



N A B A R R O

CLARITY MATTERS

Construction & Engineering update

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Ask a question

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Timing in Procurement Challenges

Summary and Implications

Two recent decisions of the European Court of Justice (ECJ) have changed the rules on the timing for procurement challenges contained in the Public Contracts Regulations 2006 (the Regulations).

The domestic legal position appears relatively straightforward: a party who wants to challenge the procurement of a contract must bring proceedings "... *promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought*"¹.

In the cases of *Uniplex*² and *Ireland*³ the ECJ ruled that the timings set out in Regulation 47(7)(b) must be interpreted in a way which is consistent with European Community law.

This means that aggrieved parties may be able to bring challenges after three months.

Ask a question

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1 (Paragraph 47(7)(b) of the Regulations).

2 *Uniplex UK Limited v. NHS Business Services Authority* (Case C 406/08)

3 *Commission v Ireland* Case C-456/08

Position in English/Irish law

English Law

As set out above, Regulation 47(7)(b) obliges an aggrieved party to commence proceedings against a public body **promptly** and in any event within three months from **the date when grounds for bringing proceedings first arose**.

This obligation has been retained in new Regulation 47D(2).

Irish Law

The Irish Superior Court Rules contain a similar provision requiring a challenge to be brought "*at the earliest opportunity or in any event within 3 months*".

The interpretation of these distinct and independent requirements has now been clarified by the ECJ in *Uniplex* and *Ireland*.

Uniplex

Uniplex is a claim brought by an unsuccessful tenderer for a framework agreement for the supply of goods to the NHS.

Uniplex sought:

- a declaration from the English Court that the NHS breached the Regulations;
- damages; and
- an order that it be awarded a place on the framework.

Two recent decisions of the European Court have changed the rules on the timing for procurement challenges

Crucially, Uniplex had been informed of the decision that they would not be appointed to the framework agreement on 22 November 2007.

Uniplex did not commence proceedings until 12 March 2008, over three months later.

The NHS took the time point, saying that proceedings had been issued more than three months after the grounds for the challenge arose. The English courts referred the following questions to the ECJ:

1. When does the limitation period start?
2. How should the English court apply the requirement to bring proceedings "promptly"?
3. How should the English court apply its discretion to extend the domestic limitation period?

The ECJ held:

1. The limitation period runs from when the claimant knew (or ought to have known) about the breach, not from the time when the breach occurred.

The ECJ confirmed that the European legislation contains no specific time limit and that English law must not compromise the effect of the relevant European Directive. The Directive requires member states to provide a suitable procedure to allow contracting authorities' decisions to be reviewed effectively. The procedure must allow for the fact that an individual cannot form a view as to whether there has been an infringement until he is possessed of all the relevant facts.

The procedure must allow for the fact that an individual cannot form a view as to whether there has been an infringement until he is possessed of all the relevant facts

Accordingly, the time limit must run from when he knew (or ought to have known) about the breach (not merely the fact that his tender has been rejected).

2. The ECJ ruled that the words "promptly and in any event within 3 months" gave rise to unacceptable uncertainty. Such wording could allow a court to dismiss a claim for not being brought "promptly" even if it was within three months.

The effect of the ECJ ruling is that, if a claim is brought within the three month time limit, the English courts can no longer decide that it has not been brought "promptly".

3. The English court is obliged to use its discretion to interpret domestic law in a way which gives effect to the relevant European law.

The result of this is that:

- the time limit in English law must be interpreted as commencing when the claimant knew, or ought to have known, of the infringement
- if such interpretation is not possible, the court must use its discretion to extend the period to ensure the claimant has an equivalent period; and

- if the domestic law cannot be interpreted in a way which is consistent with the Directive, the English courts must not apply those provisions.

Ireland

EuroLink submitted a tender to the Irish National Roads Authority (NRA) for the construction and operation of a new bypass. On 9 December 2003, the NRA decided to award the contract to an alternative tenderer but did not inform EuroLink of this decision. A contract award notice was published in the Official Journal on 3 April 2004.

On 8 April 2004, EuroLink challenged the award. The Irish court dismissed the claim for not being brought within three months from the date when grounds for the application first arose.

The case ended up in the ECJ.

The ECJ took the same approach as in *Uniplex*, saying that the Irish rule was too imprecise and did not allow the parties to predict with certainty when the limitation period would end. For this reason, the Irish rules were incompatible with the Directive.

Although it was not in issue in this case, the ECJ expressed the same view of the wording “at the earliest opportunity” as it did of the word “promptly” in the *Uniplex* case, i.e. that it left too much to the Court’s discretion and created further uncertainty.

Conclusion

Regardless of whether the text of the Regulations will be amended, these decisions mean that the interpretation of the Regulations has been substantially changed. As a result, aggrieved tenderers potentially have a much longer period in which to bring a challenge.

The ECJ took the same approach as in *Uniplex*, saying that the Irish rule was too imprecise and did not allow the parties to predict with certainty when the limitation period would end

The New Remedies Directive

Although the New Remedies Directive (2007/66) amended the Directive referred to in this article, the relevant provisions remain the same and as such the ECJ’s decisions remain valid.

Design obligations the problem of 'fitness for purpose' liability

Summary and implications

Traditionally, the parties involved in a construction project would have clearly defined roles and responsibilities. The design of a project was carried out by professional consultants and contractors would carry out the construction. Nowadays, with modern procurement methods, the lines are blurred, as contractors are increasingly responsible for all or part of the design.

This article:

- reviews the position on design obligations and liabilities;
- examines the differences between the liability of a contractor under a building contract and a professional designer under an appointment.

Design Consultants

Duty of Reasonable Skill and Care

In the absence of any written terms and conditions, a professional designer will have a duty to act with reasonable skill and care¹. This means a designer will only be liable if it can be proved that he is professionally negligent. The test imposed by the courts to establish this is whether the design meets the standards of a competent professional designer.

In the leading case² the test was stated to be "the ordinary skill of an ordinary competent man exercising that particular art".

In practice, a design consultant will need to show he acted in accordance with the usual practice and professional standards current at the time the design was carried out to escape liability.

Express provisions

It is unusual for professional consultants to be engaged without any written terms and conditions whether they are bespoke or industry standard. Most bespoke forms of appointment drafted by lawyers will specify the level of skill and care required of the designer. For example:

"The Consultant warrants to the Client that in the design of the Works he has used and will continue to use all the reasonable skill, care and diligence to be expected of an experienced and competent consultant experienced in carrying out the design of works of a similar size, scope and complexity to the Works."

Ask a question

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1 Section 13 of the Supply of Goods and Services Act 1982

2 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 852

This raises the level of skill and care to that of a competent professional experienced in carrying out services for projects of a similar size to the one in question. The higher level is desirable for more complex projects.

It is always sensible to specify the level of skill and care required so that the parties are in no doubt on the standard required of them

The British Property Federation and the Construction Industry Council standard forms contain similar provisions, as above whereas the consultant body standard forms such as the ACE and RIBA simply refer to an obligation to use reasonable skill and care. For example:

“The Architect exercises reasonable skill care and diligence in conformity with the normal standards of the Architect’s profession in performing the Services... “

It is always sensible to specify the level of skill and care required so the designers are in no doubt on the standard required of them.

A consultant’s professional indemnity insurance policy will not cover fitness for purpose obligations

Fitness for purpose

The higher standard of care which may be applicable is that of fitness for purpose. In this situation, a design consultant would be liable simply if its design does not work for the purposes required. It is generally accepted that in the absence of any specific wording in an appointment, a design consultant will not be under any fitness for purpose obligations. It should be noted, however, that the court³ has stated that the issue of whether fitness for purpose obligations apply will depend on the facts of the case.

3 Greaves & Co (Contractors) Limited v Baynham Meikle & Partners [1975] 1 WLR 1095

The important point to note, however, is that a consultant’s professional indemnity insurance policy will not cover fitness for purpose obligations. In fact, some policies may be completely invalidated if a consultant has agreed to any fitness for purpose obligations within an appointment.

Design and Build Contractors

Fitness for Purpose

The position for a contractor carrying out design under a building contract is different. For construction works, the relevant statute is the Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994. Amongst the terms which will be implied is a term that the goods supplied will be of satisfactory quality and, where the purchaser makes known a particular purpose, that the works are reasonably fit for the intended purpose.

For this reason, the court has been more inclined to impose a fitness for purpose obligation on contractors with design responsibilities. The court has stated⁴:

“We see no good reason ... for not importing an obligation as to reasonable fitness for purpose into these contracts or for importing a different obligation in relation to design from the obligation which plainly exists in relation to materials.”

4 IBA v EMI Electronics Limited and BICC Construction Limited (1978) [1980] 14 BLR 1

Expressly limiting liability

The JCT and ICE contracts contain express reasonable skill and care clauses which effectively overrides any implied or common law fitness for purpose obligation. The issue is silent under the NEC3 contract, the issue is silent, but there is an option to limit the contractor’s obligation to reasonable skill and care. If the option is not selected, a fitness for purpose obligation may be implied.

The courts have been more inclined to impose a fitness for purpose obligation upon contractors who take on design responsibilities

By way of example, clause 2.17.1 of the JCT Design and Build Contract Revision 2: 2009 states “the Contractor shall, in respect of any inadequacy in such design, have the like liability to the Employer, whether under statute or otherwise, as would an architect...” This effectively means that the contractor has a reasonable skill and care obligation in respect of design and not one of fitness for purpose.

‘Fit for Purpose’ in disguise?

The standard JCT clause is often amended by employer’s lawyers to raise the standard of skill and care to that of a competent consultant with experience of projects of a similar size.

Some lawyers amend the standard clause to make the standard of skill and care that of a competent design and build contractor. The effect of this is debatable, but some lawyers consider that this reintroduces an obligation of fitness for purpose. If this is the case, the probable result is that the contractor’s professional indemnity policy may not cover any of the design obligations.

Clarity and protection

The main lessons to be learned from the above are that the parties to a construction contract should specify clearly the standard of design obligation required. If they are serious about a sensible allocation of risk and preserving protection under professional indemnity insurance policies, fitness for purpose obligations are best avoided.

Project Bank Accounts

Summary and implications

In large construction projects, extended payment terms and delayed payments down the supply chain cause additional costs through finance costs and increased tender costs to pay for this risk.

Project Bank Accounts (PBAs) are a relatively new concept to try and overcome 'bottlenecks' in the flow of funds to the supply chain. To remove these costs;

- the Office of Government Commerce identified a potential saving of up to £750m in public sector contracting if "fairer" payment practices could be adopted by the construction industry. Similar ideas are also being employed by private developers; and
- the JCT and NEC have produced their own forms of PBA documentation which we are starting to see being used in the industry.

However, for all the worthy assertions that PBAs are a means of helping the smaller parties in a cash-strapped situation, it appears that PBAs, without a lot more effort may still not achieve their objective and get the funds where they are required.

What is a Project Bank Account?

A PBA is a bank account opened by the Employer into which the employer pays sums in advance of the progress of the works ready to pay the construction team. Whilst in theory the employer could put the full build cost in the account at the outset of a development, this is highly unlikely in practice. Most employers will fund the PBA one or two months in advance.

To do this the employer will usually have a detailed and frequently updated payments schedule setting out the envisaged construction cost in each month of the development.

Each month the various parties, major sub-contractors, main contractor and consultants - submit their applications for payment. If the application for payment is agreed with the employer in the normal way, each member of the team is given direct signing rights on the PBA. The parties then can simply withdraw their own payments due. Instead of waiting for the employer to pay them.

One of the greatest potential advantages is that further down the supply chain the parties do not suffer from the compounded payment periods, where at each level the paying party gradually extends his payment period in order to buy himself some grace. For many smaller suppliers this means that they are effectively trading on credit for each new project, and so can not adequately manage their cashflow.

Ask a question

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Administrative problems - A sledgehammer to crack a nut?

People at all levels of the industry believe in the benefits of improved cashflow to the supply chain, but unless the groundwork is put in at the outset of a project the administrative burdens of a PBA may be too high.

The benefit that the supply chain is looking to gain is an increase in certainty over payments. But from an employer's point of view these perceived benefits may be achieved by the much simpler procedure of undertaking to pay valuations both on time and within a shorter payment period. The employer could also insist in his contract that payment periods down the supply chain are both appropriately short and respected.

The people who argue strongest for setting up a PBA are probably the same people who could put up with the longer payment periods in the first place

An administrative problem is that a PBA can only be accessed by parties who are signatories to the account. For reasons of financial control these have to be limited to the major players in the project. A high number of signatories to an account, greatly expands the opportunity for fraud and accounting irregularities, which would be very costly and time consuming to resolve after the event.

However, restricting the PBA signatories frustrates the very object of having a PBA in the first place. Those parties who argue strongest for setting up a PBA are probably the same parties who could better afford to suffer the longer payment periods in the first place. And there are no guarantees that their own suppliers will benefit from improved payment terms.

Problems for the cost consultants

If the number of signatories to a PBA is widened to include all of the suppliers on a given project, this then presents a valuation nightmare for the QS running the development. Previously in a design and build contract the QS only had to assess the main contract valuation, including any amounts due to nominated sub-contractors. The Contractor would then use the employer's assessment in ascertaining amounts due to sub-contractors.

But where all parties are hoping to draw at the same time in respect of the month's work, each of these valuations is effectively being carried out both independently of each other and simultaneously. With a large number of suppliers on a given project, and with potential issues such as withholding arising on various accounts, the QS is presented with a herculean task each month.

A beleaguered QS would at least be understood (if not exonerated) in this instance if he erred on the side of caution, undervaluing the works so as not to risk overdrawing on the PBA. Of course if he did this it would immediately reduce the benefit of the improved cashflow under the PBA.

It is possible for this valuation task to be undertaken, but as with any solution it comes at a cost. The employer at the top of the chain (leaving aside the banks) will need to invest more heavily in the cost control function as the QS will be carrying out project-wide valuations each

month. Similarly the contractor will also have to pass on a degree of responsibility for assessing payments due to his subcontractors.

In order to do this the contractor and all subcontractors will have to submit their costs on a fully open book basis each month. This is seen in the cost-reimbursable forms of the NEC3 suite of contracts. Without this transparency the QS would not have adequate information to value amounts due to all parties in the supply chain drawing on the PBA.

Funder issues

Frustratingly, the leading industry guidance on PBAs was published at the end of the last building boom, when magnanimous ideas about protecting smaller players in the supply chain appeared pragmatic and commendable. But even in good times banks are generally unwilling to lend ahead of progress of the works, and as credit dried up, this became even less likely.

If an employer wishes to have a reservoir of cash paid into a PBA in advance of the works he will usually have to fund this himself out of capital. Even if the employer can obtain funding, it means he will be accruing finance costs, probably in excess of any interest being earned on the funds in the PBA.

Insolvency risks

There is a concern where a sub-contractor withdraws its payment but the intervening contractor becomes insolvent. A liquidator of the contractor could claim that the direct payment to the subcontractor was a preference over other creditors of the contractor who should have had priority over the money.

This would result in the payment to the insolvent contractor, increasing costs further.

Contractual issues

If the PBA holds one or two months money but is not funded in a particular month, or not funded in time, the construction team would need to serve a notice of suspension immediately so as not to continue to run up costs, exhaust the funds and then lose all the advantages of the PBA.

This is a disproportionate sanction as it does not allow for any commercial period of grace for the employer or funder to rectify the default and it would certainly sour relationships on site. It would also needlessly add to the future costs of the development through restart costs. If the construction team continue without a funded PBA they are effectively back in the same position as if no PBA had been put in place but with the open book accounting requirements and, probably, reduced contract sum to reflect the anticipated shorter payment periods arising from the PBA.

Whilst the perceived benefits of a PBA sound alluring the realities are that to put one in place may put a significant burden on all parties.

Related item:

The OGC Guide to best 'Fair Payment Practices'

The 2007 Guide was intended to apply just to public sector contracts, but it contains principles of wider application. It covers many areas other than Project Bank Accounts such as different approaches to retention and measurement.

It will take a brave QS to take on the responsibility to all parties for assessing payments under varying contracts

Practical Completion: Getting it right in the credit crunch

Summary and implications

Practical Completion is a term of art, which is often misunderstood and frequently misapplied.

In a booming market, this was less of a problem. Everyone wanted buildings finished and to move on to the next project. The intricacies of Practical Completion were just minor details not to be overly concerned with.

The credit crunch has changed that landscape. There is now much stronger commercial drive for getting it right, because:

- a dispute on Practical Completion can often be technical, complicated and expensive to resolve;
- the implications of a disputed Practical Completion certificate can extend beyond the parties to the building contract by bringing in tenants, purchasers, funders and insurers.
- disputes can be avoided by good planning and a proper understanding of the legal issues.

Impact of the Credit Crunch

Prior to the credit crunch, employers' and contractors' interests were often aligned – each party wanted to have buildings completed as soon as possible so that tenants could move in, rents start to accrue, retentions be part released and no liquidated damages become payable.

The result was sometimes that Practical Completion got pushed through even though buildings may not have been properly practically complete, and relatively little regard was had to what it really means.

The credit crunch has changed the landscape for employers and contractors because:

- employers without tenants lined up to occupy buildings in construction generally do not want to take possession of their buildings any earlier than they have to;
- if no rent is accruing, employers may seek to claim liquidated damages;
- employers will not want to take over the obligation to insure buildings earlier than they have to;
- contractors may seek to maximise prolongation claims on current projects if they have been delayed by employers and have no other projects lined up; and

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- third parties, such as tenants or forward purchasers, may seize on problems surrounding Practical Completion to delay taking a building and paying rent, to obtain more favourable terms or even to try to get out of expensive leases / purchases signed up to at the height of the market.

What does Practical Completion mean?

Keating on Construction Contracts says that Practical Completion is “*easier to recognise than to define*”.

Hong Kong’s Court of Final Appeal found¹ that the Practical Completion is “*a term of art*” which means that the works have been completed without any patent defects which cannot be ignored as trifling.

Practical Completion is “*easier to recognize than to define*”!

There was a suggestion in this case that the standard required is higher than that which may generally be applied in practice, but that the fact it is more exacting would not change the test.

Although the decision comes from Hong Kong, it is likely to be followed by the courts of England and Wales as it is from a Commonwealth Court of Final Appeal.

¹ *Mariner International Hotels Ltd v Atlas Ltd*
Hong Kong Court of Final Appeal, 2007

² *Menolly Investments 3 Sarl v Cerep Sarl*
[2009] EWHC 516 (Ch)

Making Representations

The English courts have held² that a Certificate of Practical Completion which is said to be “final and binding” can only be opened up in cases of manifest error or fraud.

The court found that the contract required disabled ramp access to comply with statutory obligations. The ramp access had not been constructed so the court held that the Certificate of Practical Completion was invalid because the works has not been carried out.

However, the Court of Appeal found that because Menolly had given the impression to the contractor and the certifier that a lack of disabled ramps (which were required by the contract) would not affect the issue of a Certificate of Practical Completion, Menolly could not rely on the lack of those disabled ramps to invalidate the Certificate of Practical Completion.

How should the test be applied?

The question of whether a building is Practically Complete is one of fact:

1. Has the contractor done **all** the work he is to carry out?
2. Are there any apparent (or patent) defects in the works that he has carried out?
3. If there are defects, are those defects trifling or minimal enough in the eyes of the certifier to allow him still to issue a Certificate of Practical Completion?
4. Have any representations been made which affected the certifier’s discretion and which mean that either party cannot now rely on some issues?

In the current economic climate, it is vitally important that any certifier applies the test correctly.

Employers and contractors should therefore make early representations if any error is seen. However, as shown in the Menolly investments case, anyone making representations should think carefully about them and the implications.

Consultation on amendments to Scheme for Construction Contracts

Summary and implications

On 25 March 2010, the Department for Business Innovation Skills (DBIS) published its consultation on amendments to the Scheme for Construction Contracts 1998 (England and Wales) Regulations 1998 (the Consultation).

The Consultation seeks views on proposed amendments to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme). The Scheme provides payment provisions and a set of adjudication rules that will be imported into a construction contract that does not comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA).

Some of the proposed amendments are required as a consequence of the Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act).

The Consultation also undertakes wider review process. The proposed further amendments fall into three main areas:

- the costs of adjudication;
- the "Slip Rule";
- payment notices.

The Consultation closes on 18 June 2010, and the next step would be putting the draft statutory instrument before Parliament for approval.

The Consultation could affect all construction contracts in England. Note that whilst the current Scheme applies to both England and Wales, the draft statutory instrument only applies to the carrying out of construction operations in England, so two different sets of requirements may apply in the future. Although some of the proposed amendments are not particularly revolutionary, other parts of the Consultation would impose requirements in the Scheme that go beyond the provisions of HGCRA.

Proposals consequential on the LDEDC Act 2009

Some of the amendments are consequential on the LDEDC Act which received Royal assent on 12 November 2009. Part 8 of the LDEDC Act amends the HGCRA payment and adjudication provisions.

Adjudication costs

The LDEDC Act provides that contract terms relating to adjudication costs will be ineffective. This will outlaw so called *Tolent* clauses that seek to restrict the freedom of a party to go to adjudication by making it contractually responsible for all the costs of the process.

Ask a question

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Related item:

Bridgeway Construction Ltd v Tolent Construction Ltd [2000] TC 14100

There are two exceptions to this:

1. Where the agreement is in writing and allows the adjudicator to allocate his fees and expenses between the parties.
2. Where the agreement is in writing and made after the issue of a notice of intention to seek adjudication.

The current Scheme currently makes the parties jointly and severally liable for the adjudicator's reasonable fees and expenses.

The revised Scheme gives an adjudicator the express power to apportion his fees and expenses between the parties. The consultation seeks views on whether it is appropriate and necessary to include such a provision.

In practice parties often give an adjudicator the power to apportion its fees and expenses between the parties. It would therefore seem sensible to give adjudicators this as an express power.

In practice parties often already give adjudicators the power to apportion their fees and expenses

The "Slip Rule"

The LDED Act introduces a requirement that construction contracts must include a provision giving an adjudicator the power to correct clerical and typographical errors in their decisions. This will allow an adjudicator to correct errors by "accident or omission" either on their own initiative or at the request of a party.

The Slip Rule forms part of the minimum criteria that must be included in contract adjudication procedures, i.e. failure to include the Slip Rule will result in the procedures being ineffective and replaced by the Scheme.

The amended Scheme requires corrections to be made within seven days of the decision being given. As a consequence, unlike the current Scheme which requires immediate compliance, the amended Scheme allows parties eight days before they are required to comply with the decision.

A Slip Rule is a welcome addition that should prevent disputes arising over clerical or typographical errors

The introduction of a Slip Rule such as already exists for court proceedings, is a welcome addition that should prevent disputes arising over clerical or typographical errors.

Supplementary proposals

The supplementary proposals arise from discussions with the Construction Umbrella Body Adjudication Task Group and the Construction Industry Council. They relate to adjudication and aim to remove uncertainty in five key areas:

Referring the dispute to the adjudicator

It has been suggested that reference of a dispute to adjudication "not later than seven days from the date of the notice of adjudication" (the Scheme wording) lacks clarity. The Consultation asks if the seven days should run from the day the adjudicator receives the adjudication notice, the date of the adjudicator's appointment or another date. The amendments to the Scheme set provide that the referring party shall

refer the dispute to the adjudicator not later than 10 days from the date a copy of the notice of adjudication was sent.

In practice we do not believe there is any real confusion over the meaning of the existing wording. The amendments to the Scheme are also inconsistent with the provisions of the HGCRA that require the dispute to be referred within seven days of the notice of adjudication.

Dealing with related disputes

Adjudicators cannot currently deal with related disputes at the same time unless both parties agree. The Consultation has asked whether people are happy with the current position.

There are circumstances when it may be helpful to have the same adjudicator consider related disputes, and sensible parties are likely to agree to this when there is an obvious benefit. It may be the case however that an adjudicator who is right for one dispute is not right for another, for example if the dispute whilst related is outside their usual field of expertise. In those circumstances it does not seem sensible to give the adjudicator the power to decide if they will consider that related dispute.

Confidentiality

The Scheme currently provides that a party must expressly state that it is claiming confidentiality over documents and information that are disclosed during an adjudication. The Consultation asks whether the Scheme should adopt a presumption in favour of confidentiality over the whole process of the adjudication.

There may well be some benefit in adopting a standard approach of confidentiality though an exception would be needed to allow the adjudicator's decision to be used in subsequent adjudication proceedings, if required by the parties.

"Final and conclusive" certificates

An adjudicator cannot currently open up and review decisions or certificates that are final and conclusive. The Consultation considers the implications may be of removing this limitation from the Scheme.

It seems likely that some will welcome this suggestion but others will be less comfortable. Much will rest, as is often the case with adjudication, with whether or not you have the right adjudicator. Parties may be comfortable with a quantity surveyor reviewing a final and conclusive valuation certificate but are likely to be much less comfortable with a lawyer carrying out the same exercise.

Awarding interest

The Consultation asks whether an adjudicator should have the power to award interest "as he considers appropriate". This would make adjudication consistent with other forms of dispute resolution. This would seem sensible, but the power will not be implied. It would only be available to the adjudicator either expressly stated in the contract or if the adjudication was being conducted pursuant to the Scheme.

Consultation: Supplementary questions

- Time for referring dispute
- Multiple and related disputes
- Confidentiality of adjudication
- Final and Conclusive valuation certificates
- Power to award interest

The Consultation asks whether the Scheme should adopt a presumption in favour of confidentiality over the whole process of the adjudication

What should you do?

If you have comments on the proposed amendments to the Scheme or the other matters than DBIS have sought views on then the Consultation will remain open until 18 June 2010 for you to submit your response.

Alternatively please feel free to contact us with your comments and we can include them in our response to the Consultation.

The Bribery Act 2010

Summary and implications

The Bribery Bill completed its passage through Parliament and received Royal Assent on 8 April 2010. It now takes its place on the statute book as the Bribery Act 2010.

In preparation for the new Act coming into force (probably by autumn of this year), we anticipate that all commercial organisations will now need to review their current anti-corruption policies, procedures and training to ensure that they have taken all appropriate steps to prevent others committing bribery on behalf of their organisation.

The effect of the new Act is that:

- there are two new general offences of “active” and “passive” bribery;
- there are further new offences of bribing a foreign public official (an FPO) and (for commercial organisations only) of failing to prevent bribery;
- individuals convicted of any of the new offences will face a penalty of up to 10 years’ imprisonment and corporate entities will be liable to an unlimited fine for failure to prevent bribery.

The new Act sends a clear message that the government takes acts of corruption and bribery seriously.

Active and passive bribery

Active bribery means giving, promising or offering a bribe. Passive bribery is requesting, agreeing to receive or accepting a bribe.

A bribe in this context may occur where a “financial or other advantage” is given or received where this is linked to “improper performance” of a work-related function. This includes giving an advantage in the knowledge that the acceptance of the advantage alone would be an “improper performance” of a work-related function. The scope of these offences is intentionally broad and applies not only to cash inducements, but also to gifts and other advantages.

Bribery of FPOs

This offence applies to bribes given with the intention of influencing the FPO in his official capacity. The person giving the bribe must also intend to obtain or retain business or an advantage in the conduct of business. The definition of FPO includes anyone who holds a legislative, administrative or judicial position of any kind, or exercises a public function for any country, public agency or public enterprise, or is an official or agent of a public international organisation. Notably, the Act does not directly address the concept of facilitation payments which may be accepted practice in other jurisdictions.

Ask a question

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Failing to prevent bribery

A corporate entity can be found guilty of the above offences. In addition, a commercial organisation can be guilty of an offence if a person associated with that organisation bribes another with the intention of obtaining or retaining a business advantage for the organisation. There is a defence if the organisation can show that it had in place “adequate procedures” designed to prevent bribery. A person is associated with an organisation if that person performs services on behalf of the organisation. This is a very broad definition and can include not only other entities within the group and their directors and employees, but also consultants and agents.

There is a defence for the commercial organisation if it can show that it had in place “adequate procedures” designed to prevent bribery

Liability of directors and senior officers

Directors and other managers of a corporate entity may also face criminal liability if they are proved to have consented to or connived at the commission of a bribery offence by their company.

Jurisdiction

The UK courts will have jurisdiction to prosecute an offence under the Act if any part of the offence takes place in the UK or the offence takes place outside of the UK but is committed by a person with a close connection with the UK, which includes UK nationals and companies incorporated in the UK. Any corporate entity, whether or not incorporated in the UK can be guilty of the corporate offence if it does business in the UK, even if the act of bribery itself was committed outside the UK. This means the UK Courts will, in theory, have jurisdiction to prosecute offences of bribery which have been committed outside the UK by non-UK corporate entities.

Preparing for the new Act

The Secretary of State is required to publish guidance on what is meant by “adequate procedures”, and the offence of failure to prevent bribery by commercial organisations will not be brought into force until that guidance is available, which will follow consultation with UK businesses. Jonathan Djanogly MP, speaking on the Bill on 7 April, said that the Conservatives would wish to explore further the creation of a business advisory service to give guidance to business, even if on a non-statutory basis. It is assumed that “adequate procedures” will be determined in a proportionate manner so that the compliance standard applicable to a large multinational will not be the same as for a small company. However, this does mean that all organisations, regardless of size, will need to review their anti-corruption policies and procedures to ensure they are effective and appropriate. Things to consider include policies on giving gifts, corporate hospitality and political contributions.

All organisations, regardless of size, will need to review their anti-corruption policies and procedures

Organisations will need to provide adequate training and ensure that structures are put in place so relevant departments such as Compliance, Audit, HR and Legal enforce the policies.

Contact us

Please contact us if you would like to discuss the implications of the Bribery Act 2010. We can offer training on the new requirements to relevant departments within your organisation.

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