

Regulations to legislate prompt payments

New proposed regulations governing payments and dispute management under construction works contracts are expected to change the way the South African construction industry operates. The Construction Industry Development Board (cidb) *Prompt Payment Regulations and Adjudication Standard* appeared on Friday 29 May 2015 in the Government Gazette Notice 482 of 2015 and were open for public comment for 60 days.



Euan Massey Director MDA Consulting.



Vaughan Hattingh Director MDA Consulting.

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 sectors. Home building contracts, as contemplated by the Housing Consumer Protection Act 1998 (Act No. 95 of 1998), are however excluded from application of the regulations.

This statutory intervention was necessary

to overcome problems related to non-payment of contractors and subcontractors in the building and civil engineering industries. According to Vaughan Hattingh, Director and Adjudication Practitioner with MDA Consulting (Pty) Ltd, delayed payment has a destructive effect on the sustainable development of the construction industry. "The proposed regulations prevent withholding of payments without going through a defined procedure," he continues. "They give contractors a statutory right to suspend works, to charge interest on late payments and they introduce a mandatory form of statutory adjudication to resolve disputes."

Euan Massey, also a Director and Adjudication Practitioner with MDA Consulting,

notes that the new regulations will compel parties to resolve disputes through adjudication within 28 days. This 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," he says.

Euan explains that 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 explains. "Parties are required to comply with and promptly implement the adjudicator's decision. In this way, disputes will be dealt with cost-effectively and expeditiously."

Vaughan, together with Professor Maritz, Head of The Department of Construction Economics at the University of Pretoria, has designed, developed and currently facilitates the Certificate Programme in Construction Adjudication presented by the Centre for Continuing Education at the University of Pretoria. This certificate programme, now in its third year, will continue to produce skilled, qualified adjudicators into the South African construction industry.

The Construction Industry Development Board (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. ■