Consultation Document on Amendments to the Scheme for Construction Contracts (Scotland) Regulations 1998 and the Construction Contracts (Scotland) Exclusion Order 1998
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February 2011
EXECUTIVE SUMMARY

Part one of the consultation document seeks views on consequential amendments necessary to the Scheme for Construction Contracts (Scotland) Regulations 1998 (the Scheme) following changes to Part II of the Housing Grants, Construction and Regeneration Act 1996. The consequential amendments fall within three main areas: adjudication costs; the “slip rule” (the adjudicator’s power to make corrections) and payment notices.

Part two of the consultation document seeks views on supplementary proposals put forward by stakeholders to improve the effectiveness of the Scheme. It also seeks views on whether the Scheme should provide that the court may make an order requiring a party to comply with the adjudicator’s decision. Finally, it seeks views on whether any additional amendments to the Scheme are required in order to improve its operation in practice.

Part three of the consultation document seeks views on a proposed amendment to the Construction Contracts (Scotland) Exclusion Order 1998 (the Exclusion Order) following changes to Part II of the Housing Grants, Construction and Regeneration Act 1996.

Lastly, part four of the consultation document seeks stakeholders’ views on a partial Business and Regulatory Impact Assessment which outlines the potential benefits and costs associated with the proposed amendments.

Responses to this consultation will be analysed carefully and will inform the drafting of amendments to the Scheme and Exclusion Order.
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BACKGROUND INFORMATION

Construction contracts legislation

Part II of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act)\(^1\) concerns construction contracts. Part II of the 1996 Act:

- gives each party to a construction contract the right to refer a dispute to adjudication and requires parties to include terms in their contract relating to adjudication that comply with section 108(2) to (4);
- provides that contractors are entitled to stage payments (section 109);
- provides that contracts should have an “adequate mechanism" for determining what should be paid and when (section 110(1)); and
- requires that the payer should issue a notice in advance of each payment of the sum he proposes to pay (section 110(2)).

If construction contracts do not comply with these requirements, the relevant terms of the Scheme for Construction Contracts (Scotland) Regulations 1998 (the Scheme)\(^2\) apply.

Certain contracts are excluded from the operation of Part II of the 1996 Act by the Construction Contracts (Scotland) Exclusion Order 1998 (the Exclusion Order)\(^3\).

Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act)\(^4\) makes a number of changes to the payment and adjudication provisions of the 1996 Act while maintaining its broad principles. Some of these changes require consequential amendments to the Scheme.

Part 8 of the 2009 Act also makes changes to Scottish Ministers' power to exclude specified contracts from the operation of Part II of the 1996 Act.

Purpose

The purpose of this consultation is to seek views on:

- the consequential amendments necessary to the Scheme for Construction Contracts (Scotland) Regulations 1998 following the changes to the 1996 Act;
- proposals put forward by stakeholders to improve the effectiveness of the Scheme;
- a proposed amendment to the Construction Contracts (Scotland) Exclusion Order 1998 following the changes to the 1996 Act; and

- the potential benefits and costs associated with the proposed amendments.

**Scope**


**Approach**

We will use the responses to this consultation and any other available evidence to inform the drafting of amendments to the Scheme and the Exclusion Order which will come into force by October 2011.

We aim to issue a report on the consultation process by 24 June 2011.

**Consultation period**

Consultation is an essential and important aspect of Scottish Government working methods. This consultation will run for eight weeks from 7 February 2011 to 1 April 2011.
RESPONDING TO THE CONSULTATION

The Scottish Government welcomes input by 1 April 2011. Comments can be submitted using the online response form. The online form includes a Respondent Information Form which should also be completed.

Alternatively, comments can be submitted by e-mail to: procurementpolicy@scotland.gsi.gov.uk

or by post to:

Scott McCrindle
Scottish Procurement and Commercial Directorate
Scottish Government
2nd Floor
Europa Building
450 Argyle Street
Glasgow
G2 8LG.

If responding by post or e-mail, please quote the question number to which your comments relate as this will aid our analysis of the responses received. To ensure that we treat your response appropriately, please also complete and return the Respondent Information Form at Annex C.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at www.scotland.gov.uk/Consultations/Current.

The Scottish Government now has an email alert system for consultations (http://register.scotland.gov.uk). This system allows stakeholder individuals and organisations to register and receive a weekly e-mail containing details of all new consultations (including web links). SEconsult is designed to allow stakeholders to keep up to date with all Scottish Government consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

If you ask for your response not to be published we will regard it as confidential and will treat it accordingly. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, these will be made available to the public in the Scottish Government Library by 20 April 2011 and published on the Scottish Government consultation web pages by 27 April 2011. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You
can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us to draft amendments to the Scheme and the Exclusion Order which will come into force by October 2011. We aim to issue a report on this consultation process by 24 June 2011.

Comments or complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Jessie Laurie
Scottish Procurement and Commercial Directorate
Scottish Government
2nd Floor
Europa Building
450 Argyle Street
Glasgow
G2 8LG

or e-mail jessie.laurie@scotland.gsi.gov.uk.
PART 1: CONSEQUENTIAL AMENDMENTS TO THE SCHEME

1.1 This part of the consultation document seeks views on the consequential amendments necessary to the Scheme for Construction Contracts (Scotland) Regulations 1998 (the Scheme) following the changes to Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act).

1.2 There is consensus across the industry that the Scheme, generally, has worked well. Given the broad consensus which exists, we have decided to work very closely with the existing Scheme framework and have suggested amendments only where necessary to reflect the changes to the 1996 Act.

1.3 The consequential amendments fall within three main areas: adjudication costs; the “slip rule” (the adjudicator’s power to make corrections); and payment notices.

**Adjudication costs**

**What the 1996 Act now says**

1.4 New section 108A(2) of the 1996 Act provides that any contractual provision by the parties concerning the costs of adjudication is ineffective except in two cases. The first is where the contractual provision is in writing and allows the adjudicator to allocate his fees and expenses between the parties. The second is where the provision is made in writing after the issue of the notice of intention to seek adjudication.

**What the Scheme currently says**

1.5 Paragraph 25 of Part 1 of the Scheme currently provides that:

- the adjudicator is entitled to his reasonable fees and expenses;
- the adjudicator can determine how payment of his fees and expenses is to be apportioned between the parties; and
- the parties to the adjudication are jointly and severally liable to pay the adjudicator’s fees and expenses.

**How to take that forward**

1.6 It is necessary to amend the Scheme to provide that the above provisions apply subject to any valid agreement under new section 108A(2) to the contrary.

1.7 Paragraph 3(4) of the draft amending Scottish Statutory Instrument at Annex A illustrates how this might be drafted.

Consultees are invited to note the proposed amendment in paragraph 3(4) of the draft amending Scottish Statutory Instrument.
The “slip rule” – (adjudicator’s power to make corrections)

What the 1996 Act now says

1.8 New section 108(3A) of the 1996 Act requires parties to a construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision. The provision must be in writing. Where there is no such provision, the contractual adjudication procedure will fall away and the Scheme will apply.

What the Scheme currently says

1.9 The Scheme currently contains no provision allowing the adjudicator to correct errors.

1.10 In the absence of any instructions from the adjudicator to the contrary, paragraph 21 of Part 1 of the Scheme requires that the adjudicator’s decision should be complied with immediately.

How to take that forward

1.11 It is necessary to amend the Scheme to include a “slip rule”. New section 108(3A) of the 1996 Act clearly defines the scope of any such provision. The adjudicator is permitted to “correct his decision so as to remove a clerical or typographical error arising by accident or omission”. We therefore propose to insert a new paragraph which allows an adjudicator to correct errors (as defined by the 1996 Act) in his decision on his own initiative or at the request of one of the parties.

1.12 It is necessary to consider if, to avoid undue delay in implementation of the adjudicator’s decision, the adjudicator should be required to correct any errors within a certain time period. In practice, parties to adjudication are likely to review the adjudicator’s decision on receipt and to bring any error to the adjudicator’s attention straight away. We propose that, on discovering or being alerted to an error, the adjudicator should be required to correct the error within a specified number of days following delivery of the decision to the parties.

1.13 Paragraph 3(3) of the draft amending Scottish Statutory Instrument at Annex A illustrates how this might be drafted.

Question 1. Do you agree that the adjudicator should be required to correct any errors within a certain time period? If so, what time period should apply?

1.14 As noted above, in the absence of any instructions from the adjudicator to the contrary, paragraph 21 of Part 1 of the Scheme requires that the adjudicator’s decision should be complied with immediately. It is necessary to consider whether introduction of the “slip rule” – allowing the adjudicator to correct his decision – requires any amendment to this provision.

1.15 In practice, it would be extremely rare for an adjudicator not to specify that parties must comply with his decision within a certain time period. We therefore anticipate that the
number of decisions which do not provide instructions for compliance and which contain errors which require to be corrected by the adjudicator will be minimal.

1.16 There are two options:

Option 1: given that it would be extremely rare for the adjudicator’s decision not to include a deadline for compliance and to contain errors, paragraph 21 of Part 1 of the Scheme could be retained without amendment; or

Option 2: paragraph 21 of Part 1 of the Scheme could be amended to include a deadline for complying with the adjudicator’s decision.

Question 2. We would welcome views on options 1 and 2 above. In relation to option 2, please indicate what deadline should apply.

Payment notices

What the 1996 Act says now

1.17 New section 110A of the 1996 Act provides that a construction contract must contain a provision to the effect that a “payment notice” setting out the sum considered due must be given by the person as agreed between the parties – i.e. the payer, the payee or a specified third party (e.g. an architect).

1.18 New section 110B sets out a default mechanism which allows the payee to give the payer a payment notice where the payer has omitted to do so.

1.19 New section 111 introduces a requirement to pay the sum set out in the payment notice.

1.20 New section 111 also introduces a requirement for the payer to give notice to the payee if he intends to pay less than the sum set out in the payment notice. The parties can agree the timescale within which such notice must be given. In the absence of agreement between the parties, the period provided by the Scheme applies.

What the Scheme currently says

1.21 Paragraph 9 of Part II of the Scheme requires the payer, not later than 5 days after the date on which any payment becomes due, to give notice to the other party specifying the amount he intends to pay and the basis on which it has been calculated.

1.22 Paragraph 10 of Part II of the Scheme requires that any notice to withhold payment is given not later than 7 days before the final date for payment.

How to take that forward

1.23 The Scheme needs to be revised to reflect the new payment notice framework. We are therefore proposing to delete the existing paragraphs 9 and 10.
1.24 We propose to substitute paragraph 9 with provisions which, in relation to every payment provided for by the contract, require:

- the payer to issue the payment notice, not later than 5 days after the payment due date;
- that the notice should set out the sum the payer considers to be due and the basis on which that sum is calculated; and
- that the notice should be issued even if the sum is zero.

1.25 We propose to substitute paragraph 10 with provisions which require:

- the notice of intention to pay less to be given not later than 7 days before the final date for payment.

1.26 Paragraph 4 of the draft amending Scottish Statutory Instrument at Annex A illustrates how this might be drafted.

Question 3. Do you believe it is the right approach to continue with “payer-led” payment notice provisions in the Scheme? Please give the reasons for your answer.

Question 4. Do you agree that the Scheme should require the “intention to pay less” notice to be issued no later than 7 days before the final date for payment?

Question 5. Are any further amendments necessary to the Scheme to implement the changes to the payment framework in the 1996 Act?
PART 2: SUPPLEMENTARY PROPOSALS FOR AMENDMENTS TO THE SCHEME

2.1 This part of the consultation document seeks views on a number of additional amendments to the Scheme. Paragraphs 2.2 to 2.5 seek views on a number of issues raised by stakeholders. Paragraph 2.6 seeks views on whether the Scheme should provide that the court may make an order requiring a party to comply with the adjudicator’s decision. Paragraph 2.7 seeks views on whether any additional amendments are required to the Scheme to improve its operation in practice.

2.2 Paragraph 18 of Part 1 of the Scheme (confidentiality) requires the adjudicator and any party not to disclose any information which the party supplying it has indicated should be treated confidentially – except where disclosure is necessary for the adjudication. It has been suggested that the Scheme should be amended to include a presumption of overall confidentiality which would apply to the conduct of the adjudication (i.e. the fact that it has taken place) and any matters arising during the adjudication.

Question 6. How often do you believe parties to an adjudication would wish to maintain confidentiality in relation to:
   a) the fact of the adjudication?
   b) the matters that arise in it?

How might the Scheme be amended to better take account of this?

Should a distinction be drawn between confidentiality during the adjudication and after it?

Should the Scheme provide for applications for anonymity in court proceedings arising out of an adjudication?

2.3 Paragraph 20(2)(a) of Part 1 of the Scheme allows the adjudicator to “open up, review or revise any decision taken or any certificate given by any person referred to in the contract, unless the contract states that the decision or certificate is final and conclusive. There was a significant amount of discussion around “final and conclusive clauses” during consultation on the 1996 Act. The issues were complex and it was ultimately concluded that, all things considered, it was undesirable to seek to use primary legislation to limit their use. However, some respondents to earlier consultations considered the wording in the Scheme unhelpful in this regard.

Question 7. Is there any practical problem which prevents the deletion of the words “unless the contract states that the decision or certificate is final and conclusive” from paragraph 20(2)(a) of the Scheme?
2.4 The interest provision in paragraph 20(2)(c) of Part 1 of the Scheme has been interpreted as providing the adjudicator with the power to award the payment of interest only if:

- the issue has been referred to him;
- it has been agreed by the parties to be within the scope of the adjudication; or
- it is a matter under the contract that is necessarily connected with the dispute.

2.5 It has been suggested that the adjudicator should have an inherent power to award interest and that the Scheme should make provision for the adjudicator to award interest “as he considers appropriate”. This reflects the wording in the Construction Industry Council (CIC) Model Adjudication Procedure.

Question 8. Do you consider that the Scheme should be amended to give the adjudicator power to award interest “as he considers appropriate”?

2.6 The Scheme for Construction Contracts (England and Wales) Regulations 1998 provide that the court may make an order requiring a party to comply with the adjudicator’s decision in line with section 42 of the Arbitration Act 1996, as modified by the Scheme. This consultation provides an opportunity to consider whether similar provision should be made in the Scottish Scheme.

Question 9. Do you consider that the Scheme should provide that the court may make an order requiring a party to comply with the adjudicator’s decision?

2.7 Finally, we would welcome views on whether any additional amendments to the Scheme are required in order to improve its operation in practice.

Question 10. Are any additional amendments to the Scheme required in order to improve its operation in practice?

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PART 3: PROPOSED AMENDMENT TO THE EXCLUSION ORDER

3.1 This part of the consultation document seeks views on a proposed amendment to the Construction Contracts (Scotland) Exclusion Order 1998 (the Exclusion Order) following changes to Part II of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act).

What the 1996 Act says now

3.2 New section 106A of the 1996 Act states that Scottish Ministers may by order provide that any or all of the provisions in Part II of the 1996 Act will not apply to any description of construction contract specified in the order.

What the Exclusion Order currently says

3.3 The Exclusion Order currently excludes the following contracts from the entirety of Part II of the 1996 Act: agreements under statute; private finance initiative (PFI) contracts; finance agreements; and development agreements. In our view, the position in relation to these types of contracts should be maintained.

How to take that forward

3.4 Under new section 106A, Scottish Ministers may now provide that certain provisions in Part II of the 1996 Act will not apply to specified contracts.

3.5 New section 110(1A) of the 1996 Act prohibits any payment mechanism that makes payment conditional on the performance of obligations under another contract. This will prevent a payer relying on, for example, a “pay when certified” clause. “Pay when certified” clauses are a key feature of sub-contracts entered into in private finance initiative projects, driven by the risk allocation on such projects. In light of this, we propose that Scottish Ministers exercise their powers under new section 106A to exclude, from the application of new section 110(1A), contracts whereby a project company in a private finance initiative project sub-contracts any of its obligations under the principal contract with the authority.

Question 11. Do you agree that the sub-contracts entered into by project companies in private finance initiative projects should be excluded from the application of new section 110(1A) of the 1996 Act?

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6 The principal contract is excluded from Part II of the 1996 Act by virtue of the existing Exclusion Order.
PART 4: PARTIAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

4.1 The partial Business and Regulatory Impact Assessment (BRIA) at Annex B considers the potential benefits and costs associated with the proposed amendments to the Scheme and Exclusion Order.

4.2 We would welcome feedback on the partial BRIA.

Question 12. What are the potential benefits and costs associated with the proposed amendments to the Scheme and Exclusion Order?
2011 No.

CONSTRUCTION CONTRACTS

The Scheme for Construction Contracts (Scotland) Regulations 1998 (Amendment) (Scotland) Regulations 2011

Made - - - - 2011
Coming into force - - 2011

The Lord Advocate, in exercise of the powers conferred by sections 108(6), 114 and 146(1) and (2) of the Housing Grants, Construction and Regeneration Act 1996(7) makes the following Regulations, a draft of which has, in accordance with section 114(5) of that Act, been laid before and approved by resolution of the Scottish Parliament:

Citation, commencement, extent, application and interpretation

1.—(1) These Regulations may be cited as the Scheme for Construction Contracts (Scotland) Regulations 1998 (Amendment) (Scotland) Regulations 2011 and come into force on [    ].

(2) These Regulations only apply to construction contracts entered into on or after [    ].

(3) These Regulations apply to Scotland only.

(4) In these Regulations, “the Scheme” means the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998(8).

Amendment of regulation 4 of Scheme Regulations

2. In paragraph (b) of regulation 4 of the Scheme for Construction Contracts (Scotland) Regulations 1998, for “by section 110 of the Act” substitute “respectively by section 110 or 110A of the Act”.

Amendment of Part 1 (adjudication) of the Scheme

3.—(1) Part 1 (adjudication) of the Scheme shall be amended as follows.

(2) In paragraph 20—

(a) in sub-paragraph (2)(a) omit “unless the contract states that the decision or certificate is final and conclusive”; and

(b) in sub-paragraph (2)(b) for “section 111(4)” substitute “section 111(9)”.

(7) 1996, c.53.
(8) S.I. 1998/687.
(3) After paragraph 22 insert—

“22A.—(1) The adjudicator may on his own initiative or on the request of a party or specified person within the meaning of section 110A(6) of the Act correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(2) Any correction of a decision shall be made within xx days of the date upon which the adjudicator’s decision was delivered to the parties.

(3) Any correction of a decision shall form part of the decision.”.

(4) For paragraph 25(2) there is substituted—

“(2) Without prejudice to the right of the adjudicator to effect recovery from any party in accordance with sub-paragraph (1), and subject to any effective contractual provision in terms of section 108A(2) of the Act, the adjudicator may determine the apportionment between the parties of liability for the payment of the fees and expenses and such determination shall be binding upon the parties.”.

Amendment of Part 2 (payment) of the Scheme

4.—(1) Part 2 (payment) of the Scheme is amended as follows.

(2) For paragraph 9, substitute—

“Payment notice

9.—(1) In relation to every payment provided for by the contract, the payer shall, not later than 5 days after the payment due date, give a notice to the payee complying with sub-paragraph (2).

(2) A notice complies with this sub-paragraph if it specifies—

(a) the sum that the payer considers to be or to have been due at the payment due date;

(b) the work to which the payment relates; and

(c) the basis on which that sum is calculated.

(3) For the purposes of this paragraph, it is immaterial that the sum referred to in sub-paragraph (2) may be zero.

(4) A payment provided for by the contract includes any payment of the kind mentioned in paragraphs 2, 5, 6, or 7 above.”.

(3) For paragraph 10, substitute—

“Notice of intention to pay less than the notified sum

10. Any notice of intention to pay less than the notified sum mentioned in section 111(3) of the Act shall be given not later than 7 days before the final date for payment determined—

(a) in accordance with the construction contract, or

(b) where no such provision is made in the contract, in accordance with paragraph 8.”.

(4) In paragraph 12 (interpretation)—

(a) omit the definition of “claim by the payee”; and

(b) after the definition of “contract price” insert the following definitions—

“‘making of a claim by the payee’ means the giving of a written notice (whether pursuant to section 110B(2) or (4) of the Act or otherwise) by the payee to the payer specifying the sum that the payee considers to be due from the payer, the work to which the sum relates and the basis on which that sum is calculated;

‘payee’ means the person under a construction contract to whom a payment is due;

‘payer’ means the person under a construction contract from whom a payment is due;

‘payment due date’ means the date on which a payment is due;”.
St Andrew’s House, Edinburgh 2011

Authorised to sign by Scottish Ministers/
A member of the Scottish Executive
ANNEX B: PARTIAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

1. Title of proposal

Amendments to the Scheme for Construction Contracts (Scotland) Regulations 1998\(^9\) (the Scheme) and to the Construction Contracts (Scotland) Exclusion Order 1998\(^10\) (the Exclusion Order).

2. Purpose and intended effect

Context

Construction is a significant contributor to the Scottish economy, with £7.2 billion Gross Value Added (GVA) attributed to the construction sector in 2008. It contributes to improvements in the delivery of public services (such as health, education or transport), business productivity and standards of living and the natural environment.

In March 2010, there were 16,755 registered enterprises operating in the construction sector, representing 11% of all registered businesses operating in Scotland. The sector is also a significant source of employment: the seasonally adjusted Workforce Jobs series indicates that there were 187,100 jobs in the Scottish construction industry in 2010 Q3.

Objectives

The Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act)\(^11\) was designed to provide the construction sector with effective and fair payment practices and, in the event of dispute, access to a quick and relatively inexpensive adjudication process.

If construction contracts do not comply with the requirements of the 1996 Act, the relevant terms of the Scheme apply. The Exclusion Order excludes certain contracts from the application of the 1996 Act.

Amendments to the Scheme and Exclusion Order are necessary following changes to the payment and adjudication provisions in the 1996 Act so that the “suite” of construction contracts legislation in Scotland remains effective.

Background

Construction contracts legislation

The Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act) makes a number of changes to the payment and adjudication provisions in the 1996 Act (the relevant provisions are extended to Scotland by the use of a legislative consent motion). These changes are largely technical and include:

• extension of the 1996 Act to oral construction contracts and to those that are partly oral and partly in writing;
• provision for the costs of adjudication;
• provision for the adjudicator to correct an error in his decision;
• changes to the current payment framework, including the prohibition of payments which are conditional on the performance of obligations under another contract, including “pay when certified” clauses;
• clarification of the circumstances in which the payer must give notice to the payee if he intends to pay less than the amount due;
• improvement to the provisions relating to the right of a party to whom payment is due to suspend performance of his obligations under a construction contract.

The 2009 Act also makes changes to Scottish Ministers’ power to exclude specified contracts from the operation of the 1996 Act.

Rationale for Government intervention

As stated above, the 1996 Act was designed to provide the construction sector with effective and fair payment practices and, in the event of dispute, access to a quick and relatively inexpensive adjudication process. Providing a supportive environment for businesses contributes to the Scottish Government’s Wealthier and Fairer strategic objective and to sustainable economic growth in Scotland.

Whilst the 1996 Act has generally improved cash flow and dispute resolution, extensive consultation with the industry and its clients revealed a need for amendments to the legislation to make it more effective in achieving its objective. The amendments to the 1996 Act mean that consequential amendments to the Scheme and Exclusion Order are now necessary.

3. Consultation

Within government

The following government agencies and departments have been consulted in the preparation of this partial Business and Regulatory Impact Assessment (BRIA):

• Better Regulation and Industry Engagement Branch, Scottish Government has provided advice on the preparation of this partial BRIA;
• Scottish Government Construction Procurement Policy Team and Capital and Risk Division has provided advice on construction contracts and PFI-type arrangements;
• Scottish Futures Trust has provided advice on PFI-type arrangements;
• Scottish Government Innovation and Industries Division has provided advice on the construction industry in Scotland;
• Justice Directorate, Scottish Government has provided advice on issues relating to adjudication;
• Scottish Government Legal Directorate has provided advice on the legal issues raised in this consultation; and
The Department for Business, Innovation and Skills has provided advice from UK Government’s perspective.\textsuperscript{12}

We will also be consulting:

- Legal Aid Team, Scottish Government for advice on the implications for the legal aid fund.

Public consultation

Public consultation on the proposed amendments to the Scheme and Exclusion Order and this partial BRIA will take place from 7 February 2011 to 1 April 2011. We will also consult directly with stakeholders via the Scottish Construction Forum and via publication of a Scottish Procurement Policy Note (SPPN).\textsuperscript{13}

Where authorised to do so, we will publish the responses to the consultation; we will also publish an analysis of the responses.

Business

Consultation with business on the proposed amendments to the Scheme and Exclusion Order will be conducted via the organisations represented on the industry-led Scottish Construction Forum. The aim of the Forum is to act as a point of contact between the construction industry, the Scottish Government and the Scottish Parliament and to advise at a strategic level on the actions required to promote innovation and excellence in the construction industry.

Its membership includes:

- Balfour Beatty
- Hillhouse Quarry Group Ltd
- Erdc Group Ltd
- Keppie Design Ltd
- Scottish Building Federation
- Scottish Confederation of Associations of Specialist Engineering Contractors
- The Civil Engineering Contractors Association (Scotland)
- The National Specialist Contractors Council (Scotland)
- Union of Construction, Allied Trades and Technicians
- Construction Licensing Executive
- The Association for Project Safety
- ConstructionSkills Scotland
- Health and Safety Executive
- Quarry Products Association Scotland
- Edinburgh Napier University
- The Building & Construction Industry Forum

\textsuperscript{12} The Department for Business, Innovation and Skills is responsible for amending the equivalent Scheme and Exclusion Order for England and Wales and undertook a similar consultation in March 2010: http://www.bis.gov.uk/Consultations/construction-contracts-regulations-1998-amendments.

\textsuperscript{13} The Scottish Government’s Procurement and Commercial Directorate produces Scottish Procurement Policy Notes (SPPNs) on an ad hoc basis on current procurement policy issues. SPPNs are circulated widely to stakeholders and are also published on the Scottish Procurement and Commercial Directorate’s website: www.scotland.gov.uk/Topics/Government/Procurement.
We intend to ask the above organisations to help us to identify businesses which may wish to engage in face to face discussions with us about the proposed amendments.

4. Options

Option 1 – amend the Scheme and Exclusion Order

The amendments to the 1996 Act require corresponding amendments to the Scheme so that:
- provisions in the Scheme relating to the adjudicator’s fees and expenses apply subject to any valid\(^{14}\) agreement by the parties to the contrary;
- provision is made for the adjudicator to correct errors in his decision; and
- the Scheme reflects the new payment notice framework in the 1996 Act.

The consultation document (which includes a draft Scottish Statutory Instrument) seeks stakeholders’ views on how these amendments should be made.

In addition, we are proposing to amend the Exclusion Order to exclude sub-contracts entered into by project companies in private finance initiative contracts from the application of new section 110(1A) of the 1996 Act which prohibits “pay when certified” clauses. This would essentially maintain the status quo and is necessary because such clauses are a key feature of sub-contracts entered into in private finance initiative projects, driven by the risk allocation on such projects. The consultation document also seeks stakeholders’ views on this proposal.

Option 2 – do nothing

As stated above, the relevant terms of the Scheme apply if construction contracts do not comply with the requirements of the 1996 Act. Failure to amend the Scheme following amendments to the 1996 Act would result in inconsistency between the corresponding provisions in the Scheme and the 1996 Act and impact on the effectiveness of the “suite” of construction contracts legislation in Scotland.

Failure to amend the Exclusion Order to exclude sub-contracts entered into by project companies in private finance initiative contracts from the application of new section 110(1A) of the 1996 Act could impact on the viability and cost of such projects.

Sectors and groups affected

The following are likely to be affected by the proposed amendments to the Scheme and Exclusion Order: the construction industry and its clients (both private and from the public sector); legal firms; adjudicators; the courts.

\(^{14}\) i.e. in accordance with new 108A(2) of the 1996 Act
Benefits – option 1

The proposed amendments will ensure that the “suite” of construction contracts legislation in Scotland is effective. The amendments will contribute to improving payment practices within the construction industry by encouraging better cash flow and to enhancing the existing adjudication provisions where dispute arises.

Benefits – option 2

None. As stated above, failure to amend the Scheme would result in inconsistency between the corresponding provisions in the Scheme and the 1996 Act. Failure to amend the Exclusion Order could impact on the viability and cost of private finance initiative projects.

Costs – option 1


In our view, the proposed amendments to the Scheme do not bring any additional costs beyond those which were included in that impact assessment. Nor do we believe that there would be any costs associated with the proposed amendment to the Exclusion Order, given that the amendment would essentially maintain the status quo.

To allow us to quantify the costs of this option, we would welcome feedback on the potential costs to parties associated with the proposed amendments to the Scheme and Exclusion Order.

Costs – option 2

As stated above, we believe that failure to exclude sub-contracts entered into by project companies in private finance initiative contracts from the application of new section 110(1A) of the 1996 Act could impact on the viability and cost of such projects.

To allow us to quantify the costs of this option, we would welcome feedback on the potential costs to parties if “pay when certified” clauses are prohibited in sub-contracts entered into by project companies in private finance initiative projects.

5. Scottish Firms Impact Test

As stated above, consultation with Scottish firms on the proposed amendments to the Scheme and Exclusion Order will be conducted via the organisations represented on the industry-led Scottish Construction Forum. The aim of the Forum is to act as a point of contact between the construction industry, the Scottish Government and the Scottish Parliament and to advise at a strategic level on the actions required to promote innovation and excellence in the construction industry.

Its membership includes:

- Balfour Beatty
- Hillhouse Quarry Group Ltd
We intend to ask the above organisations to help us to identify businesses which may wish to engage in face to face discussions with us about the proposed amendments.

**Competition assessment**

In our view, the proposed amendments to the Scheme and Exclusion Order will not impact on competition within the construction industry. We have applied the competition filter which confirms this assumption.

We would, however, welcome stakeholders’ feedback on the potential impact on the construction market.

**“Test Run” of business forms**

The proposed amendments to the Scheme and Exclusion Order will not introduce any statutory business forms.

6. **Legal Aid Impact Test**

We do not believe that the proposed amendments to the Scheme and Exclusion Order will have a significant impact on the legal aid fund.

We will confirm this assumption with the Scottish Government’s Legal Aid Team.

7. **Enforcement, sanctions and monitoring**

It is for parties to a construction contract to ensure that the contract complies with the requirements of the 1996 Act. As stated above, construction contracts legislation encourages parties to resolve disputes by adjudication, where it is appropriate, rather than resorting to litigation.
The Scottish Government will work with the Scottish Construction Forum and UK Government to monitor the effectiveness of the construction contracts legislation and to identify any further improvements.

8. Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

[Cabinet Secretary/Minister name]
[Date]

Contact

Any queries about this partial BRIA should be addressed to:

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ANNEX C: RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation
   Organisation Name

Title  Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode  Phone  Email

3. Permissions - I am responding as...

   Individual  /  Group/Organisation

   Please tick as appropriate

   (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)?

   Please tick as appropriate  Yes  No

   (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

   Please tick ONE of the following boxes

   Yes, make my response, name and address all available
   Yes, make my response available, but not my name and address
   Yes, make my response and name available, but not my address

   (c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government website).

   Are you content for your response to be made available?

   Please tick as appropriate  Yes  No

   (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

   Please tick as appropriate  Yes  No
CONSULTATION QUESTIONS

**Question 1:** Do you agree that the adjudicator should be required to correct any errors within a certain time period? If so, what time period should apply?

Comments

**Question 2:** We would welcome views on options 1 and 2 above. In relation to option 2, please indicate what deadline should apply.

Comments

**Question 3:** Do you believe it is the right approach to continue with “payer-led” payment notice provisions in the Scheme? Please give the reasons for your answer.

Comments

**Question 4:** Do you agree that the Scheme should require the “intention to pay less” notice to be issued no later than 7 days before the final date for payment?

Comments

**Question 5:** Are any further amendments necessary to the Scheme to implement the changes to the payment framework in the 1996 Act?

Comments

**Question 6:** How often do you believe parties to an adjudication would wish to maintain confidentiality in relation to:

a) the fact of the adjudication?
b) the matters that arise in it?

How might the Scheme be amended to better take account of this?

Should a distinction be drawn between confidentiality during the adjudication and after it?

Should the Scheme provide for applications for anonymity in court proceedings arising out of an adjudication?

Comments
**Question 7:** Is there any *practical* problem which prevents the deletion of the words “unless the contract states that the decision or certificate is final and conclusive” from paragraph 20(2)(a) of the Scheme?

**Question 8:** Do you consider that the Scheme should be amended to give the adjudicator power to award interest “as he considers appropriate”?

**Question 9:** Do you consider that the Scheme should provide that the court may make an order requiring a party to comply with the adjudicator’s decision?

**Question 10:** Are any additional amendments to the Scheme required in order to improve its operation in practice?

**Question 11:** Do you agree that the *sub-contracts entered into by project companies* in private finance initiative projects should be excluded from the application of new section 110(1A) of the 1996 Act?

**Question 12:** What are the potential benefits and costs associated with the proposed amendments to the Scheme and Exclusion Order?