



Department for
Business, Energy
& Industrial Strategy

2011 CHANGES TO PART 2 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

A consultation to support a post implementation review

24 October 2017

2011 CHANGES TO PART 2 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

A consultation to support a post implementation review

The consultation and supporting documents can be found on GOV.UK:

<https://www.gov.uk/government/consultations/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996>

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Any enquiries regarding this publication should be sent to: constructionpayment.consultations@beis.gov.uk

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Ministerial Foreword

The Government understands the importance of prompt and fair payment in business, particularly for small and start-up companies. This is why we have taken steps to improve payment performance.

The Government is encouraging best payment practice within the construction sector through its own procurement activities, such as using innovative payment mechanisms like project bank accounts, which speeds up payment to the supply chain and by setting a baseline below which standards should not fall. For example, the Public Contracts Regulations 2015 require all public sector buyers to include 30-day payment terms in new public sector contracts, pay undisputed invoices in 30 days or less and require that these payment terms be passed down the supply chain.

We also understand the importance of transparency in driving culture change which is why we have introduced a requirement to report on payment policies and practices. The “duty to report” requires large companies and limited liability partnerships (LLPs) to report publicly twice a year on their payment practices and performance, including the average time taken to pay supplier invoices. This will put a spotlight on bad practice and lead to improved standards. Voluntary measures such as the Prompt Payment Code and its Construction Supply Chain Payment Charter can also help by setting expectations about good practices, and what standards companies should be seeking to meet.

However, despite examples of positive changes, there is some evidence that there is still scope for improvement in relation to payment practices in the construction sector. Therefore, the Government has decided to launch two consultations, on the effectiveness of the 2011 changes to the “Construction Act” and the contractual practice of cash retention, to assess the extent to which progress has been made towards the adoption of the best practice, and whether or not further intervention is necessary.

We look forward to receiving your responses.



LORD PRIOR OF BRAMPTON
Parliamentary Under Secretary of State
Department for Business, Energy & Industrial
Strategy

LORD PRIOR OF BRAMPTON

Parliamentary Under Secretary of State Department for Business, Energy & Industrial Strategy

Purpose of consultation

As part of its commitment to better regulation, the Government has said it will undertake a non-statutory post implementation review of the 2011 changes to the Housing Grants, Construction and Regeneration Act 1996 (the “Construction Act”)¹. To help inform that review, this consultation seeks information to help establish how effective those changes have been in securing their objectives of:

- increasing transparency in the exchange of information relating to payments
- encouraging parties to resolve disputes by adjudication, where appropriate; and
- strengthening the right to suspend performance.

Issued: 24 October 2017

Respond by: 19 January 2018

Enquiries to: Construction Unit
Department for Business, Energy & Industrial Strategy
1 Victoria Street
London SW1H 0ET

Email: constructionpayment.consultations@beis.gov.uk

¹ The term “2011 changes” refers to the amendments made to Part 2 of the Housing Grants, Construction and Regeneration Act 1996 by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 and changes made to the Scheme for Construction Contracts (England and Wales) Regulations 1998 by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. The impact of these changes was assessed in Impact Assessment Number BIS0146/BIS0093. The changes came into effect in October 2011.

This consultation is relevant to any party to a commercial construction contract as defined by the construction contracts legislation². It is also relevant to adjudicators, arbitrators and lawyers. While this consultation concerns construction specific legislation, it may also be relevant for those with an interest in prompt payment more generally and to insolvency practitioners. The legislation does not apply to residential occupiers.

Scope of consultation

This consultation relates to the law and practices that apply in England.

It is recognised that businesses operate across the UK and that responses may touch on issues relevant to construction practices in Scotland, Wales and Northern Ireland. We will assume that respondees are content for their views to be shared with officials in the relevant Devolved Administration unless otherwise indicated.

² [Sections 104 – 106 of Part 2 of the Housing Grants, Construction and Regeneration Act 1996](#)

Executive summary

Prompt and fair payment has long been an issue in the construction industry and many consider that some practices can be a barrier to investment, productivity improvement and growth in the sector. That is why there has been construction-specific payment and dispute resolution legislation in place for 20 years – Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the “Construction Act”).

Following extensive consultation with the industry, changes to this legislation were introduced in 2011. As part of its commitment to better regulation, the then Department for Business, Innovation and Skills said it would undertake a non-statutory post implementation review to establish how effective those changes had been in securing the objectives of:

- increasing transparency in the exchange of information relating to payments;
- encouraging parties to resolve disputes by adjudication, where appropriate; and
- strengthening the right to suspend performance.

The primary purpose of this consultation therefore is to inform that review of the impact of the 2011 changes.

The consultation also asks some more general questions to allow us to gauge the extent to which the existing construction payment and adjudication framework generally is working.

It also asks a set of questions about the affordability of adjudication, its misuse and its continuing relevance.

This consultation runs in parallel with one on retention payments in the construction industry³.

³ <https://www.gov.uk/government/consultations/retention-payments-in-the-construction-industry>

How to respond

The deadline for responses is **19 January 2018**

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

You can reply to this consultation online at:

<https://beisgovuk.citizenspace.com/im/2011-changes-to-part-2-of-the-housing>

Alternatively, an electronic consultation response form is available. This form can be obtained from:

Construction Unit
Department for Business, Energy & Industrial Strategy
1 Victoria Street
London SW1H 0ET

constructionpayment.consultations@beis.gov.uk

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a representative body please make it clear who the organisation represents and, where applicable, how the members' views were assembled.

You may make printed copies of this document without seeking permission.

BEIS consultations are digital by default but, if required, printed copies of this consultation can be obtained at the above address. Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the [Government's Consultation Principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

enquiries@beis.gov.uk

What happens next

An analysis of the consultation responses will be produced in accordance with best practice guidance.

The consultation analysis, as well as wider engagement, will help inform the Government's next steps.

The consultation outcome will be published within 12 weeks of the close of the consultation or an explanation if this is not possible.

Introduction and context

The legislation

The purpose of the Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the “Construction Act”) is to ensure fair and prompt payment through the construction supply chain and to enable the effective completion of construction projects.

To achieve this, the “Construction Act” sets out a statutory framework for key aspects of construction contracts. The framework:

- provides a statutory right for parties to a construction contract to refer a dispute to adjudication;
- provides a right to interim, periodic or stage payments, making clear when payments become due, their amount and a final date for payment;
- prevents the payer from withholding money from the “sum due” after the final date for payment unless a notice has been provided to the payee informing them of this;
- provides a statutory right for the payee to suspend performance where a “sum due” is not paid, or properly withheld, by the final date for payment; and
- prohibits so called “pay-when-paid” clauses.

Generally the Act requires this framework to be implemented through the construction contract. Where a contract omits to deal with an issue, or does so in a way which does not meet the requirements of the “Construction Act”, the Scheme for Construction Contracts⁴ (the Scheme) applies.

The 2011 changes

Following extensive consultation with businesses in the construction industry and amongst its client base over a period of years⁵, a number of changes to the “Construction Act”⁶ and the

⁴ [The Scheme for Construction Contracts \(England & Wales\) Regulations 1998](#)

⁵ [The Construction Act Review Group report \(Sir Michael Latham, September 2004\)](#)
[Improving payment practices in the construction industry \(DTI, March 2005\)](#)
[Improving payment practices in the construction industry – analysis of the consultation \(DTI, January 2006\)](#)
[Improving payment practices in the construction industry – 2nd consultation \(DTI, June 2007\)](#)
[Improving payment practices in the construction industry – analysis of the 2nd consultation \(BERR, July 2008\)](#)
[The Draft Construction Contracts Bills \(BIS, July 2008\)](#)
[Consultation on Amendments to the Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(BIS, March 2010\)](#)
[The Scheme for Construction Contracts \(England and Wales\) Regulations 1998 – Analysis of consultation responses \(BIS, June 2011\)](#)

Scheme⁷ were made. These changes were commenced in October 2011. The objective was to:

- increase transparency in the exchange of information relating to payments;
- encourage parties to resolve disputes by adjudication, where appropriate; and
- strengthen the right to suspend performance under the contract.

These changes were intended to facilitate better cash flow management and more effective dispute resolution.

Specifically, the changes were intended to:

- remove the restriction on who could issue a payment notice;
- improve the clarity of payment and withholding notices;
- introduce a “fall back” provision – allowing a payee to submit a valid payment notice where a payer has failed to issue one;
- prohibit payment by reference to other contracts;
- introduce a statutory framework for the costs of adjudication;
- remove the requirement for contracts to be in writing for the Act to apply; and
- improve the right of suspension.

Post implementation review

The Government said it would undertake a review 5 years after the introduction of these changes to establish how effective they were proving to be in practice.

To help deliver the review, this consultation paper primarily seeks to test the effectiveness of the amendments to the legislation.

We are also taking the opportunity to ask some more general questions. This will allow us to gauge the extent to which the entire existing framework is working (rather than the more limited question about the impact of the 2011 changes), the extent to which Government intervention is still required and whether the existing approach remains the most appropriate.

Given the findings of the Pye Tait work on retentions⁸ (which form part of the parallel consultation on the practice of cash retention under construction contracts)⁹, we are particularly interested in the cost of the adjudication process and the extent to which that is discentivising its use.

⁶ [Local Democracy, Economic Development and Construction Act 2009, Part 8: Construction Contracts](#)

⁷ [The Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(Amendment\) \(England\) Regulations 2011](#)

⁸ [BEIS Research Paper No.17: Retentions in the Construction Industry October 2017](#)

⁹ <https://www.gov.uk/government/consultations/retention-payments-in-the-construction-industry>

The consultation

This consultation to support the post implementation review of the 2011 changes to part 2 of the Housing Grants, Construction and Regeneration Act 1996, is split into the following sections:

- A) a set of specific questions on the effectiveness of the 2011 changes;
- B) a set of more general questions about the whole framework set out under Part 2 of the Housing Grants, Construction and Regeneration Act 1996, as amended; and
- C) a set of questions about the affordability of adjudication, its misuse and its continuing relevance.

Section A – The 2011 changes

The effectiveness of the 2011 changes to Part 2 of the “Construction Act”

This following section comprises of 3 parts to reflect the changes made in 2011:

- i) those measures which were intended directly to address the costs of adjudication;
- ii) those measures designed to improve the clarity and transparency of the payment framework; and
- iii) those measures to improve the right of suspension.

i) Costs of adjudication

Cost can be a significant disincentive to referring a dispute to adjudication.

The 2011 changes introduced measures intended to tackle what were identified as key factors in driving up the cost of adjudication.

A statutory framework for the costs of the adjudication

Prior to 2011, parties to a construction contract were able to agree that, for example, the referring party should bear all the costs of an adjudication, including the other party’s legal and other fees. This situation could create a clear disincentive for a party to refer a dispute to adjudication. It could also encourage the other party to the dispute to escalate costs – there would be no incentive to minimise them if someone else was obliged to pay them.

The 2011 changes prevented parties from making a contractual agreement on adjudication costs unless it related to the adjudicator’s ability to allocate his own fees and expenses, or was made in writing at the time of referring a dispute to adjudication. The assumption, generally, was that costs would lie where they fell.

The Impact Assessment accompanying the 2011 changes did not consider that this change would generate additional costs – simply reduce the ability to include contractual terms which might act as a disincentive to adjudication.

Conversely it did consider that the overall cost of adjudication might fall, the presumption that each party should carry its own costs would remove any incentive to escalate them beyond that reasonably required to decide the dispute. The Impact Assessment did not quantify this benefit but identified an illustrative annual saving of £396,000 to the industry. This was based on the assumption that 10% of adjudications would be 10% cheaper than they might otherwise have been.

The following questions seek information to help understand whether the cost of adjudication has reduced.

Consultation Question

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| 1. | Over the last year, have any of the contracts you have been party to included contractual agreements on adjudication costs?

(Excluding adjudicator's allocation of his own fees and expenses). |
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Consultation Question

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| 2a. | Do you believe that removing the ability of parties to construction contracts to enter into an agreement on costs in advance of the adjudication, has reduced or increased the average cost of an adjudication by parties to the dispute? |
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Consultation Question

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| 2b. | If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased. |
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Consultation Question

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| 3a. | Do you believe that removing the requirement that contracts should be in writing for adjudication to apply (over the last 5 years), have reduced or increased the average cost of an adjudication? |
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Consultation Question

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| 3b. | If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased. |
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Consultation Question

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| 4a. | How many adjudications have you been involved in over the last 5 years? |
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Consultation Question

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| 4b. | If involved in adjudications over the last 5 years, approximately, what proportion of your total contracts did this represent? |
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Consultation Question

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| 5a. | Do you believe you have been involved in more adjudications over the last 5 years than in the 5 years prior to October 2011? |
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Consultation Question

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| 5b. | Please explain the reasons for your answer to question 5a. |
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Requirement for contracts to be “in writing”

A large number of construction contracts contain orally agreed terms or variations. The 2011 changes also extended the application of the “Construction Act” to oral, or partly oral, contracts.

Alongside making adjudication more widely applicable, a specific benefit of this measure was to remove the ability of a party to challenge the adjudicator’s jurisdiction on the basis that not all the contract was in writing. This was because the consultation revealed such challenges were used as a means of frustrating the process. The 2007 consultation indicated that the incidence of challenge on the basis of not all the contract being in writing was high – around 1/3 of cases. The 2011 Impact Assessment estimated that removing these challenges would deliver a benefit of £20m (10 year Net Present Value - NPV).

The following questions explore the effect of removing the requirement for contracts to be in writing, particularly on the extent of jurisdictional challenge.

Consultation Question

6a.	Over the last 5 years, on approximately what proportion of adjudications that you have been involved in has the adjudicator’s jurisdiction been challenged?
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Consultation Question

6b.	Please list the grounds for those jurisdictional challenges.
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ii) Clarity and transparency of the payment framework

Creating greater certainty about the timing and amount of payment means that construction businesses are able more effectively to manage their cash flow. That clarity can also reduce the costs of adjudication as there will be less uncertainty about the timing and amount of money in dispute.

The 2011 changes introduced a number of measures to create a clearer payment framework.

Removing the restriction on who can serve a payment notice

Prior to 2011, the “Construction Act” required the notice setting out the proposed payment (the payment notice) to be issued by the payer. In certain circumstances this created the need for the payer to serve duplicate notices – for instance where the contract required an architect’s certificate to determine the amount due.

The 2011 changes removed this restriction and allowed the notice to be issued by the payer or a “specified person”, as determined by the contract. The Impact Assessment estimated that removing this duplication would generate a benefit of £63m (10 year NPV).

The Impact Assessment quantified the savings for the following 3 measures in terms of simplifying the adjudication process. That is to say that the changes would reduce the time the adjudicator needs to spend determining the timing and amount of payment where it was not clear from the documentation. The impact assessment identified this benefit to be in the order of £170m (10 year NPV). For the purposes of the impact assessment, this benefit was split equally between them.

The Impact Assessment did not seek to quantify the saving from the ability to manage cash flow more effectively.

Clarity of the content of payment and withholding notices

Prior to the 2011 changes, it was the case that the payment framework (and specifically the relationship between the payment and withholding notices) could fail to provide a clear account of the amount due.

The 2011 changes therefore created a direct connection between the information in the payment notice and that required in the notice to withhold payment. The changes created a framework where a withholding notice should take the form of a revised payment notice and that the payment notice should be issued even where the amount is zero – where the payer felt no money was due for that particular stage or interim payment milestone. This single format intended to create greater clarity and simplicity, though in places additional information was required.

The Impact Assessment identified a £3m cost (10 year NPV) from requiring that the payer issue a withholding notice where previously that would not have been the case – for instance when the payment was subject to abatement.

It also identified a £57m (10 year NPV) benefit by reducing the proportion of the adjudication costs spent determining the amount of the dispute where that was not clear. This is based on a 1/3 share of the overall saving from simplifying the adjudication process.

Introduction of a “fall back” provision

Prior to 2011, it was the case that the payer could simply omit to serve a payment notice, which could create considerable doubt about the timing and amount of the payment.

The 2011 changes introduced a “fall back” provision which allowed the payee to submit a payment notice where the payer had failed to do so. The intention was to establish a clear entitlement to payment, subject to the issue of any subsequent withholding notice. Alongside the obvious benefits in terms of ensuring prompt payment, it was also considered that this measure would reduce the costs of adjudication by providing greater clarity about what was in dispute.

The costs were considered negligible as the payee would already have identified what was owed and what should be paid.

On the basis of a 1/3 share of the overall saving from simplifying the adjudication process, the Impact Assessment identified a £57m benefit (10 year NPV).

Prohibiting payment by reference to other contracts

The “Construction Act” prevents the use of so-called “pay-when-paid” clauses in construction contracts. Prior to 2011 some firms avoided the effect of this by making payment dependent on the issue of a certificate (e.g. the valuation of the work by the client’s agent) under a superior contract.

The 2011 changes closed this loophole by preventing any contract term which made payment conditional on the performance of obligations under a superior contract.

The Impact Assessment identified a £325,000 annual cost to the industry of this measure. This was based on the requirement for a contractor to issue his own certificate where, under the previous legislation, it would have been possible to rely on the certificate issued under the superior contract.

As with the changes above, the Impact Assessment identified a £57m benefit (10 year NPV) by reducing the time spent determining the timing and amount of payment.

The following questions consider 2011 changes designed to improve the clarity and transparency of the payment framework.

Consultation Question

7. Over the last year, what proportion of contracts you are party to, comply (in general) with the 2011 changes to the “Construction Act”?
- (i.e. removing the restriction on service of the payment notice, clarity of content of payment and withholding notices, introduction of a fall-back provision and prohibiting payment by reference to other contracts).
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Consultation Question

8. For those contracts over the last year that you are party to that do not comply (in general) with the 2011 changes to the “Construction Act”, which are the most common changes that are not complied with?
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Consultation Question

9. What proportion of your contracts you have been party to over the last year currently contain the provision for the payment notice to be issued by either the “payee” or “specified person”?
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Consultation Question

10. Over the last year, what proportion of contract payments you have been party to, has a “specified person” certificate served as the payment notice?
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Consultation Question

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| 11. | Over the last year, what proportion of <u>contract payments</u> you have been party to has a “payer’s” payment notice been issued <u>in addition</u> to a “specified person” certificate? |
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Consultation Question

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| 12. | Currently, what is the average cost of issuing a payment notice? |
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Consultation Question

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| 13. | To what extent do you feel that the revised payment notice framework since 2011 has increased or reduced clarity about the timing and amount of payment? |
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Consultation Question

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| 14a. | On average, over the last 5 years, how often have you submitted a “payee” payment notice in the absence of the “payer’s” notice (the so-called “fall-back” notice)? |
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Consultation Question

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| 14b. | If submitted, how effective or ineffective was that “payee” payment notice in establishing the amount due to be paid? |
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Consultation Question

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| 15. | Over the last year, how often have you <u>not</u> received a payment notice or a withholding notice for a contract payment? |
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Consultation Question

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| 16a. | As a proportion of contracts over the last year, how often do you experience contract clauses which make payment dependent on the performance of obligations under other contracts? |
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Consultation Question

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| 16b. | If experienced, does this apply to particular types of contract clause? |
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Consultation Question

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| 16c. | If responded yes to question 16b, what type of contract clauses does this apply to? |
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Consultation Question

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| 17a. | Questions 17a to 17d ask about adjudications you have been involved with in the last 5 years. If you have not been involved in any adjudications, please move to question 18a.

What proportion involved <u>no</u> issue of a payment notice? |
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Consultation Question

17b.	What proportion involved <u>no</u> issue of the payment notice and withholding notice?
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Consultation Question

17c.	What proportion involved payments conditional on the performance under a superior contract?
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Consultation Question

17d.	What proportion involved the issue of a “payee” payment notice in the absence of the “payer’s” notice (the so-called “fall-back” notice)?
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Consultation Question

18a.	Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of disputes you have been involved in?
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Consultation Question

18b.	Please explain the reasons for your answer to question 18a.
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Consultation Question

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| 19a. | Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of adjudications you have been involved in? |
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Consultation Question

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| 19b. | Please explain the reasons for your answer to question 19a. |
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iii) The right to suspend performance

The right to suspend performance can provide an important “sanction” for payees in instances where payment is not forthcoming. Evidence collected through the consultations leading to the 2011 changes suggested that this sanction was not as effective as might be.

The 2011 changes therefore allowed a payee to suspend performance of some (but not necessarily all) obligations under the contract and also required the party in default to meet the reasonable costs of the party suspending performance. The intention was to make it easier for the payee to suspend (or threaten to suspend) performance and increase the incentives on the payer to administer payment in a fair way.

The Impact Assessment identified a £17 million (10 year NPV) benefit. This was based on the number of adjudications which might be saved by the threat of walking out and the expected saving of a challenge given the changes introduced to improve the clarity of the sum due (as outlined in the preceding sections).

The following questions will seek to establish whether the right to suspend performance is being exercised more frequently and the threat of suspension is leading to fewer disputes.

Consultation Question

20. How often have you suspended work over the last 5 years?

Consultation Question

21a. If you have suspended work, is this less or more frequent than the 5 years prior to October 2011?

Consultation Question

21b. Please explain the reasons for your answer to question 21a.

Consultation Question

22. How often have you used the potential to suspend performance to facilitate a payment over the last 5 years?

Consultation Question

23. For your contracts over the last 5 years, how many adjudications do you believe have been prevented due to the right to suspend performance?

Section B – Overall effectiveness

The effectiveness of the “Construction Act” and its ongoing fitness for purpose

Alongside the specific consideration of the 2011 changes, we would also like to use this consultation to “take the temperature” on the effectiveness of the “Construction Act” and its ongoing fitness for purpose.

In particular, the questions will provide information on:

- the complexity of the existing payment framework;
- effectiveness in establishing a clear debt or basis of dispute;
- current contractual payment days;
- current actual payment days;
- the extent to which applications are revised through payment or withholding notices; and
- the frequency of use of adjudication.

Payment framework

The following questions consider the effectiveness of the “Construction Act” and its ongoing fitness for purpose.

Consultation Question

24a.	Taken as a whole, to what extent do you believe the payment framework is clear or unclear?
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Consultation Question

24b.	Please explain the reasons for your answer to question 24a.
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Consultation Question

25a.	To what extent do you think the payment framework establishes a clear or unclear entitlement to payment?
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Consultation Question

25b.	Please explain the reasons for your answer to question 25a.
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Consultation Question

26a.	To what extent do you think the payment framework establishes a clear basis for dispute?
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Consultation Question

26b.	Please explain the reasons for your answer to question 26a.
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Consultation Question

27.	Across all your current contracts, what are the average contractual payment days?
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Consultation Question

28. For the 3 last months' payments, what have been the actual average payment days?

Consultation Question

29. Over the last 3 months, how often have you received the amount set out in your application / or payment notice issued?

Consultation Question

30a. If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done through the payment notice?

Consultation Question

30b. If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done through the withholding notice?

Consultation Question

31. Do you have any further comments on the payment framework?

Adjudication

The following questions explore the frequency of use of adjudication.

Consultation Question

32a.	For what proportion of disputes have you used adjudication over the last 5 years?
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Consultation Question

32b.	Of those adjudication cases (in question 32a), what proportion have gone to court for an enforcement decision?
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Consultation Question

32c.	Has this proportion going to court for an enforcement decision changed over the last 5 years?
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Consultation Question

32d.	Of those adjudication cases (in question 32a), what proportion have gone to court / arbitration for final determination?
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Consultation Question

32e.	Has the proportion of cases that have gone to court / arbitration for final determination changed over the last 5 years?
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Consultation Question

33.	Over the last 5 years, how often have the costs of adjudication prevented you from using it?
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Consultation Question

34a.	Over the last 5 years, how often have you decided not to take a dispute further on other grounds (such as concerns for an ongoing commercial relationship with the other party)?
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Consultation Question

34b.	What were those grounds?
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Consultation Question

35.	Over the last 5 years, how often has the prospect of adjudication been used to encourage you to make a payment you do not believe to be due?
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Consultation Question

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| 36a. | Do you believe there should be greater transparency about the use of adjudication (e.g. by providing a quarterly list of all adjudications)? |
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Consultation Question

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| 36b. | Please explain the reasons for your answer to question 36a, and if yes, any possible solutions. |
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Consultation Question

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| 37. | Do you have any further comments on adjudication? |
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Section C – Affordability of adjudication

To what extent are the costs of adjudication preventing its use

A key purpose of the 2011 amendments was to reduce some of the costs of adjudication so that it would become a more effective remedy in cases of non, partial or late payment. These generally sought to reduce the potential for “mischief” around the process and are discussed above.

In addition to the narrower question about the impact of those amendments, this consultation also asks some more general questions covering:

- the value of disputes referred to adjudication;
- the direct costs of the adjudication process;
- whether adjudication is being used for more complex disputes (such as on final accounts rather than stage payments);
- the extent of the parties’ own costs;
- the extent of ongoing “abuse” of the adjudication process; and
- the scale of other costs – such as legal advice.

Value of dispute

The following set of questions explore the value of disputes for which adjudication is used.

Consultation Question

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| 38. | Over the last 5 years, what have been the highest and lowest value payments claimed in the notice of adjudication in dispute which you have been involved with? |
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Consultation Question

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| 39. | If you have been involved in one or more adjudications over the last 5 years, what was or has been the range of sum claimed in the notice of adjudication? |
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Consultation Question

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| 40. | Over the last 5 years, approximately what proportion of adjudications you have been party to have related to the final account? |
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Consultation Question

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| 41. | At what value of dispute would you decline to take a matter to adjudication? |
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Costs of adjudication

There are a number of costs associated with adjudication. These questions seek to establish where these lie, and their extent.

Consultation Question

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| 42. | In the adjudications you have been involved in over the last 5 years, approximately how often has the Adjudicator reached their decision within 28 days? |
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Consultation Question

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| 43. | Over the last 5 years, what has been the average length of time the Adjudicator has taken to reach a decision? |
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Consultation Question

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| 44a. | Over the last 5 years, what was the average cost per adjudication (excluding any adjudicator's decision) borne by your firm? |
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Consultation Question

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| 44b. | Typically, what proportion of the <u>average adjudication</u> costs borne by your firm did the following represent? (Adjudicator, external legal, external consultant, in house and other fees). |
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Consultation Question

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| 45. | In the last 5 years, approximately how often have you employed the following assistance in preparing a case for adjudication? (Claims consultant, chartered surveyor, expert, legal, other). |
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Consultation Question

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| 46a. | Do you think the changes in 2011 clarifying the time and amount of payment in dispute have reduced the average costs of adjudication (excluding the adjudicator's decision)? |
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Consultation Question

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| 46b. | If you think the average cost of adjudication has changed, please indicate by how much. |
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Consultation Question

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| 46c. | If you have responded “no change”, “increased” or “greatly increased”, please explain your answer. |
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Consultation Question

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| 47. | Have you ever decided not to pursue a contract dispute through adjudication because you expected adjudication to be more costly than the size of the claim being brought? |
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Time taken for adjudication

These questions explore how long it takes to prepare a case for adjudication.

Consultation Question

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| 48. | In the adjudications you have taken over the last 5 years, how long have you taken before issuing the notice of adjudication? |
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Consultation Question

- | | |
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| 49a. | In adjudications taken against you in the last 5 years, approximately how often do you feel that “ambush” tactics have been used – for example, where the party taking a dispute to adjudication takes a long time to prepare a lengthy case to which there is typically 7 days to respond? |
|------|---|
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Consultation Question

49b.	If encountered, can you explain the tactics used?
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Consultation Question

50a.	Taking all the components of the 2011 changes to Part 2 of the “Construction Act” as a whole, do you think they have had a positive / negative impact?
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Consultation Question

50b.	Please explain the reasons for your answer to question 50a.
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Consultation Question

51.	Do you have any other comments that might aid the consultation process as a whole?
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Summary of consultation questions

Consultation Questions

1.	Over the last year, have any of the contracts you have been party to included contractual agreements on adjudication costs? (Excluding adjudicator's allocation of his own fees and expenses).
2a.	Do you believe that removing the ability of parties to construction contracts to enter into an agreement on costs in advance of the adjudication, has reduced or increased the average cost of an adjudication by parties to the dispute?
2b.	If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased.
3a.	Do you believe that removing the requirement that contracts should be in writing for adjudication to apply (over the last 5 years), have reduced or increased the average cost of an adjudication?
3b.	If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased.
4a.	How many adjudications have you been involved in over the last 5 years?
4b.	If involved in adjudications over the last 5 years, approximately, what proportion of your total contracts did this represent?
5a.	Do you believe you have been involved in more adjudications over the last 5 years than in the 5 years prior to October 2011?
5b.	Please explain the reasons for your answer to question 5a.
6a.	Over the last 5 years, on approximately what proportion of adjudications that you have been involved in has the adjudicator's jurisdiction been challenged?
6b.	Please list the grounds for those jurisdictional challenges.
7.	Over the last year, what proportion of contracts you are party to, comply (in general)

	<p>with the 2011 changes to the “Construction Act”?</p> <p>(i.e. removing the restriction on service of the payment notice, clarity of content of payment and withholding notices, introduction of a fall-back provision and prohibiting payment by reference to other contracts).</p>
8.	For those contracts over the last year that you are party to that do not comply (in general) with the 2011 changes to the “Construction Act”, which are the most common changes that are not complied with?
9.	What proportion of your contracts you have been party to over the last year currently contain the provision for the payment notice to be issued by either the “payee” or “specified person”?
10.	Over the last year, what proportion of <u>contract payments</u> you have been party to, has a “specified person” certificate served as the payment notice?
11.	Over the last year, what proportion of <u>contract payments</u> you have been party to has a “payer’s” payment notice been issued <u>in addition</u> to a “specified person” certificate?
12.	Currently, what is the average cost of issuing a payment notice?
13.	To what extent do you feel that the revised payment notice framework since 2011 has increased or reduced clarity about the timing and amount of payment?
14a.	On average, over the last 5 years, how often have you submitted a “payee” payment notice in the absence of the “payer’s” notice (the so-called “fall-back” notice)?
14b.	If submitted, how effective or ineffective was that “payee” payment notice in establishing the amount due to be paid?
15.	Over the last year, how often have you <u>not</u> received a payment notice or a withholding notice for a contract payment?
16a.	As a proportion of contracts over the last year, how often do you experience contract clauses which make payment dependent on the performance of obligations under other contracts?
16b.	If experienced, does this apply to particular types of contract clause?
16c.	If responded yes to question 16b, what type of contract clauses does this apply to?
17a.	Questions 17a to 17d ask about adjudications you have been involved with in the last

Summary of consultation questions

	5 years. If you have not been involved in any adjudications, please move to question 18a. What proportion involved <u>no</u> issue of a payment notice?
17b.	What proportion involved <u>no</u> issue of the payment notice and withholding notice?
17c.	What proportion involved payments conditional on the performance under a superior contract?
17d.	What proportion involved the issue of a “payee” payment notice in the absence of the “payer’s” notice (the so-called “fall-back” notice)?
18a.	Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of disputes you have been involved in?
18b.	Please explain the reasons for your answer to question 18a.
19a.	Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of adjudications you have been involved in?
19b.	Please explain the reasons for your answer to question 19a.
20.	How often have you suspended work over the last 5 years?
21a.	If you have suspended work, is this less or more frequent than the 5 years prior to October 2011?
21b.	Please explain the reasons for your answer to question 21a.
22.	How often have you used the potential to suspend performance to facilitate a payment over the last 5 years?
23.	For your contracts over the last 5 years, how many adjudications do you believe have been prevented due to the right to suspend performance?
24a.	Taken as a whole, to what extent do you believe the payment framework is clear or unclear?
24b.	Please explain the reasons for your answer to question 24a.
25a.	To what extent do you think the payment framework establishes a clear or unclear

Summary of consultation questions

	entitlement to payment?
25b.	Please explain the reasons for your answer to question 25a.
26a.	To what extent do you think the payment framework establishes a clear basis for dispute?
26b.	Please explain the reasons for your answer to question 26a.
27.	Across all your current contracts, what are the average contractual payment days?
28.	For the 3 last months' payments, what have been the actual average payment days?
29.	Over the last 3 months, how often have you received the amount set out in your application / or payment notice issued?
30a.	If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done <u>through the payment notice</u> ?
30b.	If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done <u>through the withholding notice</u> ?
31.	Do you have any further comments on the payment framework?
32a.	For what proportion of disputes have you used adjudication over the last 5 years?
32b.	Of those adjudication cases (in question 32a), what proportion have gone to court for an enforcement decision?
32c.	Has this proportion going to court for an enforcement decision changed over the last 5 years?
32d.	Of those adjudication cases (in question 32a), what proportion have gone to court / arbitration for final determination?
32e.	Has the proportion of cases that have gone to court / arbitration for final determination changed over the last 5 years?
33.	Over the last 5 years, how often have the costs of adjudication prevented you from using it?

Summary of consultation questions

34a.	Over the last 5 years, how often have you decided not to take a dispute further on other grounds (such as concerns for an ongoing commercial relationship with the other party)?
34b.	What were those grounds?
35.	Over the last 5 years, how often has the prospect of adjudication been used to encourage you to make a payment you do not believe to be due?
36a.	Do you believe there should be greater transparency about the use of adjudication (e.g. by providing a quarterly list of all adjudications)?
36b.	Please explain the reasons for your answer to question 36a, and if yes, any possible solutions.
37.	Do you have any further comments on adjudication?
38.	Over the last 5 years, what have been the highest and lowest value payments claimed in the notice of adjudication in dispute which you have been involved with?
39.	If you have been involved in one or more adjudications over the last 5 years, what was or has been the range of sum claimed in the notice of adjudication?
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43.	Over the last 5 years, what has been the average length of time the Adjudicator has taken to reach a decision?
44a.	Over the last 5 years, what was the average cost per adjudication (excluding any adjudicator's decision) borne by your firm?
44b.	Typically, what proportion of the <u>average adjudication</u> costs borne by your firm did the following represent? (Adjudicator, external legal, external consultant, in house and other fees).
45.	In the last 5 years, approximately how often have you employed the following

Summary of consultation questions

	assistance in preparing a case for adjudication? (Claims consultant, chartered surveyor, expert, legal, other).
46a.	Do you think the changes in 2011 clarifying the time and amount of payment in dispute have reduced the average costs of adjudication (excluding the adjudicator's decision)?
46b.	If you think the average cost of adjudication has changed, please indicate by how much.
46c.	If you have responded "no change", "increased" or "greatly increased", please explain your answer.
47.	Have you ever decided not to pursue a contract dispute through adjudication because you expected adjudication to be more costly than the size of the claim being brought?
48.	In the adjudications you have taken over the last 5 years, how long have you taken before issuing the notice of adjudication?
49a.	In adjudications taken against you in the last 5 years, approximately how often do you feel that "ambush" tactics have been used – for example, where the party taking a dispute to adjudication takes a long time to prepare a lengthy case to which there is typically 7 days to respond?
49b.	If encountered, can you explain the tactics used?
50a.	Taking all the components of the 2011 changes to Part 2 of the "Construction Act" as a whole, do you think they have had a positive / negative impact?
50b.	Please explain the reasons for your answer to question 50a.
51.	Do you have any other comments that might aid the consultation process as a whole?

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