

Eskom, Transnet and Sanral say payment overhaul could lead to job losses, writes Fifi Peters

Utilities not keen on prompt payment rules

STATE-owned companies, often criticised by big contractors for being tardy in settling debts, want to be exempted from proposed construction sector regulations that will rein in errant payers.

The regulations, tabled in May, are designed to speed up the time it takes for contractors to be paid for construction projects. But the likes of Eskom, the South African National Roads Agency Limited

(Sanral) and Transnet say the proposed payment overhaul could hinder their ability to secure project finance, and have the unintended consequences of diminished building activity and job losses.

For years, the Construction Industry Development Board — the statutory body responsible for stimulating growth, reform and improvement in the sector — has pushed for stricter regulations to curb delayed payments. But some of the worst offenders are parastatals.

Late payment is often cited as a constraint to effective infrastructure development as it cuts off cash flow, the lifeblood of the construction sector.

The proposed guidelines were tabled in May and opened to public comment for 60 days.

The regulations propose that the “pay when paid” principle be done away with; that contractors are entitled to progress payments while work is in progress, and that they have the right to suspend projects until payment is received. They also make provision for a compulsory adjudication process to settle payment disputes when they arise. This is intended to reduce the time contractors spend in courts challenging payment disputes, and save them legal costs.

In addition, if an employer fails to make a payment within 30 days of receiving an invoice, contractors will be allowed to charge an interest rate set at the Reserve Bank’s repurchase rate plus 6%.

If introduced, SA would be the

seventh country in the world to adopt a mechanism to enforce prompt payment and mandatory adjudication. Similar legislation has been passed in the UK, Australia, Singapore, New Zealand and Malaysia.

On a recent visit to SA, Sundra Rajoo — director of the Kuala Lumpur Regional Centre for Arbitration — told Business Day that exempting the government from the proposed regulations would be a mistake.

Mr Rajoo was last year involved in the implementation of Malaysia’s Construction Industry Payment and Adjudication Act.

“To not bind the government in the initial stages will not make the legislation work. There is no jurisdiction where the government is exempt,” said Mr Rajoo.

Prior to the adoption of the act in Malaysia, its construction industry was riddled with inefficiencies as delayed payments often resulted in poor work quality and in contractors pricing jobs higher relative to project margins.

“When you know that you won’t get paid in time, you are more likely to cut corners. This is what we learnt from the Malaysian experience. (But) this has since improved (with the introduction of the act). The legislation has seen contractors arrange financing upfront,” said Mr Rajoo.

Furthermore, the adjudication process proved to be efficient in settling payment disputes, he added.

Bowman Gilfillan attorney Rob Morson, who heads the construction division at the law firm, says a few factors in the guidelines would make it difficult for parastatals to secure finance for large-scale infrastructure projects, which are the most lucrative for the construction and engineering sectors.

He flags as potentially problematic the

proposal that contractors, subcontractors and suppliers be given progress payments at reasonable intervals while work was in progress. Also, employers withholding payment if reasonable grounds exist, and contractors suspending work in the event of nonpayment within 30 days, are cause for consternation, he says.

“The regulations do not define what regular and reasonable payments are with regard to progress payments. When considered holistically, these issues would create an obstacle in securing limited recourse funding,” Mr Morson argues. Recourse funding are loans on which creditors have limited claims in the event of a default.

Also, state-owned entities have balked at the proposed punitive default charge of 12% at current interest rates.

“This is higher than the default rate agreed and provided for in many standard-form contracts, including the International Federation of Consulting Engineers. Furthermore, the rate is applied without distinction as to whether payments are due in local or foreign currency — payments in US dollars or euros would attract an interest liability three to four times (than that in rand terms),” he says.

Vaughan Hattingh, director and adjudication practitioner at MDA Consulting, says the proposed mandatory adjudication process has received positive industry buy-in. But Mr Hattingh notes that, in their current form, the proposed regulations could do with some cleaning up.

The Construction Industry Development Board is in the process of collating all public comments and expects to implement the regulations before the end of the year.

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