



Northern Ireland
Assembly

**COMMITTEE FOR
FINANCE AND PERSONNEL**

**OFFICIAL REPORT
(Hansard)**

**Construction Contracts (Amendment)
Bill: Clause-by-Clause Scrutiny**

29 September 2010

NORTHERN IRELAND ASSEMBLY

**COMMITTEE FOR
FINANCE AND PERSONNEL**

**Construction Contracts (Amendment) Bill:
Clause-by-Clause Scrutiny**

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) Department of Finance and Personnel

Mr Robin McKelvey)

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.

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.

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.

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

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.

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.

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.

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.

Mr Girvan:

Thank you.

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)

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.

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.

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.

Mr Hamilton:

It is useful for the old members too.

The Chairperson:

It is useful to be reminded. That is true.

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

The Committee Clerk:

Again, no issues were raised in the evidence to the Committee.

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?

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)

The Committee Clerk:

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

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)

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.

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)

The Chairperson:

I know that Paul wants to comment on clause 5.

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.

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.

Mr Frew:

Who funds that scheme?

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.

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?

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.

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.

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.

Mr Frew:

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

The Chairperson:

We can reflect our concerns when we are writing our report. We can include that aspect.

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?

Mr Heaney:

No. The project manager is employed by the public sector client.

Clause 6 (Notices relating to payment)

The Committee Clerk:

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

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)

The Chairperson:

There were some issues in relation to this clause.

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.

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.

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.

Clause 8 (Suspension of performance for non-payment)

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.

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)

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.

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.