

THE CONSTRUCTION BAR ASSOCIATION OF IRELAND
CONSTRUCTION LAW CONFERENCE – 23RD NOVEMBER 2013

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THE CONSTRUCTION CONTRACTS ACT, 2013

Background to the Construction Contracts Act, 2013

- (i) The Construction Contracts Act, 2013 (the Act) was enacted by Dáil Éireann on the 29th July 2013. When it is commenced the Act will apply to all construction contracts entered into after a date to be specified by the Minister for Public Expenditure and Reform.²
- (ii) It is, I believe, fair to say that the enactment of the Act is a very significant development for the administration of construction contracts in Ireland and, in particular, for the management and resolution of construction sector disputes. Those involved in the industry and their advisors will have to familiarise themselves with the provisions of the legislation.
- (iii) The economic downturn did not result in any soft landing for the Construction Sector in Ireland. The Construction Sector, perhaps more than any other sector in the economy, underwent an almost overnight collapse. This sudden collapse in the sector left a large number of building contractors exposed to non payment by employers and, in the case of subcontractors, by main contractors.
- (iv) In the resulting clamour the **Construction Contracts Bill, 2010** was initiated by Senator Feargal Quinn as a Private Members Bill in Seanad Éireann. The Bill received Government support and was taken up by the Department of Finance.
- (v) During the passing of the Bill through the houses of the Oireachtas a Regulatory Impact Assessment (“RIA”) was conducted and published by the Department of Public Expenditure and Reform.³ The Assessment considered the policy objectives that, it was hoped, would be achieved by the legislation and it identified these as:

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² No date has yet been confirmed by the Minister for Public Expenditure and Reform. It is not expected that the Act will be commenced until a panel of Adjudicators and a Code of Conduct for those Adjudicators has been drawn up. No such Panel or Code of Conduct has been produced.

³ Regulatory Impact Assessment of the Construction Contracts Bill, 2010, Department of Public Expenditure and Reform. September 2011 – www.per.gov.ie

- To ensure prompt cash flow improving efficiency; and
 - To allow swift resolution of disputes by way of adjudication, allowing projects to be completed without wasting time and money in litigation.⁴
- (vi) The RIA⁵ set out that the aim of the legislation was to achieve these objectives by providing for:
- a right to interim, periodic or stage payments, making clear when payments become due, their amount and a final date for payment;
 - a statutory right for the payee to suspend performance where a ‘sum due’ is not paid, or properly withheld, by the final date for payment;
 - the prohibition of “pay when paid” clauses which delay payment until it is received by the payer;
 - a procedure for parties to a contract to make a payment claim;
 - a statutory right for parties to a construction contract to refer payment disputes to adjudication;
 - an adjudication procedure to deal quickly with disputes about payments. The adjudicator’s decision to be binding, unless appealed to arbitration, and payment, if any, to be made to the party named in the decision;
 - a panel of adjudicators to be set up and administered by the Department of Public Expenditure and Reform.
- (vii) There was a general understanding that the Bill needed to ensure that the principal relevant provisions contained in the UK Housing Grants, Construction and Regeneration Act 1996 (as amended) (the “HGCR Act”) were replicated here in Ireland.⁶ The HGCR Act in the UK was born out of lengthy discussion and consultation, following concerns about the level of insolvency and financial difficulties experienced in the construction industry, particularly on smaller contractors in the sector. The introduction of statutory adjudication under Section 108 of the HGCR was one of the key recommendations in the Latham Report⁷. Latham recommended that a system of adjudication should be introduced within all of the standard forms of contract, unless some comparable arrangement already existed for mediation or conciliation. He further recommended that the system of adjudication should be “*underpinned by legislation*” capable of

⁴ At page 14

⁵ At page 14

⁶ Cunningham, Tony - ‘Will the Construction Contracts Bill Improve Subcontractor Cash Flow?’ – (2013). *Other Resources*. Paper 10. <http://arrow.dit.ie/beschreoth/10>

⁷ Latham, M. (1994), *Constructing the Team*, London: HMSO. ISBN 978-0-11-752994-6

considering a wide range of issues and that the decision of an Adjudicator should be implemented immediately.

- (viii) The tenor of the relevant provisions of the HGCR has been reflected in the Construction Contracts Act, 2013.

The Act

- (ix) The Act has 12 sections and runs to just 12 pages and one Schedule. It applies to all construction contracts, whether oral or in writing. The Act applies to construction contracts, whether or not the parties to the contract purport to limit or exclude its application.⁸

Section 1 - Interpretation

- (x) “*Construction contract*” is defined as meaning an agreement (whether or not in writing) between the executing party and another party, where the executing party is engaged for any one or more of the following activities:

“(a) *carrying out construction operations by the executing party;*

“(b) *arranging for the carrying out of construction operations by one or more other persons, whether under subcontract to the executing party or otherwise;*

“(c) *providing the executing party’s own labour, or the labour of others, for the carrying out of construction operations;”*⁹

- (xi) “*Construction Operations*” are defined very broadly and includes “*any activity associated with construction*”. This is elaborated upon to include the likes of alteration, demolition, repair, dismantling, roadworks, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, wells, sewers and coast protection or defences, systems of heating, ventilation, sanitation, cleaning of buildings in the course of construction, tunnelling and the making, installing or repairing of sculptures, murals and other artistic works that are attached to real property.¹⁰

- (xii) An “*executing party*”, in relation to a construction contract, means-

“(a) *where the parties to the construction contract are a contractor and the person for whom the contractor is doing work under the contract, the contractor, or*

⁸ Section 2 subsection (5)(b)

⁹ Section 1 subsection (1)(a)-(c)

¹⁰ For the full list of operations covered by the Act see definition of “construction operations” at section 1 of the Act.

- (b) *where the parties to the construction contract are a contractor and a subcontractor or are 2 subcontractors, the subcontractor or whichever of the subcontractors agrees to execute work under the contract.”*
- (xiii) The Act will apply not only to traditional building contracts and subcontracts, but also to an agreement in relation to construction operations to do work or provide services ancillary to the construction contract such as architectural, design, archaeological or surveying work, project management services or advice on building, engineering, interior and exterior decoration and on the laying-out of landscape.¹¹
- (xiv) Section 1(3) provides that construction operations do not include the manufacture or delivery to a construction site of building or engineering components or equipment, materials, plant or materials, or components for heating, ventilation, power supply, drainage systems or telecommunication systems. However, section 1(4) provides that if the ‘*things*’ referred to in subsection (3) are supplied under a contract which also includes for their installation, then the contract is covered by the Act.¹²

Section 2 - Construction contracts; exceptions, etc.

- (xv) Section 2 sets out the thresholds which are to apply to a construction contract before it is covered by the Act. The section provides that “*a contract is not a construction contract—*
- (a) if the value of the contract is not more than €10,000, or*
- (b) if—*
- (i) the contract relates only to a dwelling, and*
- (ii) the dwelling has a floor area not greater than 200 square metres, and*
- (iii) one of the parties to the contract is a person who occupies, or intends to occupy, the dwelling as his or her residence.”*
- (xvi) The Construction Contracts Bill, 2010 had included somewhat different threshold provisions. The Bill envisaged a situation where the legislation would not apply to:-
- publicly funded contracts under €50,000 in value;
 - other contracts not exceeding €200,000 in value;

¹¹ Section 1 subsection (2)

¹² Section 1 subsection (4)

- private owner-occupied dwellings over €200,000 in value provided these are less than 200 square metres in area.
- (xvii) These thresholds came in for significant criticism during the consultation stages and during the progress of the Bill through the Dáil¹³. However, the authors of the RIA of September 2011 noted that “*It was considered that applying the legislation to contracts below these levels would place a disproportionate regulatory burden on the parties to the contracts.*” The RIA went on to state however that “*during the consultation it was argued that these thresholds were too high as contracts under these thresholds accounted for approximately 50% of all the contracts. In addition it is apparent from analysis of the UK experience of adjudication that the majority of disputes that use such processes are in relation to contracts valued between £10,000 and £50,000. On balance it would appear that these thresholds should be reviewed.*”¹⁴
- (xviii) The threshold provisions contained in the Bill were accordingly amended and the Act now applies to all construction contracts with a value of over €10,000.00 other than those contracts for the construction of domestic houses where one of the parties intends to occupy the house as his residence and where the floor area of the house is not greater than 200 square metres.
- (xix) It would seem that the threshold provisions now strike an appropriate balance although it is still the case that many building contracts entered into in Ireland will concern ‘one-off’ domestic houses with a floor area of less than 200 square metres. This will mean that very many contracts will continue to exist outside of the ambit of the Act. However, it is also the case that any subcontractors engaged in the construction of domestic houses will have their contracts covered by the Act if the value of the subcontract exceeds €10,000.00.
- (xx) Section 2(2) provides that a contract of employment (within the meaning of the Organisation of Working Time Act 1997) is not a construction contract.
- (xxi) Section 2(3) provides that “*a contract between a State authority and its partner in a public private partnership arrangement, as those terms are defined in the State Authorities (Public Private Partnership Arrangements) Act 2002, is not a construction contract.*” The rationale for excluding PPP agreements from the ambit of the Act is not clear and the

¹³ The CIF contended that “*the legislation (as it was drafted in the Bill) will not apply to the majority of subcontractors, the group of people who are in greatest need of protections offered by this legislation*”.

The Society of Chartered Surveyors opined that “*the Bill excludes contracts that are below €200,000 in value. Given that, with rare exception, all subcontracts in the state are below this threshold these vulnerable subcontractors are immediately deprived of any protection. The Society of Chartered Surveyors Ireland is of the opinion that if the threshold is not removed entirely the legislation will have been a complete waste of time.*”

¹⁴ Cunningham, Tony - ‘Will the Construction Contracts Bill Improve Subcontractor Cash Flow?’ – (2013). *Other Resources*. Paper 10. <http://arrow.dit.ie/beschreoth/10> at page 21

CI Arb expressed the view in its submissions on the Bill that this exclusion should be reconsidered by Minister Hayes.¹⁵ However, while the main agreement between the State authority and the PPP partner will be excluded from the legislation, the reality is that the vast majority of the work carried out on any particular PPP project will be subcontracted and will therefore be covered by the provisions of the Act.

Section 3 – Payments under construction contracts

- (xxii) The primary purpose of the Act is to free up cash-flow within the industry by ensuring timely payment, improving communication regarding deductions from payment claims and providing mechanisms to enforce entitlements. This section provides that a contract must identify or include an “*adequate mechanism*” to establish the payment claim dates and each interim and final payment amount. The contract must also stipulate the maximum period for making payments otherwise the Schedule provisions of 30 day intervals will apply. In this regard Section 3(1) provides that “*a construction contract shall provide for—*”
- (a) *the amount of each interim payment to be made under the construction contract, and*
 - (b) *the amount of the final payment to be made under the construction contract,*
- or for an adequate mechanism for determining those amounts.”*
- (xxiii) Section 3(2) provides that “*a construction contract shall provide for—*”
- (a) *the payment claim date, or an adequate mechanism for determining the payment claim date, for each amount due under the construction contract, and*
 - (b) *the period between the payment claim date for each such amount and the date on which the amount is so due.”*
- (xxiv) Section 3(3) provides that the Schedule shall apply “*to a main contract if and to the extent that it does not make provision for the matters specified in subsections (1) and (2).*”
- (xxv) Section 3(4) provides that “*the Schedule shall apply to a subcontract except to the extent that it makes provision which is more favourable to the executing party than that which would otherwise be made by the Schedule.*”

¹⁵ CI Arb submission to Minister Hayes on the Construction Contracts Bill

- (xxvi) There is just one Schedule to the Act. The Schedule is entitled ‘Provisions to Apply to Matters Regarding Payment’. Clause 1 of the Schedule provides that “*the payment claim dates under a construction contract shall be:*
- (a) *30 days after the commencement of the construction contract;*
 - (b) *30 days after the date referred to in clause (a) and every 30 days thereafter up to the date of substantial completion;*
 - (c) *30 days after the date of final completion.”*
- (xxvii) In the circumstances, and in so far as main contracts are concerned, the provisions of the Schedule will only apply if no provisions regarding the timing of interim and final payments are contained in the contract. If the main contract makes provision for the timing of interim and final payments then those terms will prevail. However, in so far as subcontracts are concerned, the provisions of the Schedule will apply if the relevant terms contained in the subcontract are less favourable to the executing party than the Schedule terms.
- (xxviii) These particular provisions would appear to be an attempt to afford somewhat greater protections to sub-contractors *vis-à-vis* the timing of payments than are afforded to main contractors. One assumes that the rationale in this regard is that, in most cases, a main contractor may be in a stronger position to negotiate terms more favourable for itself with an employer or it may be in a position to absorb an employer’s more onerous condition. On the other hand, a subcontractor may not be in such a strong position when negotiating terms with a main contractor.
- (xxix) Clause 3 of the Schedule provides that “*The date on which payment is due in relation to an amount claimed under a construction contract shall be no later than 30 days after the payment claim date.*”
- (xxx) Section 3(5) of the Act provides that “*except after the occurrence of the circumstances specified in subsection (6), a provision in a construction contract is ineffective to the extent that it provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract.*” The said subsection (6) lists various circumstances which, effectively, concern the insolvency of the employer in the main contract.
- (xxxi) The provision amounts to a banning of so-called ‘pay when paid’ clauses from construction contracts and this must be seen as a very significant event in construction contract administration. The existence of pay when paid clauses has been the bane of many subcontractors’ operations. The outlawing of such clauses will be warmly welcomed by subcontractors.

(xxxii) However, section 3 also effectively removes a main contractor's ability to agree payment terms with a subcontractor which may be less favourable to the subcontractor than provided for in the Schedule. A practical effect of this would appear to be that, in certain circumstances, a main contractor could be subject to payment terms under a main contract which are less favourable than those under which it has to engage a subcontractor. The main contractor may in those circumstances have to make payment to the subcontractor before being paid by the employer.

Section 4- Payment claim notices

(xxxiii) This section deals with the procedures now required for making payment claims. The Act provides that where a payment claim notice is submitted and the amount is contested by the paying party, the paying party has 21 days to deliver a response setting out the amount that it proposes to pay and the reasons for the difference between that amount and the amount claimed. This response must also set out the basis of the calculations used to arrive at the amount to be paid. If this is not agreed between the parties, then the amount to be paid shall be the amount included in the response notice.

(xxxiv) Section 4(1) provides that *“This section applies where, not later than 5 days after the payment claim date, an executing party to a construction contract delivers a payment claim notice relating to a payment claim to the other party or another person specified under the construction contract.*

(2) A payment claim notice is a notice specifying—

(a) the amount claimed (even if the amount is zero),

(b) the period, stage of work or activity to which the payment claim relates,

(c) the subject matter of the payment claim, and

(d) the basis of the calculation of the amount claimed.”

(xxxv) This provision will not have any great impact on more formal construction contracts where it is likely that the written agreement will provide for a procedure to be followed for making payment claims. The provision will have a greater impact on the more informal (and probably smaller) building projects or subcontracts where the written contract (if there is one) is silent as to the manner in which payment claims are to be made and dealt with. If contractors and subcontractors are to avail of the protections afforded by the Act regarding payment claims and disputes in respect of same, the contractors will have to embrace a new culture of submitting relatively formalised payment claims for the work.

(xxxvi) Subsection (3) provides that *“If the other party or specified person referred to in subsection (1) contests that the amount is due and payable, then the other party or specified person—*

(a) shall deliver a response to the payment claim notice to the executing party, not later than 21 days after the payment claim date, specifying—

- (i) the amount proposed to be paid,*
- (ii) the reason or reasons for the difference between the amount in the payment claim notice and the amount referred to in subparagraph (i), and*
- (iii) the basis on which the amount referred to in subparagraph (i) is calculated, and*

(b) if the matter has not been settled by the day on which the amount is due, shall pay the amount referred to in paragraph (a) to the executing party not later than on that day.”

(xxxvii) Subsection (4) provides that *“where a reason for the different amount in the response is attributable to a claim for loss or damage arising from an alleged breach of any contractual or other obligation of the executing party (under the construction contract or otherwise), or any other claim that the other person alleges against the executing party, the response shall also specify—*

- (a) when the loss was incurred or the damage occurred, or how the other claim arose,*
- (b) the particulars of the loss, damage or claim, and*
- (c) the portion of the difference that is attributable to each such particular.”*

(xxxviii) It is submitted that the provisions of section 5 will prove helpful as it now provides a clear procedure for determining, at an early stage, what the respective parties’ position is in respect of each and every claim for payment. The rights and obligations conferred or imposed by this section are additional to any conferred or imposed by the terms of the construction contract.¹⁶ Therefore, in the event that a payment claim is disputed, the parties will now be clear about the basis for and the amount in dispute at an earlier stage than might otherwise be the case. In addition, a party withholding payment on the grounds of alleged loss or damage suffered as a result of some breach of contract on the part of the executing party will be forced, at an early stage, to particularise the grounds upon which the

¹⁶ Section (5) subsection (5)

alleged loss or damage arises. This is likely to cause the detail of a payment dispute to crystallise at an early stage and this, if submitted, is likely to assist in the earlier resolution of the dispute.

Section 5 – Right to suspend work for non payment

(xxxix) The right of suspension for non-payment has now been put on a statutory footing. The Act allows a party which has not been paid by the date the payment falls due to suspend work, provided that a written notice has been delivered to the employer at least seven days before the proposed suspension is to take effect specifying the grounds upon which suspension is proposed. The Act ensures that the period of suspension of work for non-payment will be disregarded for the purpose of the construction programme and the period of suspension will be disregarded for both the suspending party and other contractors involved in the project whose works may be affected by the suspension of the other party. The right to suspend work ends immediately upon payment of the outstanding amount being made by the employer (or main contractor in the case of a subcontract) or when a notice of adjudication is served.

(xl) The section provides that:

“5(1) Where any amount due under a construction contract is not paid in full by the day on which the amount is due, the executing party may suspend work under the construction contract by giving notice in writing under subsection (2).

(2) Notice under this subsection shall specify the grounds on which it is intended to suspend work and shall be delivered to the other party—

(a) not earlier than the day after the day on which the amount concerned is due, and

(b) at least 7 days before the proposed suspension is to begin.

(3) Work may not be suspended under subsection (1)—

(a) after payment by the other party of the amount due, or

after notice has been served by a party to the construction contract under section 6(2) in relation to a dispute relating to payment of the amount concerned.

(xli) Subsection (4) provides that *“where work is suspended under subsection (1) and the ability of the executing party to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the*

contractual time limit unless the suspension of work is unjustified in the circumstances.”

Subsection (5) provides that *“where work is suspended under subsection (1) and the ability of a subcontractor to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit.”*

- (xlii) Subsection (6) provides that *“a period of suspension of work under subsection (1) shall also be disregarded for the purpose of computing the time taken to complete the work under another construction contract where—*
 - (a) the construction contract the work under which is suspended is a subcontract,*
 - (b) the other construction contract is also a subcontract and the other party to that other subcontract is the same as the other party to the subcontract the work under which is suspended, and*
 - (c) the ability of the executing party under that other subcontract to complete work within a contractual time limit is affected by the suspension of work.”*
- (xliii) Subsection (7) provides that *“this section is without prejudice to the right of the other party to the construction contract under which work is suspended to claim for compensation or damages for any loss due to a suspension of work that is unjustified in the circumstances.”*

Section 6 – Right to refer payment dispute to adjudication¹⁷

- (xliv) The Act gives a party to a construction contract the right to refer any payment dispute to adjudication ‘at any time’. This entitlement cannot be restricted to post practical completion or by having to complete other steps under the contract beforehand. Once a dispute has crystallised, either party may (but is not bound to) refer the dispute to adjudication.
- (xlv) It is anticipated that adjudication will provide a speedy and cost-effective means of dispute resolution for construction disputes with the decision of the adjudicator becoming binding unless and until it is overturned either by the courts or by an arbitrator, depending on the agreed dispute resolution procedure within the particular construction contract. This means that where an adjudicator decides that payment is due, such payment must be made up-front despite a referral to arbitration or the initiation of court proceedings.

¹⁷ This lecture will not deal in detail with the adjudication process under the Act. These will be dealt with in a separate paper.

- (xlvi) The Minister for Public Expenditure and Reform is tasked under the Act with forming a panel of Adjudicators and a Code of Conduct for those Adjudicators. This has not yet been done by the Minister and it is not expected that the Act will commence until these two matters have been addressed.
- (xlvii) A party to a construction contract has the right to refer for adjudication any dispute relating to payment arising under the contract.¹⁸ The parties are free to appoint their own adjudicator to the dispute or, in default of agreement, to have one appointed from a panel of adjudicators which is to be assembled by the Minister for Public Expenditure and Reform.¹⁹
- (xlviii) The adjudicator is expected to reach a decision on the matter within 28 days.²⁰
- (xlix) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.²¹

Section 7 - Right to suspend work for failure to comply with adjudicator's decision

- (l) The provisions of this section are similar to those set out in section 5. However, the context for the suspension under this section is different from that under section 5. Under section 7 a contractor or subcontractor is entitled to suspend work "*where any amount due pursuant to the decision of the adjudicator is not paid in full before the end of the period of 7 days beginning with that on which the decision is made, the executing party may suspend work under the construction contract by giving notice in writing under subsection (2).*"²²
- (li) Section 7(3) provides that "*work may not be suspended:*
 - (a) *after payment by the other party of the amount due, or*
 - (b) *after the decision of the adjudicator is referred to arbitration or proceedings are otherwise initiated in relation to the decision*".²³

¹⁸ Section 6 subsection (1)

¹⁹ Section 6 subsection (3)

²⁰ Section 6 subsection (6) and the period can be extended with the consent of the referring party by a further 14 days pursuant to subsection (7)

²¹ Section 6 subsection (10)

²² Section 7 subsection (1)

²³ Section 7 subsection (3)

- (lii) Section 7(4) provides that “*where work is suspended under subsection (1) and the ability of the executing party or a subcontractor to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit*”.
- (liii) Section 7(5) provides that if the work suspended is a subcontract and if the suspension affects other subcontracts involved in the same main contract, the period of suspension shall also be disregarded when computing the time taken to complete those other affected subcontracts.

Section 8 – Selection of panel of adjudicators

- (liv) This section provides that the Minister for Public Expenditure and Reform shall select persons to be members of a panel to act as adjudicators in relation to payment disputes and one of the panel shall be the chair of the panel.
- (lv) Subsection (5) sets out that the Minister shall, in selecting persons to be members of the panel, have regard to their experience and expertise in dispute resolution procedures under construction contracts.
- (lvi) A person may not be a member of the panel unless the person is:
 - (a) a registered professional as defined in section 2 of the Building Control Act 2007;
 - (b) a chartered member of the Institution of Engineers of Ireland;
 - (c) a barrister;
 - (d) a solicitor;
 - (e) a fellow of the Chartered Institute of Arbitrators;
 - (f) a person with a qualification equivalent to any of those specified in *paragraphs (a) to (e)* duly obtained in any other Member State of the European Union.

Section 9 – Code of Practice for adjudication

- (lvii) Section 9 provides that “*The Minister may prepare and publish a code of practice governing the conduct of adjudications under section 6*”. The code of practice has not yet been published.

Section 10 – Delivery of Notices

- (lviii) This brief section provides that if no agreement is reached between the parties to a construction contract regarding the delivery of notices then delivery of same can be effected “*by post or by any other effective means*”²⁴
- (lix) Section 10 (3) provides that “*where under this Act a notice is required to be delivered not later than a specified number of days after a particular date and the last of those days is a day which is a Saturday or Sunday or a public holiday (within the meaning of the Organisation of Working Time Act, 1997), the notice shall be taken to be validly delivered if delivered on the next day which is not such a day.*”

Section 11 – Expenses

- (lx) This section provides that “*The expenses incurred by the Minister in the administration of this Act shall be paid out of moneys provided by the Oireachtas.*”

Section 12 – Short title and commencement

- (lxi) This section provides that the Act may be cited as the Construction Contracts Act 2013 and the Act will apply in relation to a construction contract entered into after such day as the Minister for Public Expenditure and Reform may by order appoint. No such day has yet been appointed by the Minister.

Notable Omission from the Act – Security for Payment

- (lxii) The Act does not provide that any formal security for payment should be put in place by the commissioning party. It is generally accepted that one of the main reasons that many contractors and subcontractors failed after the downturn in the industry is that there simply was no money in place to meet their payment claims. Some stakeholders made submissions during the passing of the Bill through the Oireachtas that it was imperative that the Act made provision for security of contractors’ payments under construction contracts.
- (lxiii) The Society of Chartered Surveyors submitted in respect of the Bill that “*without security of payment the point of this piece of legislation would be lost and the Bill would be utterly meaningless. The means of security of payment must be agreed by the parties prior to the award of a contract. The level of security must reflect the nature of the project and the level of cash flow on site. This security could quite simply be a representative percentage of the contract sum, perhaps two months expenditure which*

²⁴ Section 10 subsection (2)

*would be lodged into a project account or held in escrow. Such an option is already recognised by the industry and is included in the existing RIAI contracts [vis Clause 35 (a)(i)] It is worth noting that if such option had been exercised over the past ten years, we would have a lot less of the partially complete developments that have now become a burden for Government and Local Authorities.*²⁵

- (lxiv) However, the RIA considered these submissions and concluded that “*the inclusion of security provisions in construction contracts would fundamentally change the regulatory impact of the legislation and although there may be merits in including such provisions, their inclusion is likely to increase the regulatory burden and costs associated with contracts between clients, contractors, subcontractors and the final consumer. The cost of providing security, through bonds, is likely to be high given current economic conditions. The inclusion of such a provision could be counter-productive as it may have the unintended consequence of further deteriorating the cash flow for smaller contractors by tying up limited resources in security instruments. It is likely that this additional cost would reduce the number of players in the market and lead to an increase in the price for construction related services that would result from reduced competition.*”²⁶
- (lxv) In the circumstances, no such provisions were included in the legislation.

Conclusion

- (lxvi) When it is commenced, the Construction Contracts Act 2013 will represent a significant development in the administration of construction contracts in Ireland. The provisions of the Act will apply to most construction contracts that exceed a reasonably modest financial threshold.²⁷ Many will maintain that the Act represents an exercise in closing the stable door after the horse has bolted. This may, to some extent, be true and the Act does come too late for many contractors and subcontractors that have not survived the economic downturn.
- (lxvii) Nonetheless, it is submitted that the Act represents a welcome development for the administration of construction contracts in Ireland.

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²⁵ Submission by the Society of Chartered Surveyors Ireland on the Construction Contracts Bill - 28th June 2011

²⁶ Regulatory Impact Assessment of the Construction Contracts Bill, 2010, Department of Public Expenditure and Reform. September 2011 – www.per.gov.ie

²⁷ See section 2 for a list of arrangements not covered by legislation

The Law Library,
The Four Courts,
Dublin 7.

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