October 2015

On 29 May 2015 the Minister of Public Works issued a notice of the Ministry's intention to amend the Construction Industry Development Regulations of 2004 (as amended). The amendment of the regulations is issued in terms of the Construction Industry Board Act of 2000.

The proposed regulations will have far reaching consequences in the construction industry. They will apply to both the public and private sectors and, if enacted into law, it will not be possible to contract out of them.

One major consequence of the proposed regulations is the provision relating to compulsory adjudication in construction contracts. When contracting under any standard form of contract that doesn't make provision for adjudication, the particular conditions will have to be amended to comply with this provision. The regulations do not apply.

The proposed regulations provide for the procedures applicable to adjudication proceedings as well as the definition of an adjudicator. While there is no doubt that the Ministry had good intentions in drafting the provisions, they leave the reader with more questions than answers. Certainty on various issues arising from the regulations will be required before they are enacted into law to avoid interpretive issues in the future.

**Prompt payment**

Prompt payment is dealt with under Part IV B and is applicable to all contracts except home building contracts. The aim of this provision appears to safeguard the interests of contractors by regulating payment procedures, to ensure that contractors are paid as timeously as possible.

- **"Pay when paid" clauses**
  
  Regulation 26B prohibits contracts from containing provisions relating to payment of a contractor, service provider or a supplier, conditional on the payer receiving payment from a third person. The definition of “payer” means any party to a contract who, in terms of the contract, has the obligation to pay another to that contract or a contract relating to that contract. This is permissible only where the payer has been ordered to undergo business rescue by the court or where the payer is insolvent under section 2 of the Insolvency Act of 1936. This Regulation does away with "pay when paid" clauses.
**Mandatory progress payments**
Mandatory progress payments are provided for under Regulation 26C. If a contract fails to provide for regular and reasonable intervals at which progress payments must be made, monthly invoices and tax invoices in relation to works completed or services rendered may be submitted by a contractor or service provider.

The date on which payment becomes due and payable is the date determined in the contract, which may not be later than 30 days after the due date on which the contractor or service provider has submitted an invoice or tax invoice for progress payment. Interest will accrue at a rate determined by the Reserve Bank plus 6%. This will become problematic when dealing with international construction contracts in countries where the prime rate varies.

**Withholding of payment**
Neither party may withhold payment or part of that payment unless effective notice has been given. For a notice to be effective, it must comply with the provisions of Regulation 26E (4)(a)-(d), which provide *inter alia* that the notice must specify the grounds for withholding payment, the amount to be withheld, and the notice must be given within five days from the date of receipt of the invoice or tax invoice. The grounds for withholding payment must be reasonable in terms of the contract.

This gives rise to two issues. It is not clear what constitutes “reasonable grounds” and the five-day period stipulated for the issuing of the effective notice will not be sufficient, especially in larger projects.

If the contractor is not satisfied with the reasons provided in the notice, or where the contractor or service provider is of the opinion that the employer has not complied with the regulations, he must declare a dispute and refer it to adjudication. The portions of the invoice or the works not in dispute must still be paid and cannot be withheld, pending the adjudication of the portions that are in dispute.

Where the adjudicator decides that an amount must be paid, the amount must be paid in 10 days of the decision of the adjudicator.

**Suspension of performance due to non-payment**
Regulation 26F entitles a party to whom payment is due to suspend performance of his obligations under the contract without prejudice to any other right and remedy.

The right to suspend may not be exercised without a notice of intention to suspend being issued at least seven days prior to suspension of the performance. Only once payment in full is effected, will the right to suspend cease. No provision is made for partial payment or an agreement to pay the full amount in instalments.

It is also important to note that the period in which performance is suspended is disregarded in computing any contractual time limit. Therefore, there can be no delay claims against a
contractor for delays arising from a party enforcing its right to suspend payment.

**Mandatory adjudication**

Part IV C of the proposed regulations deals with adjudication and the procedure which must substantially comply with the proposed regulations. It is required, in terms of Regulation 26J, that all contracts must contain adjudication provisions, failing which, the Standard for Adjudication issued in terms of these Regulations will apply.

- **The adjudicator's decision**
  The adjudicator, who is appointed by the accredited adjudicator nominating body, which is not defined, is then required to reach a decision within 28 days from the date of referral notice, or such longer period as agreed between the parties, but no longer than 42 days. In reality, this appears practicably impossible. The time it would take to issue a referral, a response, a reply and, in some cases, a rejoinder would in all likelihood exceed a period of 28 days. For example, in a NEC3 standard form of contract, a decision is required to be handed down four weeks after the end of the period for receiving information and would therefore be non-compliant.

  Regulation 26P(3) provides that if the adjudicator fails to reach a decision within this time period, any party to the dispute is entitled to serve a new notice to refer the matter to adjudication and appoint a new adjudicator.

  Furthermore, if the adjudicator fails to reach or issue a decision within the required time period, he will not be entitled to any fees or expenses.

- **Dissatisfaction with the adjudicator's decision**
  In terms of Regulation 26K(2), any party dissatisfied with the adjudicators decision may refer that dispute to arbitration as contemplated in the Arbitration Act 42 of 1965, or take that decision on review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But section 6 of PAJA implies that the review procedure would not be applicable to private arbitrations.

- **The powers of the adjudicator**
  The powers of the adjudicator as set out in Regulation 26M, are structured to avoid an actual hearing of the matter. The adjudicator has powers that range from requesting written statements and supporting documentation, to site inspections and tests or experiments. If any party fails to comply with any of the requests made by the adjudicator, the adjudicator may, *inter alia*, impose a financial penalty. The manner in which this financial penalty is assessed is not stipulated. Furthermore, it is not clear to whom the penalties must be paid.

The regulations require further amendment to give effect to the practicalities of construction contracts, specifically in relation to the payment and the realties faced by the adjudication process.