

Pay rules to change construction

Proposed prompt payment regulations expected to be implemented shortly

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THE Construction Industry Development Board Prompt Payment Regulations are expected to profoundly change the way the South African construction industry operates and will govern construction works in the public and private sectors.

The proposed regulations appeared in the Government Gazette on May 29 (in Notice 482 of 2015) for public comment by the end of July and are expected to be implemented shortly.

The anticipated regulations follow similar statutory interventions in the UK, Singapore, Hong Kong, New Zealand, Australia and Malaysia.

The purpose is to address a crippling constraint to effective infrastructure development by enabling the life blood of the construction industry — cash flow — to actually flow.

Similar international interven-

tions have ensured that problems relating to nonpayment of contractors and subcontractors in the building and civil engineering industries have been overcome.

The consistent flow of cash during the construction project life cycle between employer and main contractor, and main contractor and subcontractors, all the way down the contracting chain, is ensured under the proposed Prompt Payment Regulations. It introduces a system of mandatory adjudication as a first step in resolving disputes, outlawing pay-when-paid clauses, a statutory right to suspend works in the event of non-payment and a system to manage the withholding of payments due.

Delayed payment and unresolved disputes have a destructive effect on the sustainable development of the construction industry. The proposed regulations prevent withholding of payments without going through a defined procedure. They give contractors a statutory right to suspend



works, to charge interest on late payments and they introduce a form of statutory adjudication to resolve disputes. Issues such as withholding payment linked to performance or until completion of a project and delayed dispute resolution have resulted in contractors unwittingly financing projects.

The proposed Prompt Payment Regulations in the current form will compel parties to resolve disputes through adjudication within 28 days.

The 28-day window may only be extended by 14 days in prescribed circumstances. Wherever similar statutory interventions have been enacted internationally, they have contributed positively to creating a sustainable construction industry by freeing up cash flow.

In his address at the recent annual MDA Consulting Collective Wisdom

Lecture, Professor Sundra Rajoo, an expert on the Malaysian equivalent of the Prompt Payment Regulations and director of the Kuala Lumpur Regional Centre for Arbitration, supported the introduction of the regulations into the South African construction industry.

Prof Rajoo explained that

“Malaysia’s experience was that the state initially wanted to be exempted from the act, but this would not have made any sense, given that a large percentage of projects in the construction industry are undertaken by state-owned companies (SOCs) and it is an important driver of the economy. Government argued that SOCs are too large to adhere to the principles of the act, but the counter argument prevailed: that no entity — SOC or otherwise — should enter into a contract if they can’t manage it and went

on to to caution that the development of alternative dispute resolution for the construction industry has important potential to help the industry to grow. If you have too many exemptions to the regulations, it simply won’t work.”

In just over a year since the implementation of the Construction Industry Payment and Adjudication Act in Malaysia, the number of construction disputes registered with the Kuala Lumpur Regional Centre for Arbitration for adjudication has more than tripled. Of these, most were settled in considerably less time.

Most claimants were contractors and subcontractors, while respondents are mostly main contractors and employers. The most common types of adjudication disputes involve final accounts, interim payments and payment of professional fees for consulting services rendered.

The Malaysian construction industry, legal practitioners and especially contractors and subcontractors have now embraced the Construction Industry Payment and Adjudication Act, recognising the suitability of adjudication as an effective means of resolving payment disputes in Malaysia. “The aggrieved parties have embraced the flow of money in the construction industry and this is expected to increase as awareness of this new right to recourse grows,” said Prof Rajoo.

He highlighted the need for competent adjudicators to ensure that the principles of natural justice are adhered to through the adjudication procedure and that the strict timelines provided in such regulations are strictly complied with.

While training in construction adjudication will likely receive greater focus, existing training programmes have ensured that competent adjudicators are available to the construction sector.