

EXECUTIVE NOTE

THE CONSTRUCTION CONTRACTS (SCOTLAND) EXCLUSION ORDER 2011

SSI 2011/370

Introduction

The Construction Contracts (Scotland) Exclusion Order 2011 was made in exercise of the powers conferred on Scottish Ministers by sections 106A(3) and 146 of the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009, and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Purpose of the Instrument

The purpose of this instrument is to exclude sub-contracts entered into by project companies in Private Finance Initiative (PFI) projects from the application of section 110(1A) of the Housing Grants, Construction and Regeneration Act 1996 (the “1996 Act”), as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009.

Legislative Context

Part 2 of the 1996 Act makes provision in relation to the terms of construction contracts. Section 106A of the Act confers powers on the Scottish Ministers to exclude descriptions of contracts from the operation of any or all of Part 2. Section 110(1A) is contained within Part 2 of the 1996 Act.

Policy Objectives

Under section 110(1A) of the 1996 Act, clauses in construction contracts which make payment conditional on the performance of obligations under another contract, or certification (for example, “pay when certified” clauses where payment is conditional on an architect or surveyor certifying under its appointment that the obligations under a construction contract have been performed), will be ineffective. Such clauses seek to frustrate the payee’s entitlement to staged payments and impede the ability of parties in the supply chain to manage cash flow.

However, such clauses are a key feature of sub-contracts entered into by project companies in PFI projects (known as “first tier PFI sub-contracts”). For example, the contract between the project company and main building contractor will typically make provision for staged payments. However, the lender will not permit payments to be made unless and until it is satisfied that the building contractor has built to the contractual requirements for that stage. The lender/project company will employ the services of a technical adviser to certify that the building contractor has completed a stage of the construction and is entitled to payment for that stage and in that respect payment under the construction contract is conditional on the performance of obligations under the technical adviser’s contract.

In order to maintain the payment structure and risk allocation in PFI-type arrangements, this instrument excludes first tier PFI sub-contracts from the application of section 110(1A) of the

1996 Act. The principal contract in a PFI is already excluded from the operation of the entirety of Part 2 of the 1996 Act by the Construction Contracts (Scotland) Exclusion Order 1998.

Territorial Extent and Application

This instrument applies to Scotland only. Similar instruments have been laid in England and Wales.

Consultation

We have worked closely with officials in the UK and Welsh Governments, which are making equivalent Exclusion Orders in England and Wales respectively, with a view to ensuring that construction contracts legislation remains consistent.

We consulted on the proposed Exclusion Order and an initial Business and Regulatory Impact Assessment from February to April 2011. The consultation document was published on the Scottish Government's website and publicised via Scottish Procurement Policy Note 1/2011 and the Public Contracts Scotland portal. We also consulted direct with organisations represented on the industry-led Scottish Construction Forum.

We received a total of eighteen responses to the consultation and have taken full account of these in finalising this instrument. Where respondents gave permission for their responses to be made public, these were published on the Scottish Government's website on 13 May 2011: <http://www.scotland.gov.uk/Publications/2011/05/05104752/0>. An analysis of the responses will be published on the Scottish Government's website shortly.

We will issue a further Scottish Procurement Policy Note to stakeholders to alert them to the new Exclusion Order and other changes to the construction contracts legislation and to provide guidance on the practical implications. The Note will also be published on the Scottish Government's website and the Public Contracts Scotland portal.

Impact assessment

The new Exclusion Order will have no impact on people from any of the equality groups. As a result, an equality impact assessment has not been completed.

Financial effects

A final Business and Regulatory Impact Assessment has been completed and is attached. In our view, the new Exclusion Order will not lead to any additional costs to businesses because it maintains the existing payment structure and risk allocation in PFI-type arrangements.

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