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Payers beware

Many would say The Housing Construction and Regeneration Act 1996 (the Act) has succeeded in its aim to improve cash-flow in the construction industry.

The Local Democracy Economic Development and Construction Act 2009 (the new Act) is due to become law later this year (expected October 2011). Its aim is to improve cash-flow further still.

Payees (persons seeking payment) are the intended beneficiaries. Payers (eg contractors liable to pay sub-contractors) are put to task by the legislation.

So, if you are a contractor, ask yourself:

1. Will my sub-contractor carry out construction work?
2. Has it been agreed that the duration of the work is less than 45 days?

The relevant legislation will apply if your answers are ‘yes’ and ‘no’ respectively. Now ask yourself:

1. Is the sub-contractor entitled to periodic payments?
2. Is it clear when payments will become ‘due’, and when due amounts will be paid?
3. Is the sub-contract free from pre-conditions to payment which relate to:
 - a. the giving of a notice by me?
 - b. payment, certification or performance under contracts with third parties (e.g. the main contract with the client)?
4. Is there provision for the giving of payment and ‘pay-less’ notices as prescribed by the legislation?

If your answer is 'no' to any of the above then your sub-contract may not comply with the legislation, with the result that the Scheme for Construction Contracts Regulations will apply by default. The Scheme is being rewritten and we do not expect a final version until October 2011, but like the current Scheme it will impose terms which could have unwelcome consequences. One such consequence might be the imposition of 28 day periodic payments, despite an intention to pay the sub-contractor after the completion of work stages. If in doubt, have your contracts checked by a professional.

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