

# CONSTRUCTION ALERT

AMENDMENTS TO  
THE REGULATIONS OF  
THE CONSTRUCTION  
INDUSTRY DEVELOPMENT  
BOARD ACT

## AMENDMENTS TO THE REGULATIONS OF THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT

**The Minister of Public Works recently published for public comment proposed amendments (Proposed Amendments) to the Regulations of the Construction Industry Development Board Act 38 of 2000 (Act). The Proposed Amendments, if promulgated could potentially have significant consequences for contractors in the South African construction industry.**

### Objectives

The objective of the Act and its existing Regulations, amongst others, is to regulate the growth and development of the construction industry. The construction industry is still largely governed by the common law principles of contract law, which gives one the right to freedom of contract.

A criticism that the Proposed Amendments seems to be directed at is the perceived 'funding' by the contractor (and subcontractors) of the employer's construction project.

The Proposed Amendments prohibit 'pay-when-paid' provisions and contemplate a speedy resolution of any dispute that, if left unresolved, may see contractors (and subcontractors) financing construction projects while not having been paid for work done while the dispute resolution is underway.

In principle, the objective of the Proposed Amendments appears to be beneficial for the construction industry by attempting to address challenges contractors may face from time to time and which could contribute to insolvency and unemployment, amongst other things.

### Effect

The Proposed Amendments will impose statutory mechanisms to ensure the prompt and progressive payment to a party for work performed and to expeditiously solve disputes in a judicially enforceable manner.

The Proposed Amendments are significant in effect and consequence as the ability to freely contract could be curtailed and both parties exposed to a potentially unrealistic and unworkable adjudication process.

### Prompt Payment

A contract may not contain any provision making payment to the contractor conditional upon payment from a third party.

A contractor who has carried out construction work is entitled to progress payments. If the contract does not provide for regular progress payments at reasonable intervals, the contractor may submit monthly invoices for work completed. The amount of the progress payment is determined in terms of the contract or if not specified, based on the value of the work completed. The value is derived from the contract or if not specified, with reference to various criteria including rates or prices prevailing in the building and construction industry.

Payment of any such invoice becomes due and payable no more than 30 days after it is submitted. If not paid on due date, interest becomes payable at the Reserve Bank repurchase rate plus 6%. Interest paid must be reflected in the financial statements of the defaulting party.

The employer may not withhold payment (or part thereof) unless it has given 'effective notice' of intention to withhold payment within five days of receipt of the invoice concerned. That notice must set out the amount being withheld with detailed reasons. Any undisputed portion must be paid without delay. A failure by the employer to strictly comply with the 'effective notice' requirement may compromise its ability to challenge the contractor's claim for payment.

The contractor is given the right to suspend its own performance if an amount, which is due and payable, is unpaid and no effective notice to withhold payment has been delivered, provided it has given the employer seven days' notice of its intention to suspend. The period during which performance is suspended due to non-payment is disregarded in calculating any contractual time limits for performance.

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The Proposed Amendments will apply to both verbal and written construction contracts concluded in the private and public sector.

Any provision in a contract that excludes or waives any aspect of the Proposed Amendments will be null and void.

Seemingly a construction contract for a lump sum contract price that provides for regular progress payments at reasonable intervals would not fall foul of the Proposed Amendments.

Parties are well advised to conclude clear and precise construction contracts setting out the scope of work, progress payments and what constitutes progress.

### Adjudication

Any dispute between the parties in relation to the contract must be referred to adjudication. Every contract must provide for an adjudication procedure, substantially in compliance with the Proposed Amendments.

Notice can be given at any time of an intention to refer a dispute to adjudication. Within seven calendar days thereafter the appointment of an adjudicator is to be agreed and the dispute referred. The adjudicator must make a decision within a maximum of 42 days.

The adjudicator may be appointed by agreement or an 'adjudicator nominating body' accredited by the CIDB and in terms of the Standard for Adjudication to be issued. The latter appointment cannot be set aside.

The broad powers and duties of the adjudicator include determining the dispute on the facts and the law, making a default determination and imposing a financial penalty on a party that fails to properly comply with the adjudication process.

The adjudicator's decision is binding and must be executed within 10 days regardless of a referral of the dispute to

arbitration or a review of the decision. A decision that involves payment of a sum of money is a liquid document. If payment has not been made within 30 days and falls within the Magistrates' Court jurisdiction, a judgment can be registered against the defaulting party.

### Conclusion

The Proposed Amendments accord with and advance the objects of the Act. However, they appear to suggest a 'one size fits all' solution. If implemented, the Proposed Amendments could have unintended adverse consequences for parties to construction contracts leaving the intended objective unfulfilled.

It seems that without further consideration the Proposed Amendments could potentially:

- limit the parties' right to freely contract;
- create uncertainty as to what constitutes a progress payment;
- compromise the contracting parties' ability to self-regulate claims and disputes designed to avoid or limit dispute resolution;
- unreasonably and unfairly inhibit the contracting parties' right to be heard and the proper ventilation of extremely complex, large scale, technical disputes by prescribing a maximum adjudication period of 42 days before an adjudicator with extensive powers and duties;
- prevent the parties proceeding straight to arbitration or to court for redress; and
- create risk for a party who has made payment based on an arbitrator's decision, only for that decision to be overturned at arbitration, without any guarantee of recovery from the party to whom payment was made.

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