

THE CONSTRUCTION CONTRACTS ACT 2013

SEPTEMBER 2017

BACKGROUND

The Construction Contracts Act 2013 (the Act) applies to construction contracts in both the private and public sector (other than PPP contracts) entered into after 25 July 2016.

A code, entitled the Code of Practice Governing the Conduct of Adjudications under Section 6 of the Construction Contracts Act 2013 has been issued to accompany the ACT.

The Act is modelled on the UK legislation which has been in place for some time. As a result, case law from the UK may be helpful in understanding the Act.

The Act regulates payments under construction contracts by imposing a requirement that such contracts expressly provide for the amounts of all interim and final payments (or adequate mechanisms to determine them).

IMPORTANT TERMS

“Construction operations” means any activity associated with construction, including any of the following:-

- construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of land (whether permanent or not);
- work to walls, roadworks, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- installation of fittings, including such as systems for heating, lighting, air-conditioning, thermal insulation, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works and traffic management;
- painting or decorating any building or structure; and
- making, installing or repairing sculptures, murals and other artistic works that are attached to property.

“Construction contract” is an agreement (whether or not in writing) for:-

- carrying out or arranging for the carrying out of construction operations whether under subcontract to the executing party or otherwise;

- providing the executing party's own labour, or the labour of others, for the carrying out of construction operations.

The following contracts are excluded from the scope of the Act:-

- Those with value below €10,000;
- Those between a State Authority and its partners in a PPP arrangement;
- Those relating to residential dwellings with a floor area not greater than 200 sqm and where one of the parties will occupy the property as their residence;
- Those of an employment nature; and
- Those relating to manufacture or delivery of building or engineering components or equipment, materials, plant or machinery (except where the contract also provides for their installation).

WHO BENEFITS?

The Act protects, the contractor under a construction contract. And any subcontractor or sub-contractors who execute work under the construction contract. In addition to those who do actual construction work, architects, engineers, project managers, site surveyors, archaeologists and interior decorators can also be protected.

PAYMENTS UNDER A CONSTRUCTION CONTRACT

All construction contracts entered into after 25 July 2016 must include:-

- The amount of each interim payment;
- The amount of the final payment;
- The payment claim date for each amount due; and
- The period between the payment claim date for each such amount and the date on which the amount is due.

If a contract fails to make provision for the above, the Act sets out 30 day default intervals for stage payments which will automatically apply and a default formula for calculating the amount of an interim payment due at a particular claim date.

PAYMENT CLAIM NOTICE

The Act provides for the issue of payment claim notice within a period of 5 days from the due date for payment. This notice triggers the mechanism provided by the Act to enforce the payment in question. The form of notice should specify:-

- the amount of payment;
- the period or activity to which payment relates;
- the subject matter of the claim; and
- the basis of the calculation.

The intention of the payment claim notice is to set out in sufficient detail why payment is being sought which in turn facilitates the paying party to decide whether the amount is due or not.

RESPONSE TO PAYMENT CLAIM NOTICE

If the other party contests that the payment is due and payable it cannot lawfully withhold payment unless that party has issued a response to the payment claim giving the following:-

- the amount proposed to be paid;
- the reason for the difference in the amounts sought and proposed to be paid; and
- the basis on which the amount proposed is calculated.

Example

On 26 July 2016, Buildco employs Sam, a supplier and installer of air-conditioning, as a sub-contractor, to install an air-conditioning system in a new office block to be completed by Buildco. The consideration for the installation is €240,000 payable in 3 stages of €80,000 each. On completion of Sam's work on the second stage, Buildco delays paying Sam the 2nd on the grounds that Buildco has not been paid by the employer who commissioned the office block. Sam serves a Payment Claim Notice within 5 days of the due date for the 2nd stage payment. Buildco does not respond.

Notwithstanding the fact that Buildco may not have been paid by the employer, Buildco is obliged to pay Sam within 30 days of the completion of the 2nd stage of Sam's work.

“PAID WHEN PAID” CLAUSES

The Act also renders any ‘pay when paid’ clauses in a construction contract ineffective. These clauses would otherwise allow the paying party under a contract to withhold payment where they themselves are awaiting payment from a third party under a separate contract.

RIGHT TO SUSPEND

Where a party seeking payment under a construction has not been paid in full any amount due to them by the due date for payment, he/she may then suspend the works (but not all of their obligations under the contract) by notice in writing not earlier than the day after the due date for payment giving:-

- the grounds for the proposed suspension; and
- at least seven days’ notice of the start of the proposed suspension.

This right to suspend for non-payment ceases where either the amount due is paid in full prior to the start of any proposed suspension or where either party refers the payment dispute to adjudication.

ADJUDICATION

A party can seek adjudication of a payment dispute by a fast track procedure at any time by issuing a notice of intention. The parties can agree on an adjudicator or select one from a panel. A code of procedures for adjudication is provided under the ACT.

IN CONCLUSION

The Act has been welcomed by the industry. When drafting agreements for construction operations, care will be required to ensure compliance with its provisions.

For further information please do not hesitate to contact us.



URSULA TIPP

Partner

Tel: +353 1 254 3432

M: +353 86 1703405

utipp@tipp-mcknight.com



MICHAEL O'CONNOR

Partner

Tel: +353 1 254 3432

M: +353 86 8592838

moconnor@tipp-mcknight.com

DISCLAIMER

The above is intended as a general guide to the law only. It is not intended as a full statement of the law on any point. No responsibility will be accepted for any person acting or failing to act on the basis of this paper. Before taking action in relation to any matter, full professional advice should be obtained.