

IMPROVING ADJUDICATION IN THE CONSTRUCTION INDUSTRY

Proposals relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts

1. INTRODUCTION

- 1.1 This paper seeks comments on proposals to improve the operation of adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996¹ and the Scheme for Construction Contracts².
- 1.2 The objective of incorporating a mandatory right to adjudication in construction contracts was to provide a quick, low-cost and impartial means of resolving disputes during projects. This was proposed by Sir Michael Latham³, supported by all the members of the Construction Industry Board (CIB), and enacted by Parliament. Nick Raynsford, The Minister for Construction, signed the Commencement Order for the construction contracts legislation on 1 May 1998.
- 1.3 On 23 June 2000, just over two years after the legislation first came into force, the Minister wrote to Christopher Vickers, the Chairman of the CIB, and asked the Board to undertake a review of the current operation of adjudication under the Act. A CIB task group conducted the review in the second half of 2000 and their report was published on 9 February 2001⁴.

2. CIB REVIEW AND DETR RESPONSES

- 2.1 The review by the CIB concluded that the adjudication provisions of the Act and associated Scheme have proved generally to work well in meeting the original objectives. The DETR agrees that the impact of the 1996 Act and the Scheme has generally been positive and beneficial.
- 2.2 The CIB expressed concern at the problems which had arisen due to 'bespoke' adjudication processes (i.e. those which do not adopt the Scheme and instead amend or ignore its wording and seek to comply with the requirements of the Act in other ways). The CIB suggested that the motivation for this was often to avoid parties in the supply chain receiving the intended benefits of adjudication, and recommended the enshrinement of a single procedure in legislation. It proposed that only the adjudication procedure contained in the Scheme should be available to the parties and also that the present exclusion of certain contracts relating to process plant should be amended.
- 2.3 The DETR view is that any amendments to the legislation should aim to make the Act or Scheme as originally intended more effective and not to reopen the compromises that underlay its drafting. The Act intended to allow bespoke arrangements for adjudication, and to exclude from the operation of the Act certain works relating to process plant. Bespoke adjudication

¹ In this paper, *The Housing Grants, Construction and Regeneration Act 1996* (clauses 104-117) is henceforth referred to as '*the Act*'.

² *The Scheme for Construction Contracts (England and Wales) Regulations 1998* (Statutory Instrument 1998 No. 649) and *The Scheme for Construction Contracts (Scotland) Regulations 1998* (Statutory Instrument 1998 No. 687, (S.34)) are henceforth referred to as '*the Scheme*'

³ *Constructing the Team*, 1994

⁴ A copy of the CIB's report and the DETR's response is available from <http://www.ciboard.org.uk>.

arrangements and the boundary of the exclusions are both areas that are still giving rise to litigation. The implications of the courts' rulings may take some time to be widely understood, and to be reflected in day-to-day practice. Other aspects may yet come before the courts; and, as the report notes, it is possible that some of the bespoke adjudication procedures that are felt to be causing problems might be found to be non-compliant. The DETR believes it would be premature to consider amending the Act in either of these respects.

- 2.4 The DETR proposes to work with the industry, through the CIB or its successor organisation, to improve adjudication in the following ways:
- a) Better guidance to and training of adjudicators, so that they understand the full extent of, and the limitations on, the powers and duties given to them by the Scheme.
 - b) Better guidance to lay parties on their rights and on what to do and when, to use the adjudication system effectively.
 - c) Amending the Scheme where the difficulties that have been encountered cannot be dealt with by better guidance and are not likely to be resolved by the courts, providing that there is a wide measure of agreement on the proposed amendments, and providing also that they do not risk detracting from the simplicity, speed or cheapness of adjudication.
 - d) Amending the Act in so far as is necessary to outlaw the practice of putting into contracts requirements that a party that refers a dispute to adjudication should bear the other party's legal and other costs.
 - e) Inviting the industry, through the CIB or its successor organisation, to consider whether there is more that could be done by way of marketing or persuasion, to promote use of the scheme rather than of bespoke adjudication procedures; and also whether there is a role for clients in encouraging the specification of Scheme adjudication procedures.
- 2.5 The DETR proposes no changes at this stage to the Scheme or Act other than those set out in section 3. Ministers have invited the CIB or its successor organisation to make arrangements for a further review in around two years.

3. DETAILED PROPOSALS

- 3.1 The following paragraphs set out the DETR's proposals to give effect to the approach outlined above; each proposal follows a brief summary of the concerns identified in the CIB report. Each section highlights whether new guidance or amendment to the Scheme or Act is proposed.

Ambush

- 3.2 The CIB review identified some evidence of a form of ambush in which referring parties submit unmanageable quantities of 'relevant information', which under paragraph 17 of the Scheme the adjudicator is obliged to take into account. The CIB review noted that robust adjudicators have dealt with this matter effectively by telling the referring party that a decision is not possible in the time available or by requesting summary submissions when appointed.
- 3.3 The CIB review concluded that, in order to avoid any suggestion that this practice is an infringement of paragraph 17, paragraph 17 should be deleted. DETR's view is that paragraphs 13 and 17, read together, provide a balance of powers and duties that is reasonable as between adjudicators on the one hand and the parties on the other. Deletion of paragraph 17 might alter

that balance, detracting from the rights of the parties. This paragraph is the key to a party's 'right of response' as advocated by the CIB as it puts a duty on the adjudicator to consider "any relevant information".

- 3.4 The DETR view is that the balance of powers and duties provided by the two paragraphs is a reasonable one and that to delete 17 would be detrimental to the rights of the parties. It is clear however that both adjudicators and the parties would benefit from guidance on their respective powers, duties and rights provided for by the Scheme.

Natural Justice

- 3.5 The CIB review concluded that guidance is needed both for adjudicators and the parties on applying the principles of natural justice. DETR agrees.

Entitlement to submit a response

- 3.6 The CIB review recommended that the right for defendants to respond to a referral to adjudication should be made clear. The DETR view is that paragraph 7(3) read together with paragraph 17 already provides an implicit right of response to the parties and a duty on the adjudicator to consider any relevant information submitted in a response from a party. There is no need for any further provisions in the Scheme, but there is a need for guidance to parties and adjudicators about their rights and duties under the Scheme.

Intimidatory legal tactics

- 3.7 The CIB review recommended that this matter be kept under review, with improved publicity to deter bad practice. The DETR view is that this is an issue that should be covered in guidance to adjudicators.

'Slip rule'

- 3.8 The CIB review was concerned to clarify that adjudicators should have the power to correct obvious mistakes on the face of the decision (ie that part which the parties are bound to implement). It suggested using the device of a simplified version of the 'slip rule' as used in the Arbitration Act⁵.
- 3.9 The DETR view is that adjudicators have an implicit power to amend manifest errors of typography or arithmetic and that it might be sufficient to give guidance to adjudicators. However, DETR is not opposed to the inclusion of a provision in the Scheme defining the extent of an adjudicator's power to correct slips. If this were done, it would be preferable, in DETR's view, to limit its scope to manifest errors of typography or arithmetic in the decision and for the timetable to be determined by the adjudicator using the powers given by paragraph 13.
- 3.10 DETR's concern is that if a wider definition (similar to that used in the Arbitration Act) were to be imported into the Scheme it would risk extending corrections to matters requiring more extensive consultation, prolonging arguments, extending timescales, and detracting from the speed and simplicity of the adjudication process. On balance the DETR and industry representatives concluded that there would be benefits to adjudicators and the parties if an explicit provision defining the adjudicator's powers to correct slips were to be included in the Scheme. They wished to consider further how tightly it should be drawn, given that some

⁵The Arbitration Act 1996 (Part I Section 57)

industry representatives prefer a wider definition of slips. Comments are invited.

Costs

- 3.11 The CIB review recommended that each party in the adjudication should be required to meet its own legal and other costs, as was the original intention of the Act. The DETR agrees in principle that the Act should be amended. The form of the amendment requires further consideration. The DETR will also consider an interim amendment to the Scheme, although, without a corresponding amendment to the Act, there is a risk that such an amendment might encourage greater use of bespoke adjudication.

Timing of reasons

- 3.12 The CIB review recommended that the Scheme should be amended to require that any request for written reasons to support the decision should be received before delivery of the adjudicator's decision and that, if requested by one party, the reasons should be provided to all parties in the interests of clarity and openness.
- 3.13 The DETR view is that there is some risk that including such a requirement in the Scheme could provoke parties to take the precaution of requesting reasons in a greater proportion of cases. This might unnecessarily add to the complexity and time taken.
- 3.14 Nonetheless, adjudicators ought to give the parties reasons, however basic, for their decision, and there are practical reasons why it is better that this should be agreed either before the adjudicator issues his decision or very shortly thereafter. Adjudicators might be given guidance that they could use their powers under paragraph 13 to require that a request for reasons should be put to them by a specified date. This would be a more flexible approach than amending the Scheme in the way proposed.
- 3.15 However an amendment to paragraph 22 of the Scheme may be required to put beyond doubt that the parties rights under paragraph 22 may be subject to the adjudicators power to set deadlines under paragraph 13.

4. CONSULTATION RESPONSES

- 4.1 This is a DETR consultation, which is being taken forward with the close co-operation of the CIB. In the first instance the consultation document has been sent by the Department to interested parties, including all of the Adjudicator Nominating Bodies it is aware of. The document has been distributed by the CIB to all of the construction trade associations, professional institutions and other bodies that are affiliated to the umbrella bodies in its membership.
- 4.2 If you have received this consultation document directly from the DETR and wish to respond to the proposals it contains, please send your comments by post or email to:

Improving Adjudication in the Construction Industry
Zone 3/J6
Department of the Environment Transport and the Regions
Eland House
Bressenden Place
London
SW1E 5DU

Email: pauld_smith@detr.gsi.gov.uk
Tel: 020 7 944 5662
Fax: 020 7 944 5529

Contact the same address if you wish to receive a paper copy of this consultation document.

- 4.3 Please ensure that any comments you have on these proposals reach the Department by Monday 18 June 2001.
- 4.4 Construction organisations should send their responses to the umbrella body to which they are affiliated. All of the construction umbrella bodies have agreed to forward to the Department all of the responses they receive. As usual the umbrella bodies will also produce their own response based on the consensus of opinion among their member organisations. Construction firms and professionals who wish to respond to this consultation directly should consider sending a copy of their response to any trade or professional organisation of which they are a member.
- 4.5 The DETR assures everyone that their response will be given due consideration in all cases. Unless specifically requested otherwise, the DETR will assume that responses can be made available to the public on request.

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DETR Consultees
Adjudicator Nominating Bodies
Construction Industry Umbrella Bodies (for
further dissemination)

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Dear Colleague

Improving Adjudication in the Construction Industry

Attached is a copy of the consultation paper, *Improving Adjudication in the Construction Industry*. I hope you will be willing to take the time to respond to the proposals it describes, which relate to the construction contracts legislation contained in Part II of the Housing Grants Construction and Regeneration Act 1996 and in the Scheme for Construction Contracts.

The Construction Minister, Nick Raynsford, signed the commencement order for this legislation on 1 May 1998. On 23 June 2000, just over two years after the legislation first came into force, the Minister wrote to Christopher Vickers, the Chairman of the Construction Industry Board, and asked the Board to undertake a review of the current operation of adjudication under the Act. A CIB task group conducted the review in the second half of 2000 and their report was published on 9 February 2001.

The review concluded that the adjudication provisions of the Act and associated Scheme have proved generally to work well in meeting the original objectives. I would agree that the impact of the 1996 Act and the Scheme has generally been positive and beneficial.

The CIB made a number of proposals to improve the operation of adjudication. These ranged from amendments to the construction contracts legislation to the production of clear guidance on the adjudication process. Based on those proposals and following extensive discussions with the CIB's Review Task Group, the DETR is embarking on a broader consultation aimed at finalising its plans for improving adjudication.

The wording of the planned legislative changes and text of guidance documents on adjudication will all be consulted on further when they are developed. However I hope that as many organisations involved in adjudication as possible will take the opportunity to comment at this stage. Details on how to take part in the consultation are contained in section 4 of the consultation paper. Please ensure that any comments you have on these proposals reach the Department by Monday 18 June 2001.

We look forward to hearing from you.

Yours sincerely

JOHN HOBSON
DIRECTOR, CONSTRUCTION DIRECTORATE