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DEPARTMENT OF PUBLIC WORKS

Central Government Building

Corner Madiba Drive & Bosman Street

Pretoria

Attention: Gugu Mgwebi

PER EMAIL

Email address: gugu.mgwebi@dpw.gov.za

27 July 2015

Dear Sir or Madam:

COMMENTS – PROPOSED AMENDMENT TO CIDB REGULATIONS, PUBLISHED UNDER GN 692 IN GG26427 OF 9 JUNE 2004, AS AMENDED – PROMPT PAYMENT REGULATIONS PUBLISHED IN GN38822 ON 29 MAY 2015

INTRODUCTION

1. MDA Consulting (Pty) Limited is a firm of commercial practitioners and South Africa's only specialist construction adjudication practice. Our firm has canvassed numerous stakeholders with regards to the proposed Prompt

Payment Regulations, reviewed such regulations and we provide the below comments for your consideration.

GENERAL COMMENTARY

2. Whilst we support the intended purpose of the proposed Prompt Payment Regulations we feel that in certain respects such regulations:

2.1. Could be improved; and / or

2.2. Are overly prescriptive.

3. If certain areas of the proposed Prompt Payment Regulations are not suitably amended prior to being legislated there could be a number of unintended consequences.

4. We anticipate a strong opposition being raised to reg. 26B, especially from employers utilising project finance. We would suggest that in assessing such opposition you consider the addition of a regulation empowering the minister to issue an exclusion order, similar to the power found in section 106A of the Housing Grants, Construction and Regeneration Act 1996, to the effect that certain projects (note – not contracts), may on application properly motivated, be excluded from the regulations (or part thereof).

5. These aspects are dealt with in our detailed commentary below.

DETAILED COMMENTARY – PART IV B

6. It is unclear whether the exemption at regulation 19 (as appears in the current regulations) applies to the proposed Prompt Payment Regulations. We suggest that this be clarified by the inclusion of the following wording at the end of reg. 26A(1):

> "… *and any contract referred to in regulation 19*."

7. It is not clear as to the extent to which the proposed Prompt Payment Regulations are implied into contracts. More specifically are the regulations implied *in toto* or only to the extent that a contract fails to comply with the regulations? It appears that the latter may be intended but needs clarification. We would suggest that the following be added to reg. 26A(2):

> "*To the extent that a contract fails to comply with this Part, the offending and / or omitted provision / s of such contract shall be replaced by relevant regulation / s appearing in this Part.*"

8. The reference to "*regular and reasonable*" in reg. 26C(2) is open to interpretation and consequently potential dispute. This regulation is fundamentally aimed at implying an entitlement to progress payments where there is no agreement to such payments in the contract. With this in mind we

propose that the words "*for regular and reasonable intervals at which*" be deleted and replaced with the word "*that*".

9. In regard to reg. 26D in its present form the wording of the proposed regulation is of concern. In South African construction payment practice a contractor becomes entitled to payment after submitting an application for payment which is the engineer assesses and certifies an amount in response to the contractor's application. Once an amount is assessed the contractor issues a tax invoice in respect if the certified amount. Under this practice the certified amount becomes due, owing and payable within a period agreed to between the parties following on the contractor's tax invoice. In its current form reg. 26 D is problematic and in our view should be revised to remove the ambiguity and reflect the aforementioned practice.

10. Reg. 26E(5) is unnecessarily prescriptive in providing that the "*contractor, service provider or supplier must declare a dispute… and must that dispute for adjudication.*"

10.1. It may be that if dissatisfied with a withholding notice, a contractor may prefer an alternative form of dispute resolution – such as mediation. This regulation would prohibit parties attempting alternative forms of dispute resolution prior to embarking upon adjudication.

10.2. Further the prescriptive wording found in the regulation is incongruous with the provisions of reg. 26J(4)(a) which allows a party to refer a dispute to adjudication "*at any time*".

10.3. We suggest that the words "*must*" be replaced with "*may*".

11. Reg. 26F seems incomplete in that no clear provision is made for the consequence following such suspension. We suggest that provision be made for a consequent entitlement to additional payment and extension to the time for completion of the works.

DETAILED COMMENTARY – PART IV C

12. The time periods provided for in reg. 26J(4)(c) cannot cater for:

12.1. Larger, more complicated disputes – such as final account disputes; and

12.2. The existing adjudication provisions in the international standard form contracts recommended by the CIDB (FIDIC clause 20 and NEC3 Option W1).

In order to address this, the default position should be catered for in the regulations and the parties to the dispute should be entitled to agree to longer time periods. This is the position adopted by the section 108(2) (c) and (d) in

the Housing Grants, Construction and Regeneration Act 1996. The wording in the regulations should be changed as follows:

> "*(c) require the adjudicator to reach a decision within 28 days from the referral of the dispute to him or her or such longer period as may be agreed by the disputing parties after the dispute has been referred.*
>
> *(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the referring party.*
>
> *(e) enable the adjudicator…*"

13. We would also suggest that a requirement in reg. 26(J)(4), namely the immunity of the adjudicator.

14. Please note that the wording in reg. 26J(4)(c) "*the referral notice as prescribed in the Standard of Adjudication*" is inappropriate due to the fact that the Standard for Adjudication only applies where a contract fails to substantially comply with Part IV C. Therefore the definition and description of what constitutes a "*referral notice*" may be different in the contract concerned.

15. The wording of reg. 26K(2) is concerning.

15.1. Firstly there should be a time period within which a party should notify its dissatisfaction with an adjudicator's decision. If not so notified the decision should become final and binding. If there is no such provision and adjudicator's decision is open to challenge for a significant period of time (at least three years but perhaps longer).

15.2. Dissatisfaction should only be referred to arbitration where arbitration is agreed to in the contract. The current wording grants, and perhaps obliges, the dissatisfied party the right to refer such dissatisfaction to arbitration, regardless of the underlying contract. This is akin to creating statutory arbitration which we do not believe is the intention of the Regulations.

15.3. The reference to a review under section 6 of PAJA is also ill conceived and entirely inappropriate. PAJA is intended and designed for decisions made by public authorities during the course of their public duties. It is not designed for decisions made by impartial third parties during the course of a dispute resolution process such as adjudication. In as much as PAJA would be inappropriate for arbitration awards, it is also inappropriate for adjudication decisions.

15.4. We would suggest that the wording of this regulation be redrafted along the lines of what is proposed below:

"*Should either party be dissatisfied with a decision of an adjudicator, such party may issue a notice of dissatisfaction, detailing the reasons and basis for such dissatisfaction. The decision of an adjudicator shall be binding on the parties, regardless of any such notice of dissatisfaction, unless and until overturned by agreement, a court or an arbitrator's award (where the parties have agreed to arbitration).*

Should no notice of dissatisfaction be issued within 28 days of the date of the adjudicator's decision, then such decision shall become final and binding."

16. The wording of reg. 26(L)(2) is too prescriptive. Again the contract may contain a provision which relates to the appointment of the adjudicator and should the contract substantially comply with this part, then an appointment in terms of the contract should be permitted.

17. The reference to a "*financial penalty*" in reg. 26M(5) is problematic. Any such penalty automatically falls under the Conventional Penalties Act which could potentially stimulate further litigation between the adjudicator and the party against whom the financial penalty is imposed. Further, the imposition of a financial penalty may be regarded as a form of punitive damages, which is inconsistent with South African law. We would propose that this reference be omitted in its entirety, alternatively changed so that the adjudicator has the power to award costs against the defaulting party.

18. The exclusion of jurisdiction in respect of decisions or certificates which are final and conclusive should be removed. Lawyers for employers and contractors drafting amendments to contracts will simply amend those provisions to make decisions and certificates final so as to exclude adjudication. Furthermore the application of these regulations to disputes is broad (see reg. 26(J)(2)) and disputes regarding final decisions and certificates should not be excluded.

19. Reg. 26R(2) and (3) are unnecessary. The courts have robustly enforced adjudicator's decisions to date. These two regulations seek to limit (and indeed complicate) the route which a party may take to enforcement and we would strongly suggest that they be removed.

CONCLUSION

20. Should you wish to discuss any aspect of these comments please feel free to contact us. We are also more than willing to appear before any committee to provide comment and assist in drafting the Regulations.

Yours faithfully

THE DIRECTORS

MDA CONSULTING (PTY) LIMITED