

NOTICE 482 OF 2015**DEPARTMENT OF PUBLIC WORKS****CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT, 2000**

The Minister of Public Works intends to amend the Construction Industry Development Regulations, published under GN 692 in GG 26427 of 9 June 2004, as amended. The draft amendment regulations annexed hereto are accordingly published for public comment.

Interested persons are invited to submit their written comments on the proposed regulations to the Director-General of the Department of Public Works within 60 days of the date of publication of this notice by-

- (a) posting it to: Department of Public Works, Private Bag X65, Pretoria, 0001;
- (b) delivering it by hand at: Central Government Building, Corner Madiba Drive & Bosman Streets, Pretoria, 0001; or
- (c) e-mailing it to: gugu.mgwebi@dpw.gov.za.

Comments must be marked for the attention of Gugu Mgwebi.

Comments received after the closing date may not be considered.

T.W NXESI (MP)
MINISTER OF PUBLIC WORKS

DEPARTMENT OF PUBLIC WORKS**AMENDMENT OF REGULATIONS ISSUED IN TERMS OF THE
CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ACT, 2000
(ACT NO. 38 OF 2000)**

The Minister of Public Works has under section 33 of the Construction Industry Development Board Act, 2000 (Act No.38 of 2000) (“the Act”), made the Regulations set out in this Schedule.

SCHEDULE**1. Definitions**

In these Regulations, unless the context otherwise indicates, every word takes the meaning as defined in the Act, and –

“the Regulations” means the Construction Industry Development Regulations, published under Government Notice No. R. 692 published in Government Gazette No. 26427 of 9 June 2004, as amended by Government Notice No. R. 1333 published in Government Gazette No. 26991 of 12 November 2004, Government Notice No. R. 751 published in Government Gazette No. 27831 of 22 July 2005, Government Notice No. R. 842 published in Government Gazette No. 29138 of 18 August 2006, Government Notice No. R. 1121 published in Government Gazette No. 30510 of 23 November 2007, Government Notice No. R.1224 published in Government Gazette No. 31603 of 14 November 2008, and Government Notice No. R464 published in Government Gazette No. 36629 of 2 July 2013.

2. Amendment of Regulation 1 of the Regulations

Regulation 1 of the Regulations is amended by the insertion of-

- (a) the following definitions before the definition of “approved” :

“adjudication” means the process contemplated in Part IV C of the Regulations;

“**adjudicator**” means a person who is by virtue of his or her training and experience competent to undertake adjudication of a dispute in terms of these Regulations and who has been identified by an accredited association contemplated in Regulation 26L;

(b) the following definitions after the definition of “class of construction works”:

“**construction works related contract**” means a contract that relates to goods and services where-

(a) goods mean-

- (i) materials and components to form part of any building, structure or work arising from construction works; or
- (ii) plant or materials supplied in any manner for use in connection with the carrying out of construction works; and

(b) services mean work contemplated in the following acts:

- (i) the Project and Construction Management Professions Act, 2000 (Act No. 48 of 2000);
- (ii) the Engineering Profession Act, 2000 (Act No. 46 of 2000);
- (iii) the Architectural Profession Act, 2000 (Act No. 44 of 2000);
- (iv) the Quantity Surveying Profession Act, 2000 (Act No. 49 of 2000);
- (v) the Valuers Profession Act, 2000 (Act No. 47 of 2000); or
- (vi) the Landscape Architectural Profession Act, 2000 (Act No.45 of 2000).

“**contract**” for the purpose of Parts IV B and C of these Regulations means a construction works contract as defined in the Act or a construction works related contract;

(c) the following definition after the definition of “programme ”:

“**Standard for Adjudication**” means the Standard for Adjudication issued in terms of these Regulations”.

3. Amendment of the heading of Part IV of Regulations

The heading of Part IV of the Regulations is substituted for the heading “**PART IV A**”.

4. Insertion of Part IV B and Part IV C

The following Parts are inserted into the Regulations after Part IV A:

“PART IV B**PROMPT PAYMENT****26A. Application and definition**

(1) This Part applies to a contract, whether reduced to writing or not, undertaken by private sector and public sector clients, excluding a home building contract as contemplated in the Housing Consumer Protection Measures Act, 1998 (Act No. 95 of 1998).

(2) This Part applies to any contract, despite the provisions of any of those contracts.

(3) For the purposes of adjudication in terms of this Part and Part IV C, a “day” means a calendar day.

26B. Prohibition of conditional payment provisions

(1) For the purpose of this Regulation, “payer” means any party to a contract who, in terms of that contract has the obligation to pay another party to that contract or a contract relating to that contract.

(2) Subject to subregulation (3), a contract may not contain any provision making payment to a contractor, service provider or a supplier conditional on the payer receiving payment from a third person.

(3) A provision making payment under a subcontractor’s, service provider’s or supplier’s contract conditional on the payer receiving payment from a third person is enforceable where, in relation to the payer-

- (a) a court order to begin business rescue proceedings has been made in terms of section 131 of the Companies Act, 2008 (Act No. 71 of 2008); or
- (b) becoming insolvent as contemplated in section 2 of the Insolvency Act, 1936 (Act No.24 of 1936).

26C. Entitlement to progress payments

(1) Notwithstanding anything to the contrary in any contract, any person who has carried out any construction works, or supplied any goods or rendered any services under that contract is entitled to progress payment.

(2) If the contract does not provide for regular and reasonable intervals at which progress payments must be made, a contractor, supplier or service provider may submit monthly invoices or tax invoices in relation to construction works completed, services rendered or goods delivered.

- (3) The amount of progress payment to which a person is entitled under a contract is —
- (a) the amount calculated in accordance with the terms of that contract;
or
 - (b) if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied by the person under that contract.
- (4) Construction works carried out, or goods or services supplied in terms of a contract are to be valued —
- (a) in accordance with the terms of that contract; or
 - (b) if that contract does not contain a provision providing for such valuation, having regard to the matters specified in subregulation (5).
- (5) For the purpose of subregulation (3) (b), construction work carried out, or goods or services supplied in terms of a contract are to be valued, —
- (a) having regard to —
 - (i) the contract price for the construction work, goods or services;
 - (ii) any other rate or price specified in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price specified in the contract, is to be adjusted by a specific amount; or
 - (b) in the absence of the matters referred to in sub-paragraphs (i), (ii) and (iii), then having regard to the rates or prices prevailing in the building and construction industry at the time the construction work was carried out, or the goods or services were supplied;
 - (c) if any part of the construction works, goods or services is defective, having regard to the estimated cost of rectifying the defect; and
 - (d) in the case of materials or components that are to form part of any building, structure or works arising from the construction works on the basis that the only materials or components to be included in the valuation are those that have become or, on payment, will become the property of the party for whom the construction work is being carried out.

26D. Date of liability for payment

- (1) The date on which payment becomes due and payable is the date determined in the contract, which may not be later than 30 days after the date on which the contractor,

service provider or supplier has submitted an invoice or tax invoice to the client or employer in relation to construction works, goods or services completed or delivered in accordance with that contract or in accordance with Regulation 26C (2).

(2) Where an invoice or tax invoice is not paid within a period of 30 days, a client or employer must in addition to the amount that had become due and payable, pay interest to the contractor, service provider or supplier at the repurchase rate determined by the Reserve Bank in terms of section 10 (2) of the Reserve Bank Act, 1989 (Act No. 90 of 1989), plus 6%.

(3) Any interest paid in accordance with subregulation (2) must be disclosed in the financial statements of the client or employer concerned.

26E. Notice of intention to withhold payment

(1) A party to a contract may not withhold payment or part of that payment, unless he or she has given an effective notice of intention to withhold that payment, or part of that payment.

(2) A party to contract may not withhold payment in terms of that contract unless there is a reasonable ground in terms of the contract on which that withholding of payment is justified.

(3) The notice referred to in subregulation (1) is considered to be a notice of intention to withhold payment if it complies with the provisions of this Regulation.

(4) To be effective, such a notice must—

- (a) specify the amount proposed to be withheld and the ground for withholding payment; or
- (b) if there is more than one ground, specify each ground and the amount attributable to that ground;
- (c) be given in accordance with Regulation 26I; and
- (d) be given within five days from the date of receipt of the invoice or tax invoice.

(5) If the contractor, service provider or supplier is not satisfied with the reasons provided by the client or employer for withholding payment, or where the contractor, service provider or supplier is of the opinion that the client or employer has not complied with these Regulations, that contractor, service provider or supplier must declare a dispute in terms of the contract and must refer that dispute for adjudication.

(6) Where a dispute is referred to an adjudicator, a client or employer may not withhold payment -

- (a) where a dispute relates to a technical or legal matter, for the part of the works, deliverables or goods that is not in dispute, even though

the works, deliverables or goods form part of a unit within a works schedule;

- (b) where the dispute relates to the invoice or tax invoice, for the part of the invoice that is not in dispute.

(7) Where an adjudicator decides that an amount must be paid in part or in full, that amount must be so paid within ten days of the decision of the adjudicator.

26F. Right to suspend performance for non-payment

(1) Where payment due under a contract is not paid in full by the date for payment and no effective notice to withhold payment has been given, the person to whom the payment is due has the right (without prejudice to any other right or remedy) to suspend performance of his or her obligations under that contract.

(2) The right to suspend performance may not be exercised without first giving the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount referred to in the notice in terms of subregulation (2).

(4) Any period during which performance is suspended in pursuance of the right conferred by this Regulation is disregarded in computing any contractual time limit, or the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

26G. Validity of contract

Subject to Regulation 26H, the failure to comply with a provision of this Part does not render a contract invalid.

26H. Prohibition

Any provision contained in a contract that excludes or waives any provision of this Part is null and void.

26I. Service of notices

(1) The notice must be served at the addresses of the parties recorded in the contract or if not so recorded, the parties must agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the contract or for any of the purposes of this Part.

(2) If or to the extent that there is no agreement as referred to in subregulation (1) the following provisions apply:

- (a) a notice or other document may be served on a party to the contract by any effective means.
 - (b) if a notice or other document is addressed, pre-paid and delivered by post to the addressee's last known principal business address, that notice or other document is considered to have effectively been served.
- (3) For the purpose of this regulation, "address" includes an e-mail address and in the case of a notice or other document having been sent to the last known business e-mail address of the person concerned, that notice or document is considered to have been effectively served.
- (4) This regulation does not apply to the service of documents for the purposes of legal proceedings, other than adjudication and contractual notices.

PART IV C

ADJUDICATION

26J. Right to refer disputes to adjudication

- (1) Every contract must provide for an adjudication procedure, which must substantially comply with these Regulations and if that contract does not contain such a procedure, or in the case of a verbal contract, the provisions of this Part and the Standard for Adjudication apply to that contract.
- (2) A party to a contract may refer a dispute arising from that contract to adjudication according to a procedure substantially complying with this Part and for the purpose of this Regulation "dispute" includes any difference between the parties in relation to the contract, whether it relates to a technical or legal matter, an invoice or a tax invoice.
- (3) A dispute must be referred to an adjudicator in accordance with the adjudication procedure contemplated in subregulation (1).
- (4) Notwithstanding a contract having an adjudication procedure that substantially complies with these Regulations, that contract must—
- (a) enable a party at any time to give notice of adjudication of his or her intention to refer a dispute for adjudication;
 - (b) provide a timetable with the object of securing the appointment of an adjudicator and referral of the dispute to him or her within seven days of the notice of adjudication;

- (c) require the adjudicator to reach a decision within 28 days from the date of the referral notice as prescribed in the Standard of Adjudication or as agreed on by the parties, which agreement may not extend the date of the decision beyond 42 days after the date of the referral notice; and
- (d) enable the adjudicator to take the initiative in ascertaining the facts and the law.

26K. Status of adjudication

(1) Any dispute contemplated in Regulation 26J must be referred for adjudication as contemplated in these Regulations.

(2) Where an adjudicator has made a decision and either party to the dispute is not satisfied with that decision, that party may, subject to subregulation (3), refer that dispute to arbitration as contemplated in the Arbitration Act, 1965 (Act No. 42 of 1965), or take that decision on review as contemplated in section 6 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

(3) The decision of the adjudicator is binding and the parties to a contract must give effect to that decision even though either party intends to take action as contemplated in subregulation (2).

(4) Where the decision of the adjudicator has been overturned by the court or an arbitrator, the parties are entitled to restitution in relation to any performance in terms of the decision of the adjudicator as referred to in subregulation (3), in accordance with the decision of the arbitrator or the court, as the case may be.

26L. Appointment of the adjudicator

(1) The Board must accredit an adjudicator nominating body or bodies, not being a natural person and not being a party to the dispute, which holds itself out publicly as a body that will select an adjudicator when requested to do so by a referring party, and the Board may maintain a list of those adjudicators.

(2) The appointment of an adjudicator must be made in terms of the Standard for Adjudication.

(3) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as adjudicator unless the act or omission is in bad faith, and an employee or agent of the adjudicator is similarly protected from liability.

(4) The objection by any of the parties to the dispute after the appointment of an adjudicator, against that appointment, does not render the appointment of that adjudicator invalid and it does not render the decision of that adjudicator invalid.

26M. Powers and duties of adjudicator

- (1) The adjudicator must—
 - (a) act impartially in carrying out his or her duties and must do so in accordance with any relevant terms of the contract and shall reach his or her decision in accordance with the applicable law in relation to the contract;
 - (b) avoid incurring unnecessary expense; and
 - (c) adhere to the rules of natural justice.
- (2) The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and must decide on the procedure to be followed in the adjudication and in particular he or she may—
 - (a) request any party to the contract to supply him or her with such documents as he or she may reasonably require, including, if he or she so directs, any written statement from any party to that contract supporting or supplementing the referral notice and any other copies of, or relevant extracts from that contract, and such other documents as the referring party intends to rely upon;
 - (b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom;
 - (c) meet and question any of the parties to the contract and their representatives;
 - (d) subject to obtaining any necessary consent from a third party or parties where necessary, make such site visits and inspections as he or she considers appropriate, whether accompanied by the parties or not;
 - (e) subject to obtaining any necessary consent from a third party or parties where necessary, carry out any tests or experiments;
 - (f) obtain and consider such representations and submissions as he or she requires and, provided he or she has notified the parties of his or her intention, appoint experts, assessors or legal advisers;
 - (g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and
 - (h) issue any other directions relating to the conduct of the adjudication.
- (3) The parties must comply with any request or direction of the adjudicator in relation to the adjudication.

(4) If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his or her powers, or fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may—

- (a) continue the adjudication in the absence of that party or of the document or written statement requested;
- (b) draw such inferences from that failure to comply as the circumstances may, in the adjudicator's opinion, justify; and
- (c) make a decision on the basis of the information before him or her, attaching such weight as he or she considers fit to any evidence submitted to him or her outside any period he or she may have requested or directed.

(5) In addition to paragraphs (a) to (c) above, the adjudicator may impose a financial penalty, as he or she considers appropriate, on any party who, without showing sufficient cause, fails to comply with any request, direction or timetable of the adjudicator made in accordance with his or her powers, or fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication.

26N. Advisor and representative

(1) Any party to a dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he or she considers appropriate.

(2) Where an adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.

26O. Confidentiality

The adjudicator and any party to the dispute may not disclose to any other person any information or document provided to him or her in connection with the adjudication and which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.

26P. Period within which adjudicator must make decision

- (1) The adjudicator must reach his or her decision not later than—
 - (a) 28 days after receipt of the referral notice prescribed in terms of the Standard for Adjudication; or

(b) such period exceeding 28 days after the referral notice as the parties to the dispute may, after receipt of the giving of that notice, agree in terms of Regulation 26J (4) (c).

(2) Notwithstanding the provisions of subregulation (1), and if the parties agree, the period of adjudication may be extended beyond the period referred to in Regulation 26J (4) (c) where the adjudicator undertakes multiple adjudications under the same contract.

(3) Where the adjudicator fails, for any reason, to reach a decision in accordance with subregulation (1) or (2), any of the parties to the dispute may serve a new notice in accordance with the adjudication procedure prescribed by the Standard for Adjudication for serving a notice to refer a matter for adjudication, requesting the appointment of a new adjudicator.

(4) Insofar as it is reasonably practicable, the adjudicator who failed to reach a decision and the parties to the dispute must supply the newly appointed adjudicator with copies of all documents, which were available to that adjudicator.

(5) As soon as possible after he or she has reached a decision, the adjudicator must deliver a copy of that decision to each of the parties to the contract.

(6) In the absence of any directions by the adjudicator relating to the time for performance of his or her decision, the parties must comply with the decision of the adjudicator immediately on delivery of the decision to the parties.

26Q. Manner in which adjudicator must make decision

(1) The adjudicator must consider any relevant information submitted to him or her by any of the parties to the dispute and must make available to them any information to be taken into account in reaching his or her decision.

(2) The adjudicator must decide the matters in dispute and he or she may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or, which are matters under the contract, which he or she considers are necessarily connected to the dispute, including, but not limited to—

- (a) opening up, revising and reviewing any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive;
- (b) deciding that any of the parties to the dispute is liable to make a payment under the contract and, subject to Regulation 26E, when that payment is due and the final date for payment; and
- (c) having regard to any term of the contract relating to the payment of interest and subject to Regulation 26D (2), decide the circumstances

in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

(3) If requested by one of the parties to the dispute, the adjudicator must provide reasons for his or her decision.

(4) The adjudicator may on his or her own initiative or on the application of a party, correct his or her decision so as to remove a clerical or typographical error arising by accident or omission.

(5) A correction of a decision must be made within five days of the delivery of the decision to the parties.

(6) As soon as possible after correcting a decision in accordance with this subregulation, the adjudicator must deliver a copy of the corrected decision to each of the parties to the contract.

(7) Any correction of the decision forms part of the decision.

(8) The adjudicator must file his or her decision with the Board and those decisions must be retained by the Board with the purpose contemplated in sections 5 (1) (e) and 5 (6) (b) of the Act.

26R. Effect of adjudicator's decision

(1) Notwithstanding any intention to take the decision of an adjudicator on review or on arbitration, the parties must give effect to the adjudicator's decision within 10 days from the delivery of that decision.

(2) The decision of an adjudicator constitutes a liquid document or in the case where it orders the payment of an amount of money, a liquidated amount as contemplated in Rule 32 (1) of the High Court Rules.

(3) Where a dispute involves the payment of a sum of money and the amount does not exceed the jurisdiction of the Magistrate's Court and effect has not been given to the adjudicator's decision within 30 days after the date of that decision, the decision of the adjudicator is considered to be a certificate as contemplated in section 57 (2) (c) of the Magistrate's Court Act, 1944, (Act No.32 of 1944), and the clerk of the court must enter judgement as contemplated in section 57 (2) (c) (i) of that Act.

5. Transitional provision

These Regulations do not apply to any contract that has been entered into before the commencement date.

6. Short title and commencement

These Regulations are called the Construction Industry Development Amendment Regulations, 2015, and commence on the date of publication.