

**Report of the Chairperson of the Ministerial Panel of Adjudicators,
Dr. Nael Bunni, on the 1st Anniversary of Commencement of the
Construction Contracts Act, 2013**

1. Introduction:

The Construction Contracts Act, 2013 came into force for certain construction contracts entered into after the 25th July 2016 in accordance with the 'Construction Contracts Act, 2013 (Appointed Day) Order 2016' (Statutory Instrument No. 165 of 2016).

Section 8(1) of the Act, provides that the Minister shall select persons to be members of a panel of adjudicators and shall select one of those persons to chair the Panel.

The role of the Chairperson of the Construction Contracts Adjudication Panel includes a provision whereby s/he is required to report annually to the Minister of State with responsibility at the Department of Jobs, Enterprise and Innovation as to the efficacy of the legislation in terms of meeting its objective and also in respect of the operation of the statutory adjudication service now available to disputants in circumstances where agreement between the parties as to the selection and appointment of an adjudicator cannot be achieved.

The following represents my first such report.

2. Background to, Enactment and Commencement of the Construction Contracts Act, 2013

The enactment and commencement of this legislation was particularly important for subcontractors in the construction industry who have been considered vulnerable in the payment cycle. The economic downturn after the events in 2008 exacerbated their cash flow difficulties as illustrated by the following extract from the Regulatory Impact Analysis conducted in respect of the Construction Contracts Bill, 2010.

"the economic downturn in the construction sector has highlighted the lack of formal contract arrangements and bad payment practices in the sector. While there is strong anecdotal evidence of the practice of delayed or non-payment having escalated in recent times, it should be noted that the problem is not new. It is reported that many firms, mainly SMEs, are experiencing serious difficulty in obtaining payment for work done. It is therefore important that where possible, payment transactions within this sector should be facilitated to ensure prompt payment of the correct amount."

Source: Regulatory Impact Analysis – Construction Contracts Bill, 2010 –
Department of Public Expenditure and Reform, September 2011.

Senator Fergal Quinn introduced the Construction Contracts Bill, 2010 in the Seanad on the 19 May 2010 and during the second stage debate on the Bill advised that:

"The main purpose of this Bill is to provide for a mechanism whereby prior notice of an intention to withhold sums from payments otherwise due to contractors must be given. Otherwise, payments must be made in full and-or the payee may suspend the provision of works and-or services under the construction contract until payment is made in full.

The Bill will improve payment practices in the construction industry by providing clarity and transparency in the payment of moneys due in construction contracts. This will improve crucial cash-flow to those subcontractors working in the industry, thus helping companies involved in the construction sector to survive and keep people in employment. It also aims to reform dispute procedures in the construction industry to make them less costly and less time-consuming, and to relieve some pressure on the courts system."

The 2011 Programme for Government contained a commitment to "introduce new legislation to protect all small building subcontractors that have been denied payments from bigger companies." The then Government supported the passage of the Construction Contracts Bill through to its enactment in 2013 to fulfil that commitment. The commencement of the Act was dependent however on the implementation of a number of factors set out in the legislation. These factors included the appointment of a Panel of Adjudicators; a Chairperson to that Panel; and the publication of a Code of Practice for the conduct of adjudications under section 9 of the Act, which would be binding on all adjudicators operating under the Act.

In October 2014, the Government approved the transfer of responsibility for implementation of the Act to the Department of Jobs, Enterprise and Innovation from the Department of Public Expenditure and Reform. The then Minister of State for Business and Employment Mr. Gerald Nash appointed the undersigned as Chairperson of the Construction Contracts Adjudication Panel for a three year term in July 2015. Following a competition run by the Public Appointments Service, 30 Adjudicators (i.e. all qualifying candidates) were appointed by Minister Nash to the Panel for a five year term commencing on the 8 December 2015.

Minister Nash signed the 'Construction Contracts Act, 2013 (Appointed Day) Order 2016' (Statutory Instrument No. 165 of 2016) on the 13 April 2016 to commence the Act in respect of construction contracts entered into after the 25th July 2016. A national information campaign was undertaken by the Department to highlight the new legal rights and responsibilities provided for in the Act and the entitlement and availability of this new statutory adjudication process to resolve payment disputes.

Responsibility for the Act is now delegated to the Minister for Employment and Small Business, Mr. Pat Breen T.D., in accordance with the 'Jobs, Enterprise and Innovation (Delegation of Ministerial Functions) Order 2017' (Statutory Instrument No. 6 of 2017). Minister Breen published a 'Code of Practice Governing the Conduct of Adjudications' dated 25th July 2016 pursuant to section 9 of the Act. The Code of Practice is binding on all adjudicators operating under the Act in accordance with section 6(8).

3. Summary of the main provisions of the Construction Contracts Act, 2013

The purpose of the Construction Contracts Act, 2013 is to regulate payments - particularly the timing of payments - under a construction contract covered by the legislation. It applies to both written and oral contracts. Certain contracts are exempted under the legislation. These are: a contract of less than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling of less than 200 square metres where one of the parties occupies or intends to occupy it.

The Act provides, for the first time in Ireland, a new right for a party to a construction contract, as defined under section 1 of the Act, to refer a payment dispute for adjudication as a means of resolving the dispute.

The Act ensures payment is enforced by means of two elements;

- (1) new statutory arrangements for payments under construction contracts. Main contractors are at liberty to agree their own payment terms with their clients, however main contractor/subcontractor (and subcontractor/sub-subcontractor) contracts are governed by the Schedule to the Act which requires payment every 30 days after the relevant payment claim date (unless such contracts contain more favourable terms); and;
- (2) a new mechanism for the swift resolution of payment disputes through adjudication thereby allowing projects to be completed, without the time and cost of litigation. Adjudication represents a significant option for a party denied payment for work completed as the Act envisages that adjudications will be completed usually within 28 days of the referral of the dispute to an Adjudicator.

The parties to a new construction contract entered into after the 25 July 2016 must ensure that the contract conforms to the terms of the legislation with no option to opt out. If a payment dispute arises under such a contract, either party has the right to refer the dispute for adjudication and if the parties cannot agree on the appointment of an Adjudicator, an Adjudicator will be appointed from the Ministerial appointed Panel of Adjudicators following an application made by a party to the Chairperson of the Panel.

4. Construction Contracts Adjudication Service (CCAS)

The Construction Contracts Adjudication Service (CCAS) was established within the Department of Jobs, Enterprise and Innovation to undertake the necessary administrative arrangements to implement the legislation. It also provides support to the Chairperson of the Panel of Adjudicators who has responsibility under the Act for appointing Adjudicators from that Panel to payment disputes on the request of a party to such a dispute. In accordance with the Code of Practice referred to above, the Chairperson is required to assign an Adjudicator from the Panel, usually within seven days of the receipt of a written application specifying the details of the dispute.

An information booklet on the Act together with forms and other guidance material to assist parties in complying with the Act are available on the Department's website, www.djei.ie.

5. Enforcement of Adjudicator Decisions

The Rules of the Superior Courts were broadened to incorporate a provision for enforcement by the High Court of Adjudicator decisions - 'Rules of the Superior Courts (Construction Contracts Act, 2013) 2016' (Statutory Instrument No. 450 of 2016).

6. Applications for appointment of an adjudicator received by CCAS and Activity

To date only one application has been received by the CCAS requesting the appointment of an adjudicator by the Chairperson of the Panel. However this was not a valid application as it referred solely to contractual commitments entered into before the 25th of July 2016 and as a consequence the case was closed without appointment of an adjudicator.

Paragraphs 12, 30 and 39 of the 'Code of Practice Governing the Conduct of Adjudications' request that adjudicators provide information to the Construction Contracts Adjudication Service within 21 days of the completion of each adjudication for the purpose of compiling anonymised statistical data on the Act. The CCAS received one such notification in March 2017. The Adjudicator, whose appointment was agreed between the parties, delivered his decision on the case within the 28 days timeframe envisaged in the Act and in this case the referring party, a main contractor, received a favorable decision.

7. Consultative Forum

It was envisaged from the outset that stakeholder organisations will be invited to meet with the Minister of State at the Department; the Chairperson of the Panel; and officials of the CCAS, from time to time, in order to ascertain the efficacy of the legislation and to identify any challenges in terms of administrative arrangements. The Chairperson in this regard will represent the members of the Ministerial Panel of Adjudicators at such forum. As stakeholder feedback indicates that the level of usage of the adjudication process in terms of resolution of payment disputes is very low, it has not been considered necessary or appropriate to convene such a meeting at this early stage, due to the fact that their principle function is to report on the experience of key stakeholders in the sector.

8. Commentary

The Department of Jobs, Enterprise and Innovation engaged in considerable interaction with stakeholder organisations in anticipation of and post commencement of the legislation and having particular regard to the need to develop an appropriate Code of Practice governing the conduct of all adjudicators operating under the Act. As all stakeholders consulted recorded approval for the legislative provisions including the need to avoid future circumstance whereby subcontractors in particular would continue to be vulnerable in the payment cycle, a collaborative and supportive approach was in evidence. Stakeholder organisations also supported information dissemination measures through publishing articles in profession/trade journals in advance of and post commencement of the Act.

The legislation does not however carry a mandatory reporting provision in respect of adjudications carried out and therefore it is not possible to accurately assess the instance of relevant payment disputes and of adjudications undertaken under the Act.

In the present circumstances of a burgeoning construction sector, it is perhaps not surprising that payment disputes are at present at a low level. There is also anecdotal evidence to support the reluctance on the part of subcontractors to engage in a potentially adversarial dispute resolution process that effectively 'bites the hand that feeds them.' Furthermore, historically within the sector, research points to a strong preference for consensual dispute resolution methodologies (Cunningham, T. 2017, The Construction Contracts Act 2013 – An Overview. Dublin Institute of Technology). This 2017 study, drawing on research contributions from a number of sources, refers to 'everyone knowing everyone else' within our comparatively small construction sector, encouraging a 'business as usual' attitude in which change may be difficult to achieve. It refers to the Act as a 'step in the right direction'

while cautioning 'it is one thing to change the law; changing the culture is another thing entirely.'

In any case and notwithstanding the support of the Stakeholder organisations, and their positive views regarding the need for the introduction of a statutory adjudication service as a new dispute resolution methodology within the sector, there has been minimal activity in this regard. Certain factors have likely influenced this unexpected turn of events, as follows:

1. Notwithstanding the publicity campaign engaged in by the Department including information on its website, there seems to be lack of knowledge and awareness of the legislation and how it operates amongst the subcontractors for whom it is mainly aimed. Whilst the rest of the construction community employs professional technical staff that would be aware of the working of the legislation, the same is not true in the whole of the subcontracting sector, that is with the exception of the large Mechanical/Electrical Subcontractors.
2. There are indications that there is still some tolerance towards the long established payment procedures among subcontractors.
3. The success of conciliation as a method of dispute resolution (where the parties have complete control of the process and the outcome and where it remains to be the method stipulated in the standard forms of contract used in Ireland), leads to discourage any change to that culture.
4. There is a fear of the possibility of escalating cost if a hearing is required or ordered, pursuant to the provisions of the Irish constitution which might extend the duration of an adjudication case.
5. In the past two to three years, there has been a move in Ireland to follow the international experience towards methods of dispute avoidance. This trend has also found its way into the latest version of the Conditions of Contract for public works.

Despite this slow start for the usage of the Act, the real value of this legislation, having regard to the protections afforded therein to subcontractors, will likely become more apparent in the event of a future slowing down of activity in the sector, where payment vulnerability may once again feature as an area of concern to sub-contractors. They may in turn, increasingly seek to rely upon it to vindicate their rights to payment under applicable contracts and in the event of non-compliance on the part of main contractors, to access adjudication as a speedy dispute resolution mechanism.

It is envisaged that the need or otherwise for future change to primary legislation and indeed the Code of Practice governing the conduct of adjudications will be ascertained primarily through the responses by the courts in the event of any challenges to the provisions of the 2013 Act.

At the end of this first year in existence where no issues of particular concern have arisen and where no cases have been advanced through the courts, it is considered that the legislative and Code of Practice provisions remain fit for purpose.

This concludes my report.



Dr. Nael G. Bunni,
Chairperson of the Ministerial Panel of Adjudicators
