

Amendments to tackle late payments by employers

THE proposed amendments to the Regulations of the Construction Industry Development Board Act should have significant consequences for the construction sector.

One of the stated aims of the regulations is to deal with late payment by employers resulting in the potential for contractors and subcontractors to “fund” the employer’s construction project.

Main contractors usually insert a “pay when paid” clause in their subcontracts, which in essence makes them liable to pay a subcontractor only when they have been paid by the employer. The effect of this is that ultimately subcontractors bear a large part of the payment risk.

The proposed amendments prohibit the “pay when paid” provisions, and introduce an adjudica-

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Richard Hoal

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tion mechanism for the speedy resolution of all disputes.

The regulations record that:

- A contract may not contain any provision making payment to a contractor conditional upon payment from a third party (except where the payer is in business rescue or insolvent).
- A contractor is entitled to progress payments, and if the contract does not provide for ordinary progress payments, the contractor is entitled to submit monthly in-



voices based on the value of work completed.

● Payment of invoices are due and payable no more than 30 days after submission, and if not paid will attract interest at the reserve bank repo rate plus 6%.

● An employer is not entitled to withhold payment unless it has given a notice to withhold within five days of receipt of the invoice. The notice is required to set out detailed reasons for the dispute and the undisputed portion must be paid.

● A contractor is entitled to suspend the work on seven days’ notice if an amount is unpaid and no notice to withhold has been delivered.

These proposed amendments alter the common law position and:

● Exclude home building contracts from the prompt payment

provisions; also relate to work performed by professionals in the built environment and those who supply materials and components as part of any building structure.

Observations

The introduction of a compulsory adjudication process is welcome for small-scale construction disputes, but may not be appropriate for large complex or technical disputes.

Main contractors would be obliged to pay the subcontractors, whether or not they have received payment from the employer. Consequently it will be important for main contractors to ensure they have adequate security for payment from their employers.

Where the government is the

employer, main contractors may have to consider making security for payment part of the tender offer, or alternatively consider payment risk far more seriously in the computation of their tender:

We may also see the emergence of credit guarantee-type cover becoming more prevalent in the sector:

● Hoal is a partner at Cox Yeats Attorneys and the head of the construction law team. He can be telephoned at 031 536 8500, or e-mailed at rhoal@coxyeats.co.za.

COX | YEATS
attorneys