Northern Ireland
Assembly

COMMITTEE FOR FINANCE AND PERSONNEL

OFFICIAL REPORT
(Hansard)

Construction Contracts Bill

21 April 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Mr Jonathan Craig
Mr Fra McCann
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:
Mr Stewart Heaney) Department of Finance and Personnel
Mr Robin McKelvey)

The Chairperson (Ms J McCann):

I welcome Stewart Heaney, divisional director of the construction and advisory division, and Robin McKelvey, construction initiatives manager. Please make some opening remarks, which will be followed by members' questions.

Mr Robin McKelvey (Department of Finance and Personnel):

During our previous appearance before the Committee, we reported on the public consultation. Since then, the Bill's clauses have been prepared, as members will have seen in the submission that accompanied the explanatory and financial memorandum. The Executive approved the introduction of the Bill to the Assembly. I understand that you have copies of that.

In Great Britain, the Bill that amended the original legislation, from which our proposals are entirely derived, has received Royal Assent. At the heart of the initiatives that we were trying to propose were the concepts of partnering, collaboration and integrated teamworking on construction projects. We have tried to eliminate any scope for lengthy disputes or poor payment practices, which have constantly bedevilled the industry. The Construction Act had been expected to enforce best practice to ensure a fair balance and commercial power throughout the demand and supply chain. Since it came into force, a number of difficulties came to light, and concerns were raised about the effectiveness of the legislation in improving the payment process. Those shortcomings were the catalyst for a series of reviews in England and Wales, which, eventually, led to the enactment last November of what became Part 8 of the Local Democracy, Economic Development and Construction Act 2009. Its aim was to introduce a better, more focused and effective regulatory framework.

The draft construction contracts (amendment) Bill is intended to amend the Construction Contracts (Northern Ireland) Order 1997 in line with the proposals set out in the public consultation, which we carried out, and, through that, to seek to replicate the legislative position now enacted in GB.

As a result of Parliament's acceptance of some minor amendments, our draft Bill differs slightly from what we had originally issued for public consultation. As originally proposed, the Department could exercise an all-or-nothing power to disapply certain types of contract in the provisions of the Construction Contracts (Northern Ireland) Order 1997. The change, following government amendments to the Local Democracy, Economic Development and Construction Act 2009, will allow the Department to disapply many, but not necessarily all, of the provisions of the 1997 Order, to ensure that many valuable features may continue to apply. Among those features are the right to stage payments and to allow flexibility to deal with the contractual innovation, should any arise.

There was also an amendment corresponding to the insertion of a new clause in the Housing Grants, Construction Regeneration Act 1996. That change relates to the prevention of parties in construction contracts entering into agreement about who should pay for the costs of adjudication before a dispute has arisen. A consequence of the change is that pre-dispute agreements between parties to the effect that an adjudicator can allocate fees and expenses as part of his or her decision can be excluded from this broad prohibition. To allow parties to agree in their

construction contracts that the adjudicator has that power is considered to be current good practice and one which we want to maintain. As time is pressing, I will not go through the clauses. The Committee has the details.

The Chairperson:

Yes, we have the paper in members' packs. I will open the floor to members' questions.

Ms Purvis:

I have a couple of questions about clauses 1 and 2. Clause 1 paragraph 1 will repeal article 6 of the Construction Contracts (Northern Ireland) Order 1997, which refers to agreements that are partly in writing or wholly oral. Does that make it extremely difficult for the adjudicator if the contracts are wholly oral?

Mr McKelvey:

Yes; there is an inherent difficultly in knowing what the parties agreed if the contract is not in writing. A lot of contracts will start off wholly in writing using any of the standard forms or even ad hoc arrangements, but because of the time it takes from cutting the first sod to cutting the tape there can be a lot of changes. Not all of those will be covered in writing.

The court case of RJT Consulting Engineers Limited v DM Engineering Northern Ireland Limited proves that a very strict view was taken of what was meant by the word "wholly". Any situation in which not everything had been agreed totally in writing was therefore excluded and precluded from being covered by any of the Act. That was an area of great concern in the consultation process in GB as others had raised the same question: was this going to encourage parties not to use written contracts or was it going to provide any other limitation in that way. However, from the consultation that has taken place, it is not perceived to be a significant problem.

Ms Purvis:

Can you review that after a certain period?

Mr McKelvey:

We have very little information or feedback from the industry on whether the number of contracts that are not in writing was increasing, because we do not have any feedback on the number of

contracts that there are.

Ms Purvis:

Is there any feedback as to how that has affected adjudication?

Mr McKelvey:

Yes; it has. In the absence of the amendment that we are trying to make, quite a number of disputes have been struck out because the adjudicator did not have the power to consider them because the contracts were not wholly in writing. They have taken that very strict, rigid interpretation.

Ms Purvis:

The new insertion in clause 2 will allow the Department to disapply any or all of the previous Order. Why is it necessary to have such a power?

Mr McKelvey:

The earlier articles in the Order set out the definitions of construction and what constitutes construction contracts. However, if there were a contract between contracting parties that was not covered by the Order, then none of the provisions that we are trying to introduce could apply to them with respect to stage payments or access to adjudication. If the amendment is accepted, it will mean that the Department can make arrangements through the proper procedures that those parts of the Order considered beneficial to the operation of such contractors can be employed. It is not an "all or nothing" situation; the baby will not be thrown out with the bathwater.

Ms Purvis:

So, this is really just to allow an amendment of the principal legislation without your having to re-write the principal legislation?

Mr McKelvey:

Yes.

Mr McLaughlin:

The Committee was advised previously that the Bill aimed to encourage parties to resolve disputes through adjudication, rather than resorting to the courts, as that is ultimately in

everybody's interest because it is less time consuming and less costly. Have you established the prevalence of court actions in the North with respect to disputes? Is it a significant issue?

Mr McKelvey:

We do not have any immediate feedback. There is no central register to show whether an adjudication has been established to determine a dispute between private contracting parties. We would have no knowledge of that.

Mr Stewart Heaney (Department of Finance and Personnel):

The Royal Institute of Chartered Surveyors and other professional bodies train people as adjudicators. If parties in a contract decide to go to adjudication, they could go to a wide range of various organisations to fulfil that role.

Mr McKelvey:

We do not have any central record of nominations or requests for nominations. We have asked all of the nominating bodies what nominations they have made over different periods of time. We received a very mixed response. Some did not respond at all; others gave us limited answers. Parties are able to name an adjudicator who is acceptable to each party in the text of the contract, so there is no need in every instance for either party to approach a nominating body to get somebody appointed. The adjudicator will be named in the contract and will be known to both parties. He or she will only be called upon if required.

Mr McLaughlin:

What is the rationale for amending the legislation and the role and function of adjudicators? You said that the adjudicator's decision had been set aside in some instances. You also said that you do not track every adjudication. So, what is the rationale for going forward? Does this save money for the industry?

Mr McKelvey:

Where the facility for adjudication exists, it is being used to the benefit of the industry in general at present. The proposed steps will widen the accessibility of other forms of contract to the services of adjudication. In that sense, there should be a marginal, but not a massive, benefit to the industry as a whole because those who cannot use adjudication currently —

Mr McLaughlin:

OK. So it is more widely —

Mr McKelvey:

It will have a more widespread use.

Mr McLaughlin:

Are all parties to a contract invited or required to identify adjudicators in the event of an arbitration process being required?

Mr McKelvey:

Yes. If any form of contract is as defined — and it is a fairly wide-ranging list — then there is the requirement that there has to be a facility in the terms of the contract to have access to adjudication. Of course, if contracts do not have that provision, the statutory fallback position is the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999. Those will have to be amended in due course in light of whatever changes are made.

Mr McLaughlin:

Will the costs of adjudication be calculated with reference to a prescribed schedule of standard fees and expenses, or will each case need to be considered individually?

Mr McKelvey:

I do not know of any prescribed standard for that. It is a matter for the contracting parties to agree with the adjudicator whom they appoint.

Mr Heaney:

It would be impossible to agree a fee given that contracts are so wide and varied. One adjudication may involve a multimillion-pound issue, whereas another one may involve a smaller amount.

Mr McLaughlin:

What happens if there is a dispute about the fee charged? How is that adjudicated?

Mr McKelvey:

Ultimately, there is recourse to the courts.

Mr McLaughlin:

If one party activates the adjudicator, who carries out his function and may or may not resolve the issue, and the party has an issue with the bill or fee involved, what is the party's recourse?

Mr McKelvey:

If the dispute involves the adjudicator, I imagine that the adjudicator would have to be paid and that the individual would then have to resort to the courts to recover the money.

Mr Heaney:

The selection of the adjudicator is quite important. I do not think that we have any evidence of an adjudicator not being able to take a view and adjudicate. However, that is largely determined by the selection an appropriate adjudicator, who has expertise and knowledge in the relevant area.

Mr McLaughlin:

In theory, at least — I do not know whether it happens in practice. If the intention is to encourage people, and I am trying to remember the term used for people who are parties in a contract, to opt for arbitration as opposed to litigation, we need to be able to give them some comfort about what will happen if they are dissatisfied with the fees that they are expected to pay.

Mr Heaney:

The other key aspect of that is —

Mr McLaughlin:

Do you see what I am getting at? Would that run counter to your original intention, or would people go to court because they are discouraged by the level of fees that they are being charged?

Mr McKelvey:

The terms and conditions of the appointment of the adjudicator must be explicit.

Mr McLaughlin:

Such as the daily fee —

Mr McKelvey:

It is unlikely that anyone would view the appointment of an adjudicator as a blank cheque. Adjudication is, essentially, summary justice. The key to that element is to ensure that the progress of a job is not stopped while the parties wrangle. An adjudicator must be appointed within seven days of either party asking for an adjudicator to be appointed. The adjudicator must then give his decision within 28 days of being appointed, unless an extension is granted.

Mr McLaughlin:

In preparing the amended legislation, has there been any experience of disputes over the actual fees charged in the arbitration process?

Mr McKelvey:

I have no knowledge of any instances of that. There have been instances where adjudicators' decisions have been challenged on the grounds that they were not acting fairly or they were acting ultra vires, whereby they were resolving a dispute in which they were not due to act.

Mr McLaughlin:

Has it worked in cost terms, more or less?

Mr McKelvey:

Yes.

Mr McLaughlin:

Are you aware of any challenges on that basis?

Mr McKelvey:

No. Compared with arbitration or litigation, adjudication is a massively simplified means of dealing with disputes.

Mr O'Loan:

I wish to ask you about the consultation process. You say that the response was modest. Sometimes response to a consultation can be meaningful and significant as well as being modest. Was that the case here?

Mr McKelvey:

We did not receive anything that was strongly contrary to the proposals. We are seeking to ensure fair payment practice and achieve a proper balance in commercial power between different parties to contracts. A large operator may not necessarily use commercial muscle to intimidate a smaller firm.

(The Deputy Chairperson [Mr McNarry] in the Chair)

There will be a winner and a loser. Therefore, such practices will only be ended by achieving a balance.

Mr O'Loan:

Are you saying that you were proactive on the matter and were not just responding to a significantly displayed concern?

Mr McKelvey:

We only received vigorous responses in respect of very small areas that we felt did not merit an attempt to alter the main thrust of the proposal.

Mr O'Loan:

There are two sides involved; the client side and the construction industry. Did you get responses from both sides?

Mr McKelvey:

One of the responses came from another Government Department, which acts as both a client and a practitioner. That response probably reflected both sides.

Mr O'Loan:

The client side includes public and private sector bodies. On the public sector side of the client side, there is a significant structure, such as the CPD, COPES and so on. Did those bodies give you a response? Did you get any response from the private sector side of the client side?

Mr McKelvey:

Our responses were from one Government Department and one legal firm that specialised in the field.

Mr Heaney:

We did not receive any response from a private client.

Mr O'Loan:

Did you take any steps to contact the key stakeholders?

Mr McKelvey:

Obviously, we sent the documentation to people who we knew were interested.

Mr Heaney:

The exercise was wide ranging. About 120 applications sent out, which were specifically targeted at industry groups and bodies.

Mr O'Loan:

What was the actual number of responses?

Mr McKelvey:

We received seven, two of which were not on our pro forma. They were in the form of comments.

Mr O'Loan:

I do not dismiss those comments as they could be quite significant. Do you feel that you have fully dealt with the issues raised by those who responded, or are there other issues that merit further examination?

Mr McKelvey:

One of the firms offered strong views in one respect. It indicated that, notwithstanding its views, it was mainly interested in achieving parity with GB, and to ensure that, regardless of what might happen with a further examination of the courts through case law, or even in the event of the setting up of commercial practice, it would be working on a level playing field and that there would be a degree of certainty in the outcome of any decisions handed down by the courts.

Mr Heaney:

That same point was discussed at the Construction Industry Forum, which contains a number of companies from here that work in GB. Those companies have the added burden of having to deal with two sets of legislation. Although they had different views on aspects of the draft Bill, the overwhelming message was that we should maintain parity.

Mr O'Loan:

I understand that point. From your answers, I draw the conclusion that you could have been a bit more proactive in seeking other methods of speaking to stakeholders, other than just popping paper questionnaires on doormats, which, among other post, may not get attended to. The people who did not respond may still have serious points that need to be heard.

Mr Heaney:

The consultation was widely promoted through the Construction Industry Forum. That would not have necessarily stretched to private sector clients, but the draft Bill was widely publicised in and discussed at the forum by all the contractor representatives and the professional body representatives. They were strongly encouraged to highlight it and put it through, if you like, their communications network.

Mr McKelvey:

What we are doing follows on from what has happened in GB, where there was extensive public consultation on the original proposals in 2005, and on the amended proposals in 2007 in light of reaction obtained, plus further specific consultations with interested groups to generate what eventually became Part 8 of the Local Democracy, Economic Development and Construction Act 2009. Almost all consultation that took place on that was circulated among local bodies as well. The subject has been mentioned extensively in the technical and professional press, with legal commentaries on what has been happening. It is highly unlikely that anybody will have been

unaware that that was taking place.

The Deputy Chairperson of the Committee for Finance and Personnel (Mr McNarry):
To follow on from Declan's question; are there outstanding issues on which there are voices of strong dissatisfaction? Arising from that, are you aware of a strong lobby that is likely to come forward on any particular issue on which there are strong voices?

Mr McKelvey:
I am not aware of any areas of dissent.

(The Chairperson [Ms J McCann] in the Chair)

As we have already said, our emphasis was very much directed at maintaining parity with GB.

Mr McNarry:
OK. That is fine. Paragraph 31 of the draft explanatory and financial memorandum states that the Bill:

"will reduce the administrative burden on businesses and provide greater statutory protection to small and medium-sized businesses trading with larger commercial concerns."

Will you elaborate on how those positive impacts will be realised?

Mr McKelvey:
There was regulatory impact assessment in the original public-consultation document which was based very much on methodology that has been used by what, at that time, was the Department for Business, Enterprise and Regulatory Reform in GB. That methodology was employed for calculating and estimating the cost, for example, of the average adjudication against the cost to take an item to litigation. BERR carried out a number of estimates on the basis of what it supposed to be the number of adjudications that would be likely to be increased by the measures that it proposed.

Ms Purvis:
Will you clarify what BERR is?

Mr McKelvey:

It was the Department of Business, Enterprise and Regulatory Reform, which has been renamed BIS, the Department for Business, Innovation and Skills.

Mr McLaughlin:

As soon as you got to understand it, it changed its name.

Mr McKelvey:

It started off as DETI, the Department of Enterprise, Trade and Investment. I apologise for using an acronym.

This had indicated that there would be certain notional savings between litigation and adjudication and an estimate of the increase that could be expected in the number of adjudications due to increased accessibility. We took the volume of construction throughput in GB and compared it with throughput in Northern Ireland to reach a pro rata figure for here. We arrived at a modest figure, which is still significant with respect to the reduction in costs to the industry by having greater access to adjudication. This would favour the smaller firm against the larger firm with respect to maintenance of rights and achieving fair pay and practice.

Mr McNarry:

Bearing in mind that procurement is a big issue in its own right; are there any procurement influences or issues in all of that?

Mr Heaney:

From a public procurement perspective, the contracts that the public sector use all contain requirements that are consistent with, and in some aspects go beyond, the requirements in the Order. I do not think that there would be any particular procurement issues.

Mr McNarry:

Is it a question of how the large treats the small and the medium?

Mr Heaney:

There are issues with respect to other work that we are doing with the industry around fair payment practices concerning procurement, but not in relation to this Order.

Mr McKelvey:

The issue is that in the absence of an Order, the mere desire to have fair payment practice can be eliminated by the contracting parties simply agreeing to set aside any of the necessary clauses to insist upon that. If the scheme provides a default position that, in the absence of clauses which meet the requirements of the statutory position, then that default position will kick in to ensure that there is adequate protection for fair payment practice.

Mr McNarry:

Is there such a scheme?

Mr McKelvey:

Yes. In due course, the present scheme will have to be tweaked to reflect amendments made to the Order by the Bill.

The Chairperson:

I thank the witnesses for coming along. There are no further questions.