



AMBUSHING PUBLIC WORKS CONTRACTS

Security of payment for sub-contractors has long been recognised as an issue in the construction industry, writes Martin Cooney, Head of Construction and Head of the firm's new Infrastructure Construction and Energy (ICE) Group, at ByrneWallace LLP. Indeed, the UK introduced legislation in 1996 that sought to deal with payment issues. Ireland was somewhat slower in this regard, taking nearly twenty years to introduce similar legislation.

The financial crisis of 2008 brought matters to a head and there was general recognition at that time that sub-contractors were over-exposed in terms of payment. For example, payment terms with some main contractors included long payment periods which had significant impacts for sub-contractors' cash flow. Other contractual terms provided for payment on a 'pay when paid' basis whereby the main contractor would only pay sub-contractors when the main contractor had been paid by the client. Another issue was that most dispute resolution processes were too slow so that, even if a sub-contractor commenced a process to recover disputed sums, they would still have to wait a long time to get a decision. This could ultimately result in the insolvency of a sub-contractor when they were unable to meet their liabilities due to poor cash flow.

THE CONSTRUCTION CONTRACTS ACT

In 2010, Senator Fergal Quinn introduced the Construction Contracts Act to the Seanad as a private members bill. This bill received universal support and became enacted as the Construction Contracts Act 2013 (the "Act"). It introduced statutory rules around payment under construction contracts which includes a mechanism for payment applications and minimum payment periods for sub-contracts.

The Act also introduced a new statutory dispute resolution process known as adjudication. This is intended to be a speedy process that seeks to have payment disputes resolved in 28 days. The logic is that contractors and sub-contractors



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should be afforded a quick process to recover payments and to avoid the time involved with litigation or arbitration. An adjudicator's decision is binding in the interim, which means that it must be complied with unless and until the decision is over-turned in arbitration or court.

Therefore, if an adjudicator decides that a sum of money has to be paid by one of the parties, then this must be paid even if the paying party disputes the decision. New rules have been introduced in the High Court which provide for the enforcement of an adjudicator's decision in a relatively short timeframe. The Government established the Construction Contracts Adjudication service to assist with the implementation of the Act including a facility for the appointment of adjudicators to disputes.

A party may submit a payment dispute to adjudication at any time. This is a statutory entitlement and is in addition to any rights or entitlements under a construction contract. Therefore, even if a construction contract has dispute resolution provisions, a party may bring a payment dispute to adjudication as an alternative to those provisions. The right to refer a dispute to adjudication cannot be ousted by the provisions of the contract.

This is an interesting situation in the context of public works contracts. Public works contracts were introduced as part of the Capital Works Management Framework. The stated aim of the Capital Works Management Framework is

to implement construction procurement reform and to ensure that there is an integrated methodology and consistent approach to the planning, management and delivery of public capital works projects. The objectives are to achieve greater cost certainty, better value for money and more efficient project delivery. The suite of public works contractual documentation has been developed with that in mind. They also include dispute resolution provisions that identify a tiered dispute resolution process with the aim of resolving disputes in the first instance, before progressing to arbitration.

DISPUTE RESOLUTION

There is generally a good understanding in the industry of articulating claims under a public works contract and utilising the dispute resolution process. Conciliation is the preferred method of resolving disputes. This is a process that is conducted on a without prejudice basis whereby an independent third party (a conciliator) seeks to resolve a dispute between the parties. The main objective is to seek a settlement of the dispute, however, if the conciliator cannot bring about a settlement of the dispute, they will make a recommendation as to how the dispute should be resolved. The recommendation becomes binding on the parties if it is not rejected within a period of time. If the parties do not settle the dispute, or they reject the conciliator's recommendation, then the dispute can progress to arbitration.

Supporters of conciliation identify that it can maintain a good relationship between the parties in that they seek to resolve disputes rather than engaging

in costly arbitration proceedings. Furthermore, they argue that it permits the parties to come up with creative solutions. Parties can retain control of the process including making it as flexible as possible in terms of timing and procedure. This assists in creating an atmosphere conducive to cooperation and settlement. There are, however, those who argue that it can take too long, is not appropriate for highly contentious matters and can ultimately end in a position where there is no agreement or resolution. This means that the parties have to go to arbitration in any event and have wasted costs in a conciliation process.

APPOINTING AN ADJUDICATOR

Adjudication is entirely different to conciliation. It is an adversarial process that is structured similar to traditional litigation. The process is commenced by one party giving the



Pictured at the launch of ByrneWallace LLP Infrastructure, Construction and Energy (ICE) Group - (left - right) Feargal Brennan (Managing Partner), Gavin Blake (Head of Energy and Natural Resources), Martin Cooney (Head of Construction and Head of the firm's new Infrastructure Construction and Energy (ICE) Group), Fergal Ruane (Head of Projects and Infrastructure) and Michael Walsh (Head of Property)

other a notice of its intention to refer a dispute to adjudication. At that point, the parties have five days to agree on the nomination of an adjudicator, failing which either party can apply to the Construction Contracts Adjudication service for the appointment of an adjudicator. Once an adjudicator is appointed, the party bringing the claim must submit a document commonly known as a 'Referral' to the adjudicator.

The Referral must be submitted to the adjudicator within seven days of the appointment and it sets out the claiming party's case including the factual and legal basis for the claim. It can be accompanied by contemporaneous records, technical documentation, witness statements and independent expert statements. Once the Referral is served, the adjudicator has 28 days within which to make a decision. This can be extended by 14 days by the party bringing the claim or by a longer period where both of the parties agree. During this process, the responding party will usually only have a period of 7 to 14 days to reply to the Referral in defence of its position. The time-periods run over weekends and public holidays.

The fact that the process is completed in such a short timeframe means that it is extremely pressurised for the parties and the adjudicator. If you are defending a claim, you have a very short time to prepare your case in terms of your factual and legal submissions and evidence. It would not be unusual to have to work late nights and through weekends as a result. This can place significant pressure on public bodies as they are generally not resourced to deal with a dispute in such a manner.

In recent times, we have seen a greater tendency of contractors to threaten adjudication in respect of claims under public works contracts. Their view is that they will receive an enforceable decision far quicker than under the dispute resolution provisions of the contract. They can also then seek to enforce any decision in the High Court through a process that is quicker than enforcement of a conciliator's recommendation. Relationships are less important if the dispute arises towards the end of a project or where the parties are dealing with a final payment application. We have also seen instances where the contractor effectively ambushes the client by commencing adjudication proceedings without prior notice. The logic is that

the client may be more willing to settle a claim than have to defend it in a short period of time in adjudication. The client may simply not be in a position to defend a claim in some instances.

RECORDS MANAGEMENT IS KEY

Public bodies can seek to avoid such ambushes by ensuring that they are maintaining adequate records as a project progresses and building their defence as soon as they receive a claim. They can place obligations on the employer's representative to do the same. This will ensure that, at the very least, the public body will have all relevant documentation to hand when an adjudication commences. As always, records are key but the ability to access and utilise relevant records quickly is extremely important when it comes to an adjudication process. Public bodies may also adopt an approach that they, and the employer's representative, provide more substantive responses to claims so that these can then be leveraged and used as the base document for their defence should a contractor commence an adjudication. Technology can also assist in terms of claims and document management and contemporaneous evidence. For example, we have seen a greater use of drone footage to record progress on site and even the use of thermal imaging to identify congested work zones.

Adjudication is here to stay and it has been given judicial support in a number of recent High Court cases. The Courts have shown that they are willing to enforce an adjudicator's decision, which is a boon for contractors. It will be interesting to see if adjudication displaces conciliation under public works contracts as it is certainly becoming more common. In any event, public bodies need to be aware of the process, how it works and, critically, what steps they can take to protect their position. You cannot prevent an ambush but you can mitigate its impact.

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