

IMPROVING PAYMENT PRACTICES IN THE CONSTRUCTION INDUSTRY – 2ND CONSULTATION

Annex D - Consultation response form

We should be very grateful if you would answer these questions on the proposals in this consultation paper, and on their potential impacts. Please give reasons for your answers where you think it may be helpful. You should also feel free to suggest alternative approaches or make whatever additional comments or suggestions you think are appropriate.

Name.....
Organisation.....
Address.....
E-mail.....

Chapter 1 – Adjudication framework

1. Removing the requirement that the Construction Act should only apply to contracts in writing

- (a) Do you agree that Section 107 the Housing Grants, Construction and Regeneration Act 1996 should be removed so that the application of Part II of the Construction Act is not restricted to contracts where all the terms are in writing? **(Yes / No)**

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- (b) Do you agree with us that the terms of an adjudication Scheme required by section 108 of the Construction Act should only be effective if agreed in writing? **(Yes / No)**

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(c) Do you agree with us that the removal of the requirement that the parties must agree a contract in writing in order for the Construction Act to apply is unlikely to encourage the agreement of more oral or partly oral contracts? **(Yes / No)**

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(d) What proportion of contracts as a whole do you consider contain non-trivial terms which have been subject to oral agreement or variation?

- (i) 0% - 10%
- (ii) 10% - 25%
- (iii) 25% - 50%
- (iv) 50% - 75%
- (v) 75% - 90%
- (vi) 90% - 100%

Please select one from (i) to (vi).

(e) Do you agree with us that an agreement under paragraph 2 or 5(2) of Part I of the Scheme, as to who should act as adjudicator, should only be effective if agreed in writing? **(Yes / No)**

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2. Prohibiting agreements that interim or stage payment decisions will be conclusive

(a) Do you agree that the Construction Act should be amended to prohibit agreements that decisions as to the amounts of payments whether by installment, stage or other periodic payments are conclusive? **(Yes / No)**

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(b) Do you agree that the prohibition of agreements that decisions are conclusive should include:

- (i) Decisions as to the amounts of stage payments (ie for completed stages of work)? **(Yes / No)**
- (ii) Decisions which relate to the work that has been performed under the construction contract to the extent that it affects the amount of the payment? **(Yes / No)**

...but that it should exclude:

- (iii) Decisions as to the amount of final payment? **(Yes / No)**
- (iv) Payment decisions that have already been taken and notified to the parties? **(Yes / No)**

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3. Introduction of a statutory framework for the costs of adjudication

(a) Do you agree with our proposal to prohibit agreements as to the allocation of the costs of the adjudication until after the adjudicator is appointed? **(Yes / No)**

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(b) Do you agree with our proposal to provide that the adjudicator should have no jurisdiction as to the costs of the adjudication unless the parties have made an agreement to that effect after the adjudicator is appointed? **(Yes / No)**

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(c) Do you agree that adjudicators should be statutorily entitled to claim a reasonable amount in respect of fees for work reasonably undertaken and expenses reasonably incurred? **(Yes / No)**

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(d) Do you agree that the courts should have jurisdiction to decide whether:

(i) The fees and expenses claimed by the adjudicator are reasonable when they are claimed under the proposed statutory right? **(Yes / No)**

(ii) The legal or other costs of the parties are reasonable when the parties have agreed that the adjudicator should make a decision as to legal or other costs and that the parties should be jointly and severally liable for his amount? **(Yes / No)**

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(e) What proportion of adjudications do you think contain an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

- (i) Less than 0.1%
- (ii) 0.1% - 0.5%
- (iii) 0.5% – 1%
- (iv) 1% – 5%
- (v) 5% – 10%
- (vi) More than 10%

Please select one from (i) to (vi).

(f) What proportion of adjudications do you think are conducted under contracts containing an agreement that the referring party (or specified party) should pay all or part of the costs of the adjudication?

- (i) Less than 0.1%
- (ii) 0.1% - 0.5%
- (iii) 0.5% – 1%
- (iv) 1% – 5%
- (v) 5% – 10%
- (vi) More than 10%

Please select one from (i) to (vi).

Chapter 2 - Payment framework

1. Prevention of unnecessary duplication of payment notices

- (a) Do you agree that the Construction Act should be amended so that a certificate from a third party supervising officer under a construction contract, which makes a valuation of the work done, may function as a section 110(2) payment notice? **(Yes / No)**

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- (b) Do you agree that the Construction Act should allow the contract to provide that a section 110(2) payment notice may be issued either:

- (i) By the payer? **(Yes / No)**
- (ii) By a person identified in the contract? **(Yes / No)**
- (iii) By a person identified in a notice to the payee? **(Yes / No)**

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- (c) Do you agree that the Scheme should provide that a payment notice under Part II paragraph 9 may be issued either:

- (i) By the payer? **(Yes / No)**
- (ii) By a person identified in the contract? **(Yes / No)**

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2. Clarification of the requirement that a section 110(2) payment notice should be served

(a) Do you agree that the drafting of the provision in section 110(2) of the Construction Act on when it is necessary to issue a section 110(2) payment notice should be improved to make clear that:

- (i)** a payment notice should be issued whenever the payment has been set-off, whether under another contract or the contract in question? **(Yes / No)**
- (ii)** allowance need only be made for abatement of the sum due under the contract in question and not another contract? **(Yes / No)**

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(b) Responses to *Improving payment practices in the construction industry* in 2005 suggested that a section 110(2) payment notice is only issued for 40% of payments. What proportion of cases where the notice is not issued do you think can be explained by the current deficiencies in the requirement in section 110(2) of the Act?

- (i)** Less than 10% of cases where the notice is not issued (less than 6% of payments as a whole)?
- (ii)** Between 10% and 33% of cases where the notice is not issued (between 6% and 20% of payments as a whole)
- (iii)** Between 33% and 66% of cases where the notice is not issued (between 20% and 40% of payments as a whole)
- (iv)** Between 66% and 90% of cases where the notice is not issued (between 20% and 54% of payments as a whole)
- (v)** More than 90% of cases where the notice is not issued (more than 54% of payments as a whole)?

Please select one of (i) to (v)

3. Clarity of the content of payment and withholding notices

(a) Do you agree that section 110(2) of the Construction Act should be amended to require that, in addition to the amount of the payment made or proposed to be made, and the basis of calculation, payment notices should also state:

(i) the amount(s) withheld, where the payment is less than the amount that would have been due had the payee performed all his obligations under the contract and there were no set-off or abatement? **(Yes / No)**

(ii) the grounds for withholding where amounts have been withheld? **(Yes / No)**

(iii) the basis of calculation of any amounts withheld? **(Yes / No)**

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(b) If we introduce a requirement that payment notices should be in the format described above, do you agree that section 111 should be amended to require that withholding notices should be in the same format? **(Yes / No)**

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(c) Responses to *Improving payment practices in the construction industry* in 2005 suggested that a section 110(2) payment notice is only issued for 40% of payments. In what proportion of cases where the notice is issued do you believe it is later supplemented by a separate section 111 withholding notice because the payer is unclear about how the section 110(2) notice should act as a section 111 withholding notice?

- (i) Less than 10% of cases where the notice is issued (less than 4% of payments as a whole)?
- (ii) Between 10% and 30% of cases where the notice is issued (between 4% and 12% of payments as a whole)
- (iii) Between 30% and 70% of cases where the notice is issued (between 12% and 28% of payments as a whole)
- (iv) Between 70% and 90% of cases where the notice is issued (between 28% and 36% of payments as a whole)
- (v) More than 90% of cases where the notice is issued (more than 36% of payments as a whole)?

Please select one of (i) to (v)

4. Clarity of the “sum due”

(a) Do you agree that the Construction Act should be amended to ensure that the payer and the payee both know the sum due for the purposes of:

- (i) section 111 - so that deductions (whether by set-off or abatement) can only be made from that sum by issuing a withholding notice? **(Yes / No)**
- (ii) section 112 - so that they both know the amount that must be paid if the payer is to avoid the possibility that the payee will suspend performance? **(Yes/No)**

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(b) Do you agree that this should be achieved by providing that:

- (i) the sum due under a construction contract should be the amount paid or proposed to be paid as specified in a section 110(2) payment notice. **(Yes/No)**
- (ii) the amount in a claim by the payee should become due if no payment notice is issued. **(Yes/No)**

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(c) For the purposes of this consultation, we have assumed that on average across the industry, one in 30 payments that are (or should have been) notified under Section 110(2) are later abated. Do you consider that this proportion:

- (i) Is about right.
- (ii) Should be less than half of this (ie less than one in 60 payments)
- (iii) Should be more than twice this (ie more than one in 15 payments)

Please choose one of (i) to (iii).

(d) Do you agree that the overall cost to the payee of securing payment under the payment framework in the Construction Act can best be measured as a percentage of each payment made under the contract? (Yes / No)

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(e) Notwithstanding your answer to question (d) what percentage of the amount of each payment finally due under a construction contract do you consider is lost on account of the cost and delay involved in obtaining proper payment?

- (i) Less than 1% of each payment
- (ii) Between 1% and 2.5% of each payment
- (iii) Between 5% and 10% of each payment
- (iv) Between 10% and 15% of each payment
- (v) Between 15% and 25% of each payment
- (vi) More than 25% of each payment

Please select one answer from (i) to (vi)

(f) If changes to the payment framework were introduced as proposed in this chapter, what percentage of the amount of each payment finally due under a construction contract do you consider would be lost on account of the cost and delay involved in obtaining proper payment?

- (i) Less than 1% of each payment
- (ii) Between 1% and 2.5% of each payment
- (iii) Between 5% and 10% of each payment
- (iv) Between 10% and 15% of each payment
- (v) Between 15% and 25% of each payment
- (vi) More than 25% of each payment

Please select one answer from (i) to (vi).

(g) If, as proposed, the sum due under a construction contract were to be viewed in law as the amount paid or proposed to be paid as specified in a Section 110(2) payment notice, (with the amount in a claim for payment becoming due if no notice were issued), what effect do you think this would have on the cost of resolving payment disputes at adjudication?

- (i) The cost would not be subject to a significant reduction (i.e. less than 5%)?
- (ii) The cost would be reduced by 5% to 15%?
- (iii) The cost would be reduced by 15% to 35%?
- (iv) The cost would be reduced by 35% to 65%?
- (v) The cost would be reduced by more than 65%?
- (vi) The cost would be increased?

Please select one answer from (i) to (vi).

(h) Do you agree that the overall cost to the payee of securing payment can best be anticipated based upon recent experience of securing payments under:

- (i) interim payment certificates following the introduction of the Construction Act; and **(Yes/No)**

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- (ii) the JCT "With Contractors Design" form of construction contract. **(Yes/No)**

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5. Prohibiting the use of pay-when-certified clauses

(a) Do you agree that the Construction Act should be amended to make clear that pay when certified clauses are not an adequate mechanism for determining when payment becomes due? **(Yes/No)**

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(b) Do you agree with our understanding that:

(i) Pay-when-certified clauses are only used in Civil Engineering subcontracts? **(Yes/No)**

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(ii) Installment, stage and other period payment decisions are not conclusive in any of the standard contract forms? **(Yes/No)**

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Chapter 3 – Improving the right to suspend performance

(a) Do you agree that section 112 of the Construction Act should be amended to include a provision allowing the suspending party to claim a reasonable amount in respect of his costs caused by the exercise of the right to suspend from the party in default of payment (this would include the reasonable costs of remobilisation if this is required)? **(Yes/No)**

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(b) Do you agree that section 112 of the Construction Act should be amended to include a provision allowing the suspending party to claim an extension of time for meeting any deadlines in his contract with the party in default of payment for any delay to the completion of work caused by the exercise of the right to suspend? **(Yes/No)**

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(c) Do you agree that Section 112 of the Construction Act should be amended to clarify that the suspending party may suspend any or all of his contractual obligations to the party in default of payment? **(Yes/No)**

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(d) What would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 15% of an average monthly interim payment.
- (iii) 15% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.
- (v) 100% to 200% of an average monthly interim payment.
- (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi).

(e) What would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 25% of an average monthly interim payment.
- (iii) 25% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.

Please select one of (i) to (iv)

(f) What would you estimate to be the reasonable costs of remobilising performance on a typical construction project?

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 25% of an average monthly interim payment.
- (iii) 25% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.
- (v) 100% to 200% of an average monthly interim payment.
- (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi).

Do you consider that your answers to questions (d, (e) and (f) would be changed if the suspending party was not required to be ready to remobilise immediately, as at present, when the defaulted payment is eventually made, but was allowed an additional extension of time for any delay caused by the exercise of the right of suspension.

(g) Please select which of (i) to (vi) in question (d) you think would apply following the DTI's proposed amendment.

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 25% of an average monthly interim payment.
- (iii) 25% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.
- (v) 100% to 200% of an average monthly interim payment.
- (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi).

(h) Please select which of (i) to (iv) in question (e) you think would apply following the DTI's proposed amendment.

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 25% of an average monthly interim payment.
- (iii) 25% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.
- (v) 100% to 200% of an average monthly interim payment.
- (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi).

(i) Please select which of (i) to (vi) in question (f) you think would apply following the DTI's proposed amendment.

- (i) Less than 5% of an average monthly interim payment.
- (ii) 5% to 25% of an average monthly interim payment.
- (iii) 25% to 50% of an average monthly interim payment.
- (iv) 50% to 100% of an average monthly interim payment.
- (v) 100% to 200% of an average monthly interim payment.
- (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi).

As well as covering the regulatory impact of the proposals described in this chapter on the costs of suspension, the following questions also cover the impacts of the proposal in Chapter 2 on the transparency of the sum due and its effect on right to suspend.

In reading questions (j) to (i) consultees should bear in mind the finding of *improving payment practices in the construction industry* that the right to suspend performance is exercised in fewer than one in a 100 cases of defaulted payment at present.

(j) Following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and,
- our proposals to improve the transparency of the sum due...

...how frequently do you believe the right to suspend performance would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (ie no significant change)

Please select one of (i) to (iv) above.

(k) Following the introduction of only our proposal to reduce the costs of suspending performance in cases of non-payment how frequently do you believe the right to suspend performance would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (ie no significant change)

Please select one of (i) to (iv) above.

(l) Following the introduction of only our proposal to improve the transparency of the sum due in respect of the right to suspend performance, how frequently do you believe the right would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (ie no significant change)

Please select one of (i) to (iv) above.

(m) What do you consider is the incidence of non-payment of a sum due in the construction industry?

- (i) Fewer than 10% of payments
- (ii) 10% to 30% of payments
- (iii) 30% to 50% of payments
- (iv) 50% to 70% of payments
- (v) 70% to 90% of payments
- (vi) More than 90% of payments

Please select one of (i) to (vi).

(n) What do you consider would be the incidence of non-payment following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and
- our proposals to improve the transparency of the sum due?

- (i) Fewer than 10% of payments
- (ii) 10% to 30% of payments
- (iii) 30% to 50% of payments
- (iv) 50% to 70% of payments
- (v) 70% to 90% of payments
- (vi) More than 90% of payments

Please select one of (i) to (vi).

(o) What do you consider would be the incidence of non-payment following the introduction of only our proposals to reduce the costs of suspending performance?

- (i) Fewer than 10% of payments
- (ii) 10% to 30% of payments
- (iii) 30% to 50% of payments
- (iv) 50% to 70% of payments
- (v) 70% to 90% of payments
- (vi) More than 90% of payments

Please select one of (i) to (vi).

(p) What do you consider would be the incidence of non-payment following the introduction of only our proposals to improve the transparency of the sum due in respect of the right to suspend performance?

- (i) Fewer than 10% of payments
- (ii) 10% to 30% of payments
- (iii) 30% to 50% of payments
- (iv) 50% to 70% of payments
- (v) 70% to 90% of payments
- (vi) More than 90% of payments

Please select one of (i) to (vi).

Chapter 4 - Other Issues which we are considering as part of this consultation

1. Devolution

(a) Do you agree that the DTI and Welsh Assembly Government should continue to work together to minimise the differences between the effect of the provisions of the Schemes in England and Wales given that responsibility for the Scheme has been devolved to the Welsh Assembly? **(Yes/No)**

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(b) Do you agree that, so far as is possible give the differences between Scots law and English law, the DTI and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Construction Act in England and Scotland given that responsibility for the Act has been devolved to the Scottish Parliament? **(Yes/No)**

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(c) Do you agree that, so far as is possible give the differences between Scots law and English law, the DTI and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Schemes in England and Scotland? **(Yes/No)**

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2. Correction of errors

(a) Do you consider that the DTI and Welsh Assembly Government should work with the Scottish Executive to develop a “slip rule” with the intention, so far as is possible, of introducing the same rule in England, Scotland and Wales to ensure it is applied in a uniform way by the courts in England and Wales and in Scotland? **(Yes/No)**

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(b) Do you agree with the suggestion in the Scottish Executive’s report of its consultation on *Improving adjudication in the construction industry* that a slip rule should provide the adjudicator with:

(i) Power to correct a clerical or arithmetic error or any other matter that the parties may agree... **(Yes/No)**

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(ii) for one week after the adjudicator’s decision or such longer period as the parties may agree? **(Yes/No)**

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3. The Judgement of the House of Lords in Melville Dundas -v- George Wimpey

(a) Do you agree that section 111 should not apply where the payee is insolvent, so that payment may be withheld without notice? **(Yes/No)**

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(b) Do you agree that sections 110 and 111 should apply in all other cases (ie to final payments as well as to “payments by instalments, stage or other periodic payments” which become due in accordance with section 109 of the Construction Act)? **(Yes/No)**

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(c) Do you consider that the judgement of the House of Lords in Melville Dundas –v- George Wimpey will have the effect which we have proposed the Construction Act should have in our view, when it is applied by the lower courts, so that:

(i) Section 111 will not apply where the payee is insolvent, so that payment may be withheld without notice? **(Yes/No)**

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(ii) Section 111 will apply to all other grounds for withholding in respect of all payments (ie final payments as well as “payments by instalments, stage or other periodic payments” in accordance with section 109 of the Construction Act)? **(Yes/No)**

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(d) Do you consider that:

- (i)** the Act should expressly provide an exception to section 111 in cases where the payee is insolvent (section 113 already provides an example of an exception or insolvency), or leave this exception to be decided by the courts through case law following the House of Lords' judgement? **(Yes/No)**

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- (ii)** the Act should be amended to make clear that section 111 should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as "payments by instalments, stage or other periodic payments" which become due in accordance with section 109 of the Construction Act)? **(Yes/No)**

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