

Consultation on Amendments to the Scheme for Construction Contracts (England and Wales) Regulations

BIS Consultation March 2010

Response from the Construction Umbrella Bodies Adjudication Task Group

June 2010

CONSEQUENTIAL AMENDMENTS

ADJUDICATION COSTS

Q1 Do you believe it appropriate and necessary for the Scheme to contain a provision allowing the adjudicator to apportion his fees and expenses between the parties to a dispute?

Yes. Having said that, the Scheme already makes appropriate provision, and there is no need for amendment. The proposed amendments to paragraphs 9(4), 11 and 25 are overly complicated and unnecessary.

THE SLIP RULE – POWER TO MAKE CORRECTIONS

Q2 Do you believe 7 days is an adequate period to allow for the correction of errors? If not, what would you suggest is an appropriate period and why?

In its July 2004 Report, and when the matter was reconsidered in April 2009, CUBATG's view was that the period should be a maximum 7 days. On reflection, the majority view now is that the period should be 5 days; adjudication is intended to be a speedy process and in that context 5 days is sufficient.

Q3 Do you agree it is necessary to amend paragraph 21 of Part 1 of the Scheme to allow for a period of time within which the adjudicator's decision should be complied with?

No. CUBATG is unanimously against adding such a 'freezing period' (proposed, it is understood, as a result of an express slip rule being included). No industry rules include such a provision, and the Arbitration Act does not either. It is not needed, and to add it would mean that 28 day adjudication becomes 28+8 days. Invariably, the adjudicator would make a direction as to time for payment (as is done at present) and so the provision would just be an added complication.

Q4 Do you agree that 8 days is an adequate period for compliance? If not, what would be an appropriate period?

See answer to Q3.

SUPPLEMENTARY PROPOSALS - Date of referral (Scheme para 7(1))

Q8 Do you believe it is necessary to clarify the date of referral in paragraph 7 of the Scheme? Should it be 7 days:

- (a) from the receipt of the adjudication notice by the adjudicator?
- (b) from the appointment of the adjudicator?
- (c) from some other event?.

No, it is not necessary to clarify the date of referral.

Joinder (Scheme para 8)

Q9 Are you content with the current position that an adjudicator cannot adjudicate related disputes unless both parties agree?

Yes. However, CUBATG members are split between those who want to see paragraph 8 deleted (as being unnecessary, since the parties need to agree) and those who want to see it remain.

Confidentiality (Scheme para 18)

Q10 How often do you believe parties to an adjudication would wish the adjudication to be confidential on the grounds of:

- (a) the fact of the adjudication?
- (b) the matters that arise in it?

How might the Scheme be amended to better take account of this?

Difficult to say how often this would happen, but in any event paragraph 18 should be left as it is.

Final and conclusive (Scheme para 20(a))

Q11 Is there any **practical** problem which prevents the deletion of the words “unless the contract states that the decision or certificate is final and conclusive” from paragraph 20(a) of the Scheme?

No. In the light of previous discussions and decisions regarding possible amendment of the 1996 Act, paragraph 20(a) should be deleted.

Award of interest (Scheme para 20(c))

Q12 Do you consider it appropriate for the Scheme to give the adjudicator a wider power to award interest than that currently conferred by the Scheme?

Yes. The adjudicator should be given full discretion to award interest on such terms as he thinks fit.

ADDITIONAL PROPOSALS

CUBATG makes two additional proposals –

Reasons (Scheme para 22)

The default position should be that reasons be given, unless the parties agree otherwise, and paragraph 22 should be amended accordingly.

Effects of the decision (Scheme para 23)

Paragraphs 23(1) and 24 should be deleted. The words ‘comply peremptorily’ in paragraph 23(1) add nothing to paragraph 21 which requires immediate compliance (in the absence of a contrary direction).

Paragraph 24 should also be deleted: it is never used. See the comments of Dyson J (as he then was) in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC TCC 254 and in particular paragraph 38 of the judgment where the judge says ‘It is not at all clear why section 42 of the Arbitration Act 1996 was incorporated into the Scheme’.