 2010

Dear Shane

Prompt Payment of Subcontractors

At its meeting on 16 June 2010, the Committee noted correspondence from the Committee for Enterprise, Trade and Investment (CETI) regarding concerns that contractors working on Department for Social Development contracts are not paying their subcontractors promptly. This is set in the context of a target for Government departments to pay main contractors within 10 days.

CETI has asked DFP to consider what steps can be taken to ensure that those contractors who are being paid promptly by Government pass on similar benefits to the subcontractors they employ.

This issue was also highlighted by the Committee in its 'Report on the Inquiry into Public Procurement in Northern Ireland'. Paragraph 172 of the Report recommended that CPD and the other Centres of Procurement expertise (CoPEs) should consider the introduction of a requirement upon main contractors to pay subcontractors within 10 days.

Government is committed to paying undisputed invoices within 10 days. However, this is not a contractually-binding requirement in contracts entered into by Government and it would therefore not be appropriate to extend it into subcontract conditions.

Contract conditions typically require Government to make payment within 30 days of receipt of a valid invoice. Accordingly, the contract conditions require the main contractor to pay subcontractors within 30 days.

If payment within 10 days was made contractually-binding, this would, in the event of late payment, provide subcontractors with the right to suspend work on site. This would be detrimental to the delivery of projects and lead to further disputes.

The Construction Industry Forum for NI (CIFNI) Procurement Task Group has agreed a number of measures specifically aimed at improving payment progress to subcontractors. These measures, to be included in new construction works contracts tendered after 1 March 2010, will require:-

a) the main contractor to comply with a revised 'Code of Practice for Government Construction Clients and their Supply Chains' which includes a 'Fair Payment' Charter;

b) payment to subcontractors to be a standing item on the agenda at project meetings;

c) the main contractor to provide a report to the Project Manager on payments made to subcontractors at each project meeting; and

d) the Project Manager to carry out periodic checks with subcontractors on the payment performance of the main contractor.

Under the 'Fair Payment' Charter the construction client, main contractor and subcontractors commit to working with each other in a spirit of mutual trust and respect. Each of the parties must acknowledge that companies have the right to receive correct full payment as and when due and agree that deliberate late payment, or unjustifiable withholding of payment, is ethically unacceptable.

Subcontractors often feel that if they complain about poor payment practices by main contractors they will not be invited to bid for subcontract opportunities in the future. By requiring contractors to sign up to the 'Fair Payment' Charter and by requiring the client's Project Manager to proactively monitor payment progress to subcontractors, poor payment practices will be highlighted as a matter of routine contract management. This will mean that subcontractors will not need to be exposed to the stigma associated with having to complain about the main contractor.

If contractors don't pay their subcontractors within 30 days, they will be in breach of contract and the subcontractor will be able to claim interest for the length of time that invoices are unpaid beyond the contractually agreed period.

Supplies and services contracts also require contractors to pay all sums due to subcontractors within 30 days of the receipt of a valid invoice. If a subcontractor makes the Government client

aware of poor payment performance by a contractor, the client can apply the appropriate conditions of contract in an effort to resolve the issue.

Through CIFNI and the newly formed Business/Industry Forum for NI (BIFNI), CPD will review the effectiveness of these measures after six months.

Yours sincerely,

NORMAN IRWIN

Construction Contracts (Amendment) Bill Research and Library Service Bill Paper

Assembly Section

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Mr Shane McAteer
Clerk
Committee for Finance and Personnel
Room 419
Parliament Buildings
Stormont

27 August 2010

Dear Shane

Construction Contracts (Amendment) Bill Research and Library Service Bill Paper ~ NIAR 295-10

Thank you for the opportunity to review this Assembly Research Paper which sets out the substance of the Bill and the public response to DFP's consultation exercise. DFP's proposals to amend the Construction Contracts (Northern Ireland) Order 1997 seek to replicate recent amendments to the Housing Grants, Construction Regeneration Act 1996 now enacted in GB in Part 8 of the Local Democracy, Economic Development and Construction Act 2010.

The paper notes that the proposed amending legislation is relatively non-controversial and that the public response has been muted. It also noted that here, as elsewhere in GB, there has been

emphatic support for maintenance of parity in legislation throughout the UK, supporting the Department's plan to bring forward replicating measures in Northern Ireland.

The Paper identified one area of disagreement among DFP's respondents, namely in relation to the legislative measures proposed in response to a House of Lords judgement.

Melville Dundas Ltd (in receivership) and others v. George Wimpey UK Ltd and others: [2007] UKHL 18

George Wimpey UK Ltd was the employer under a Joint Contracts Tribunal Standard Form of Building Contract[1] and Melville Dundas the contractor. On 2nd May 2003 the contractor applied for an interim payment to be paid within 14 days. There was no dispute that this sum was due under the contract. The employer failed to pay by 16th May, the final date for payment, and the contractor went into administrative receivership on 22nd May. On 30th May the employer terminated the contract on this ground.

The contractor brought an action to recover the interim payment. The House of Lords, by a 3:2 majority, held that clause 27.6 of the JCT Contract was valid and that it entitled the employer to suspend without making any further payment to the contractor, notwithstanding that the employer had failed to issue a valid withholding notice compliant with section 111 of the Construction Act.

The House of Lords decided that withholding notices as prescribed in section 111 of the Construction Act (Article 10 in the corresponding Construction Contracts Order 1997) do not always need to be served for payments to be validly withheld. They concluded that since the contract stated that, pending completion of the works, no further payment need be made in the event of termination, payment could be withheld.

Although the House of Lords recognised that, on a straightforward reading of the Construction Act, payment could not be legitimately withheld if a valid withholding notice had not been given, where the employer had terminated the contract, the contract provisions in this case overrode this requirement.

In this case, the contract had provided that moneys need not be paid in the event of the payee's insolvency and that the payer could legitimately withhold payment. The key to that decision was the fact that the insolvency occurred after the period for giving a "withholding notice" had expired i.e. it was not in the nature of things possible for the payer to have given such a notice beforehand.

The majority judges acknowledged the importance of the payment provisions of the Act in providing a contractor with cash flow throughout the currency of the contract by way of the interim payments mechanism. However, they said that such considerations would fall away when a contractor was insolvent and the contract in question had been terminated.

In particular, Lord Hoffman, allowing the Appeal, said:

"While the contractor retains the money, he can set it off against his cross-claim for non-completion against the contractor. In practice, where the contractor has become insolvent, the employer will have a cross-claim for damages which exceeds the contractor's claim for unpaid work. On the other hand, once the employer has paid the money, it is gone ... Upon insolvency, liability to make an interim payment therefore becomes a matter which relates not to cash flow, but to the substantive rights of the employer on the one hand and the contractor's secured or unsecured creditors on the other."

Article 10 of the 1997 Order provided that a party to a contract could not withhold payment after the final date for payment, unless that party had given a notice of intention to do so. Paragraph (1) of clause 7 of the Bill proposes substituting a new Article 10 replacing the provision in respect of withholding notices with a requirement on the part of the payer to pay the sum set out in such a notice. Paragraph (10) of clause 7 is intended to ensure that the Melville Dundas decision remains confined to insolvency situations alone and is not interpreted to include other events which the parties may have specified in their contract.

Opinions expressed by respondents to DFP's proposals in its consultation varied from the view that express provision in the Order for clarity was preferable to the expectation that the industry would be conversant with the [Melville Dundas v Wimpey] case to outright opposition to allowing any exception, including insolvency, to the need to issue withholding notices.

DFP recognises that the construction industry is comprised of many complex and diverse commercial interests which may often find themselves in conflict. The measures proposed, which reflect the continuing need to achieve balance, therefore may attract more or less support, or more or less opposition, from various sectors depending on the interests affected. The views expressed ranged from questioning the need for legislative intervention at all in matters between privately contracting parties to expressions of disagreement that the measures proposed do not advance far enough. DFP remains satisfied that its proposals, as well as mirroring the recently enacted amendments to GB legislation, maintain an equitable balance between these interest groups.

Yours sincerely,

NORMAN IRWIN

[1] JCT (Joint Contracts Tribunal) Standard Form of Building Contract with Contractor's Design 1998 Edition

Clarification of the Timing of the Construction Contracts (Amendment) Bill

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Mr Shane McAteer
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27 September 2010

Dear Shane

Clarification of the Timing of the Construction Contracts (Amendment) Bill

You had sought clarification of how revisions to the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (the Scheme) might impact on the current Construction Contracts (Amendment) Bill and how progress on the Scheme would be affected by progress to amend the (GB) Scheme in Parliament. The Scheme is a set of measures complementary to the Order and which, if the Order were to be amended, would require corresponding amendments to be made to the Scheme.

The DFP Public Consultation of April 2009 on proposals to amend the Construction Contracts Order (Northern Ireland) 1997 ('The Construction Contracts Order') and the subsequent Report on Responses of November 2009 referred both to the Construction Contracts Order and to the Scheme.

This Bill is about the amendments we are proposing to make to the Construction Contracts Order. While the Bill sets out certain statutory requirements for construction contracts, the Scheme represents default provisions which would automatically supply the required measures (and/or supplant any measures which were non-compliant with the statutory requirements) as implied terms of contract in any contract falling within the scope of the Construction Contracts Order 1997.

The Construction Contracts Order and the Scheme together became effective in June 1999 in the wake of the originating legislation in GB, Part 2 of the Housing Grants Construction Regeneration Act 1996 and the (GB) Scheme for Construction Contracts (England and Wales) Regulations 1998 ('The Construction Act' and 'the (GB) Scheme').

The Construction Act in England and Wales has now been amended through Part 8 of the Local Democracy, Economic Development and Construction Act 2009. While this received Royal Assent in November 2009, it cannot become effective until its complementary (GB) Scheme is amended to reflect the changes made to the Construction Act itself. The Department for Business Innovation and Skills (BIS) has since carried out a public consultation in GB on its proposals to update its (GB) Scheme, but has yet to publish the outcome. We understand that BIS's proposals are currently being considered in Committee in the light of electoral commitments which were given not to add to the overall burden of legislation. A decision on proceeding is however expected mid-October and, if positive, an effective date for both primary and secondary legislation is still anticipated by 1 April 2011.

Should the current DFP Bill reach the Statute Book in Northern Ireland, it will therefore also become necessary to amend the NI Scheme before the planned Construction Contracts (Amendment) Act could become effective. To this end, DFP would, in due course, seek approval to carry out a further public consultation on proposals to amend the NI Scheme. In pursuit of the objective of maintaining parity of legislation with GB, we cannot finalise our proposals for the NI Scheme until it is known what precisely has been agreed in respect of the (GB) Scheme.

The Assembly timetable envisages the remaining stages of the Bill being concluded in February 2011 and, while there is currently a pause in the progress of proposals amending the (GB) Scheme, we do not foresee this having any significant effect on the proposed timing of the NI Bill.

We expect that the (GB) Scheme should have cleared all hurdles, including the current pause, well in advance of the NI Bill being enacted and that this would therefore allow DFP's subsequent consultation to reflect the measures finally agreed in the (GB) Scheme.

Yours sincerely,

NORMAN IRWIN

Appendix 4

Research Paper

14 July 2010

Colin Pidgeon

Construction Contracts (Amendment) Bill

NIAR 295-10

This paper examines the Construction Contracts (Amendment) Bill that was introduced to the Assembly by the Minister of Finance and Personnel on 26 April 2010. Responses to DFP's consultation are considered along with issues raised during consultation on equivalent legislation in Great Britain.

Paper XX/XX 14 July 2010

Research and Library Service briefings are compiled for the benefit of MLA's and their support staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. We do, however, welcome written evidence that relate to our papers and these should be sent to the Research & Library Service, Northern Ireland Assembly, Room 139, Parliament Buildings, Belfast BT4 3XX or e-mailed to RLS@niassembly.gov.uk

Executive Summary

The Construction Contracts (Amendment) Bill appears to be a relatively non-controversial piece of legislation. The Committee for Finance and Personnel's call for evidence in relation to the proposals received no responses.

The Department for Finance and Personnel's consultation on the proposals also appears to have received a modest response. Consultation on equivalent legislation in Great Britain during 2008 did not give rise to any significant issues.

One aspect of the consultation responses that is particularly worth noting is that each of the three consultation exercises conducted in Great Britain and Northern Ireland found that there was strong support from respondents for maintaining parity in the law across the UK; this suggests that the Department's approach of replicating provisions contained in legislation in Great Britain is appropriate.

The only issue where it appears that consultation responses were in disagreement was in relation to clarification related to a House of Lords judgement on a legal dispute. It may be worth the Committee for Finance and Personnel seeking further information on this issue and the consultation responses to it.

Finally, the Department conducted a pre-consultation exercise with umbrella groups representing the interests of the construction industry. No likely adverse impacts or opportunities to promote better community relations were identified.

Contents

1 Introduction

The Construction Contracts (Amendment) Bill ("the Bill") amends the Construction Contracts (Northern Ireland) Order 1997 (SI No.274 (N.I. 1))[1] This Order replicated legislation in Great Britain and was intended primarily to allow swift resolution of disputes by way of adjudication and to improve payment practices to relieve issues that were identified as problematic within the construction industry.

The amendments in the Bill are aimed at reducing poor payment practices and restrictions on access to adjudication, and clarifying that a contractor may stop carrying out some or all work in the event of non-payment by the other party. These amendments mirror changes to the originating legislation in Great Britain. The explanatory memorandum to the Bill explains that:

The proposed measures seek to follow the GB approach which was to build on the good track record between government and the industry where possible [...] Legislative intervention is proposed only where it is clearly necessary and then only to 'fine-tune' rather than re-invent the statutory framework.[2]

2 Consultation Responses

2.1 General

The Department for Business, Enterprise and Regulatory Reform (BERR) consulted on the proposed amendments in conjunction with the Construction and Domestic Energy Division of the Welsh Assembly Government. BERR's analysis on the consultation responses concluded that:

There was broad support for the proposals set out in the consultation paper though, given their technical nature, respondents were understandably concerned with the precise wording of any proposed amendments.[3]

The Scottish Government's own consultation also found that "there was broad support for the proposed amendments set out in the consultation."[4]

2.2 Adjudication

The proposals for amending the requirements in respect of adjudication were broadly supported across the administrations.

The BERR consultation analysis found that:

The support for the proposed amendments on adjudication was particularly strong.

Respondents almost universally supported the proposal to remove the requirement that contracts should be in writing for the provisions of the Construction Act to apply.

The proposal on conclusive decisions was welcomed – though some felt it might be better to deal with the issue with a different legislative solution.

The introduction of a statutory framework for costs was broadly welcomed though some respondents felt it would be better to introduce an outright ban.[5]

In Scotland, the consultation analysis found that:

The responses for the proposed amendments on adjudication were exceptionally robust.

Almost all of the respondents supported our proposal to remove the requirement that contracts should be in writing for the provisions of the Construction Act to apply.

Our proposal on conclusive decisions was welcomed – although some felt it might be better to deal with this issue with a different legislative solution.

Our proposal in relation to the introduction of a statutory framework for the costs of adjudication was broadly welcomed.[6]

In Northern Ireland, the consultation found that:

Respondents were unanimous that the Construction Contracts Order should be amended to remove the requirement that the Order should apply only to contracts in writing.

All respondents broadly welcomed the prohibition of agreements where decisions as to the amounts of interim payments are conclusive.

There was broad, but not unanimous, support for DFP's proposal to prohibit agreements on the allocation of costs of adjudication until after the adjudicator is appointed.[7]

2.3 Payment Framework

The BERR consultation found that:

There was understandably a little more difficulty with the proposed amendments to the payment framework.

The removal of the requirement to issue a payment notice for contracts subject to a third party certification process was generally welcomed though some questioned the extent to which it was an issue.

Respondents broadly welcomed the increased clarity and transparency our proposals were seeking to introduce to the existing statutory payment framework.

However, some saw no need to intervene at all while others sought to make the case for a much greater intervention into freedom of contract and for wholesale reform of the existing statutory payment framework.

Responses on the abolition of pay-when-certified clauses were mixed although no clear alternative proposal emerged which would provide greater clarity about when a payment would be made.[8]

In Scotland, consultation found that:

There was understandably a range of diverse views in relation to the proposed amendments to the payment framework. However on balance, it was generally felt that our proposals would improve the operation of the existing statutory framework.

The removal of the requirement to issue a payment notice for contracts subject to a third party certification process received mixed responses with some questioning the extent to which it was an issue.

Respondents broadly welcomed the increased clarity and transparency our proposals were seeking to introduce to the existing statutory framework, although some felt that the issues concerning payment would be best dealt with through guidance.

The proposal to abolish “pay-when-certified" clauses was broadly welcomed although this support was subject to the detailed mechanisms being made sufficiently robust.[9]

DFP’s consultation found that:

Respondents agreed unanimously that that the Construction Contracts Order should be amended so that a certificate from a third party setting out a valuation of the work done may function as an Article 9(2) payment notice and that an Article 9(2) notice may be issued by either the payer or a person identified in the contract.

While most agreed with DFP’s proposal to include provision in Article 9(2) for greater clarity on when it is necessary to issue an Article 9(2) payment notice, one respondent felt that guidance would be preferable to legislation.

Broad support was offered for DFP’s proposal to amend Article 9(2) to require that in addition to the amount of a payment and the basis of its calculation, payment notices should state the amount of any sums withheld.

All respondents accepted DFP’s proposals that the Construction Contracts Order should be amended to ensure that both payer and payee should know the sum due for the purpose of Article 10 so that deductions can only be made by issuing a withholding notice and that, for the purpose of Article 11, both should know the amount to be paid if the payer is to avoid the possibility that the payee will suspend performance.

All respondents agreed that pay-when-certified agreements should be prohibited.[10]

2.4 Suspension

BERR’s consultation found “almost unanimous support" for its proposals to improve the right of suspension. In Scotland the proposal met with “unanimous support." The DFP analysis does not include explicit reference to the right of suspension but did find that “all respondents agreed, some emphatically, that parity of legislation within the UK was highly desirable."

2.5 Other issues

Parity of legislation

As stated above, respondents in Northern Ireland felt that parity of legislation within the UK was highly desirable. This response was mirrored in the respective consultations in Great Britain.

The BERR consultation found that “there was strong support, over 98% of the respondents, for the suggestion of cross-border uniformity with the devolved administrations."[11]

In Scotland “respondents unanimously agreed that we should continue to work to minimise divergence across the United Kingdom, subject to legal difference between Scottish and English law."[12]

Correction of errors

The BERR consultation found that there was:

strong support, over 90% of respondents, for the introduction of a provision allowing the adjudicator to correct errors and omissions in his decision even though this was not strictly necessary in England and Wales.[13]

In Scotland:

There was undivided support for the introduction of a provision allowing the adjudicator to correct errors and omissions in their decisions and 7 days was generally agreed as an acceptable period to review the adjudicator’s decision.[14]

In Northern Ireland:

There was unanimous support for the introduction of a ‘slip rule’ to allow adjudicators to correct obvious errors in their decisions, but there was one objection to the proposal to allow up to a week for such corrections to be made.[15]

Melville Dundas vs George Wimpey

The Bill proposes in Clause 7(10) to clarify the legislation in relation to a House of Lords judgement.

The BERR and Scottish consultation analyses found that the judgement had caused confusion. BERR concluded that “respondents were keen to see some clarification in statute."[16] The proposal was supported by 65% of respondents. In Scotland this was supported by “just over half" of the respondents.[17]

In Northern Ireland, views on this issue were “sharply divided."[18] It is not clear from the explanatory memorandum the reasons for the divided opinion; this issue may warrant further exploration.

3 Equality Impact Assessment

The Department for Finance and Personnel conducted a pre-consultation exercise with umbrella groups representing the main participants in the construction industry. Groups consulted were:

- Construction Employers’ Federation;
- Confederation of Associations of Specialist Engineering Contractors;
- Royal Institution of Chartered Surveyors;
- Royal Society of Ulster Architects; and
- Association for Consulting and Engineering

The Department indicated that responses showed that the proposed amendments to legislation contained in the Bill would not be likely to have any impact on the needs, experiences, issues or priorities of any section 75 group.

In assessing any opportunity to promote better equality of opportunity or better community relations, the Department stated in its equality screening exercise that:

the amendments are intended to promote fairer practice in ensuring prompt payment procedures are observed and that where disputes have arisen, these may be resolved in the first instance, and where appropriate, by adjudication, rather than by resorting to litigation. These are measures which may reduce the administrative burden on businesses by clarifying payment obligations and promote a less adversarial commercial environment, so helping improve relationships generally, if not specifically with regard to Section 75 groups.

[1] Available online at: http://www.opsi.gov.uk/si/si1997/19970274.htm (accessed 07 July 2010)

[2] Explanatory Memorandum available online at: http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see 'Options Considered')

[3] BERR (2008) 'Improving payment practices in the construction industry' available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 9)

[4] Scottish Government (2008) 'Improving Payment Practices in the Construction Industry' available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see page 5)

[5] BERR (2008) 'Improving payment practices in the construction industry' available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 9)

[6] Scottish Government (2008) 'Improving Payment Practices in the Construction Industry' available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see page 5)

[7] Explanatory Memorandum available online at: http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see 'Consultation')

[8] BERR (2008) 'Improving payment practices in the construction industry' available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 9)

[9] Scottish Government (2008) 'Improving Payment Practices in the Construction Industry' available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see pages 5-6)

[10] Explanatory Memorandum available online at: http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see 'Consultation')

[11] BERR (2008) 'Improving payment practices in the construction industry' available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 16)

[12] Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see page 5)

[13] BERR (2008) ‘Improving payment practices in the construction industry’ available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 16)

[14] Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see page 5)

[15] Explanatory Memorandum available online at: http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see ‘Consultation’)

[16] BERR (2008) ‘Improving payment practices in the construction industry’ available online at: http://www.bis.gov.uk/files/file47090.pdf (accessed 07 July 2010) (see page 9)

[17] Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf (accessed 07 July 2010) (see page 6)

[18] Explanatory Memorandum available online at: http://archive.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see ‘Consultation’)