

update

Regulations to legislate prompt payments are a game-changer for the construction industry

New proposed regulations governing payments and dispute management under construction works contracts are expected to profoundly change the way the South African construction industry operates

The Construction Industry Development Board (CIDB) Prompt Payment Regulations and Adjudication Standard recently appeared in the Government Gazette Notice 482 of 2015 and was open for public comment for 60 days.

These regulations address a crippling constraint to effective infrastructure development by introducing processes to ensure the life blood of the industry – cash flow – actually flows.

They legislate a standard set of payment provisions and introduce adjudication as a mandatory first step for resolution of disputes in both the public and private sector. Home building contracts, as contemplated by the Housing Consumer Protection Act No. 95 of 1998 are, however, excluded from application of the regulations.

Similar payment regulations have been introduced by statutory intervention in the United Kingdom, Singapore, Hong Kong, New Zealand, Australia and most recently Malaysia. This statutory intervention was necessary to overcome problems related to non-payment of contractors and sub-contractors in the building and civil-engineering industries. Wherever these regulations have been applied internationally, they have made a fundamental difference by freeing up cash flow.

"Delayed payment has a destructive effect on the sustainable development of the construction industry," says Vaughan Hattingh, Director and adjudication practitioner with MDA Consulting (Pty) Ltd. "The proposed regulations prevent withholding of payments without going through a defined procedure. They give contractors a statutory right to suspend works and to charge interest on late payments, and they introduce a mandatory form of statutory adjudication to resolve disputes."

"The practice of withholding payment because of employer budget constraints or on the basis of performance or until completion of a project, and delays in resolving disputes, have resulted in contractors financing



Euan Massey, Director at MDA Consulting



Vaughan Hattingh, Director at MDA Consulting

projects," says Euan Massey, also a Director and adjudication practitioner at MDA Consulting (Pty) Ltd. "The new regulations will compel parties to resolve disputes through adjudication within 28 days. Importantly, the 28-day window may only be extended by 14 days in prescribed circumstances. These proposed interventions will have profound consequences for the South African construction industry."

Massey explains that the enforcement of the adjudicator's decision is critical to the success of the prompt payment regulations in realising the primary objective of freeing up cash flow. "For several years, South African courts have supported the adjudication

procedure by implementing a robust approach in enforcing adjudicators' decisions repeatedly, determining that adjudicators' decisions are enforceable as a matter of contractual obligation, and that furnishing notice of dissatisfaction does not prevent enforcement," he says. "Parties are required to comply with and promptly implement an adjudicator's decision. In this way, disputes will be dealt with cost-effectively and expeditiously."

Hattingh, in collaboration with Professor Tinus Maritz, head of the Department of Construction Economics at the University of Pretoria, has designed and developed and is currently facilitating the Certificate Programme in Construction Adjudication presented by the Centre for Continuing Education at the University of Pretoria. Now in its third year, the programme will continue to produce skilled qualified adjudicators for the South African construction industry.

The CIDB undertook extensive research to institute these changes and responded to issues such as:

- Chronic problems of delayed payment in the construction industry, with many organs of state failing to adhere to the PFMA/MFMA. There are no consequences for failure to comply.
- In an extensive survey of almost 900 construction projects, 43% of payments to contractors were made more than 30 days after invoicing.

In summary

The CIDB prompt payment regulations:

- Prohibit "pay-when-paid" clauses
- Insist on regular payments within a defined time frame
- Allow suspension of construction activities
- Prohibit withholding of payment
- Entitle a party to charge interest on late payments
- Introduce a mandatory statutory form of adjudication, which is a fair, rapid and inexpensive mechanism for resolving disputes.