

## EXPLANATORY MEMORANDUM TO

### THE SCHEME FOR CONSTRUCTION CONTRACTS (ENGLAND AND WALES) REGULATIONS 1998 (AMENDMENT) (ENGLAND) REGULATIONS 2011

2011 No. 2333

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

This instrument amends the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”). Related primary legislation, Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”), makes provision for the contents of construction contracts and the Scheme applies where the parties have failed to provide for these contents – in effect, by supplying the missing contractual terms.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None

4. **Legislative Context**

4.1 Part 2 of the 1996 Act was amended by Part 8 of the Local Democracy, Economic Development and Construction Act (“the 2009 Act”). Part 8 of the 2009 Act will be commenced on 1 October 2011. This instrument amends the Scheme and most of these amendments are consequential - reflecting the changes made to Part 2 of the 1996 Act by Part 8 of the 2009 Act. This instrument will come into effect at the same time as Part 8 is commenced.

4.2 A related instrument – which will be laid at the same time – is the Construction Contracts (England) Exclusion Order 2011.

4.3 During the Report stage of the Local Democracy, Economic Development and Construction Bill, the then Minister for Regional Development and Co-ordination, informed Parliament that there would be a review of the associated secondary legislation in the light of responses to a consultation that would be held early 2010

“.... .. the secondary legislation will be reviewed in the light of the responses to the consultation. We hope to consult early in the new year.....” (**Hansard, Official Report 13 October 2009 Col 185**)

This instrument is a consequence of that consultation.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England.

5.2 Separate, similar, instruments are being made by the Devolved Administrations in Scotland and in Wales.

## **6. European Convention on Human Rights**

The Minister of State for Business and Enterprise has made the following statement regarding Human Rights:

*“In my view the provisions of the named Statutory Instrument are compatible with the Convention rights.”*

## **7. Policy background**

- *What is being done and why*

7.1 The 1996 Act has had an important role to play in improving payment practices in the construction industry. It sets a statutory baseline for acceptable contractual provisions with two main aims:

- to ensure effective cash flow; and
- to facilitate the swift resolution of disputes by way of “adjudication”.

7.2 The 1996 Act has, by and large, been effective in meeting its original objectives. However, a number of weaknesses and associated regulatory burdens were identified by an industry review process.

7.3 Following two consultations in 2005 and 2007, the UK Government developed a package of measures which fix these failings. These were included at Part 8 of the 2009 Act.

7.4 The provisions at Part 8:

- improve access to adjudication and reduce the costs of the process; and
- improve the exchange of information relating to payment to enable parties to construction contracts to better manage cash flow, introducing greater clarity and transparency and removing administrative burdens.

7.5 Where the parties to a construction contract fail to comply with the 1996 Act, the Scheme provides the missing or deficient contractual terms. These Regulations amend the Scheme for Construction Contracts (England and Wales) Regulations 1998 - primarily to ensure that the Scheme will be consistent with 1996 Act following the commencement of the amendments made by Part 8 of the 2009 Act. In addition, the Government has taken the opportunity to make a number of minor, discrete changes to the Scheme.

7.6 While there is agreement across the construction industry as regards what the 2009 Act and this instrument is doing as regards adjudication, the industry has been unable to reach a consensus on payment issues. Many main contractors feel that the Government's payment proposals are unnecessary whilst, broadly speaking, sub-contractors consider that they do not go far enough. Our proposals therefore sit in the middle ground between opposing views. In 2008, the then BERR Select Committee considered our proposals and in its report "Construction Matters" and concluded that:

*".... the Government has developed proposals which it believes will address many of the industry's concerns, particularly those of sub-contractors. They appear to strike a sensible balance between the interests of the main contractors and the sub-contractors."*

- *Consolidation*

7.7 This is the first occasion that the Scheme is being amended and it is not currently intended to consolidate the relevant secondary legislation.

## **8. Consultation outcome**

8.1 A consultation was carried out in March 2010 seeking views as to what amendments should be made to the Scheme following the changes made to Part 2 of the 1996 Act by Part 8 of the 2009 Act. The consultation also invited views on "self-standing" proposals (i.e. not ones consequential upon the changes being made to the primary legislation) put forward by the Construction Umbrella Bodies Adjudication Task Group ("CUBATG") to improve the effectiveness of the Scheme.

8.2 In all there were 30 responses to the consultation exercise from a range of industry stakeholders including main contractors, sub-contractors, and the legal profession. This consultation lasted 12 weeks. We consider below the consultation responses as regards the amendments to the Scheme that are a consequence of the 2009 Act's changes to the primary legislation – these concern adjudication costs, the slip rule and payment notices.

8.3 New section 108A of the 1996 Act will mean that agreements as to adjudication costs will be ineffective, except in two cases – an agreement in writing in the construction contract whereby the adjudicator may allocate his own fees and expenses as between the parties, and an agreement (whether concerning the adjudicator’s or the parties’ costs) made in writing after the giving of the notice of intention to refer a dispute to adjudication. The Consultation asked whether it was necessary, in light of the 2009 amendments, to change the existing Scheme provisions on adjudicators’ fees and expenses. 63% of respondents agreed that we should change the existing provisions on adjudicator’s fees and expenses, while 33% of respondents did not believe that any change was necessary.

8.4 The 2009 Act introduced a requirement that construction contracts should provide that the adjudicator has the power to correct a clerical or typographical error in his decision. The Scheme contained no such provision. There was 100% support to amend the Scheme to include a new provision entitling the adjudicator to correct a ‘slip’ and to do this within a period of 5 days.

8.5 The 2009 Act made changes to the statutory payment notice framework. The Consultation asked whether, in addition to identified changes to paragraphs 9 and 10 of Part 2 of the Scheme, any further changes needed to be made as a consequence of the changes to the primary legislation. 58% of respondents agreed that no further amendments were required. Apart from a minor change to cure an ambiguity, no other amendments are being made to Part 2 of the Scheme. The Consultation also asked whether the Scheme should continue with the “payer-led” approach to payment notices. Some 75% of responses agreed that the payer-led approach to payment notices should remain and the Scheme continues with a payer-led approach to payment notices. In addition, the Consultation asked whether it was right to apply the current 7-day period as regards “withholding notices” to the replacement “intention to pay less” notices. The arguments for and against a 7-day period were finely balanced. Given the lack of clear consensus for change, however, the decision was taken to apply the current period to the new notices.

## **9. Guidance**

Construction industry bodies have offered to produce guidance on the revised primary and secondary legislation for BIS to approve. We expect this to be available shortly.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies can be more readily ascertained from the accompanying Impact Assessment.

10.2 An Impact Assessment is attached to this memorandum and will be available alongside the Explanatory Memorandum on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **11. Regulating small business**

11.1 The legislation applies to small businesses – it applies to construction businesses of all sizes within the construction supply-chain.

11.2 Taken together with the amendments to Part 8 of the 2009 Act, this instrument is de-regulatory. For this reason, and also because it would not in practice be possible to allow one party to a contract to operate under a different legal framework, we have secured a waiver from the micro-business exemption introduced in the 2011 Budget.

## **12. Monitoring & review**

The changes to the primary and secondary legislation have been contemplated for several years. The Government has undertaken to review the implementation of these changes to ensure that the changes to the legislation have been effective. The Government will also take soundings from industry stakeholders such as the Construction Umbrella Bodies Adjudication Task Group (CUBATG) to gauge whether the adjudication amendments, in particular, have had the necessary impact.

## **13. Contact**

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