Submission No.36

ABLE ADJUDICATION
The ANA of Choice
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The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
Brisbane Qld 4000

[redacted]

16th June 2014

By email: thlgc@parliament.qld.gov.au
By Post

Dear Sir/Madam,

Building and Construction Industry Payments Act (BCIPA) Amendment Bill 2014 – Committee Request for Submissions

A. Standing order 131 of the Standing Rules and Orders of the Legislative Assembly referral to the Transport, Housing and Local Government Committee
B. BCIPA Amendment Bill 2014 dated 21 May 2014

Introduction

This correspondence is in reference to requirements of Reference A and the invitation by the Transport, Housing and Local Government Committee (THLCC) from any interested persons and organisations to make submissions on the Reference B (Amendment Bill).

Able Adjudication Pty Ltd is an Authorised Nominating Authority under the current BCIP Act and offers the following submissions from a position of knowledge and understanding of the Building and Construction Industry Payments Act 2004 (QLD) and the associated issues.

Summary

Able Adjudication Pty Ltd requests the committee to consider reviewing the BCIPA 2014 Amendment Bill on the following points that are not listed in any order of priority:

1. Complex Claims definition
2. Penalty for not declaring an application "complex"
3. Standard & Complex Claim classification
4. Lessening the Burden for Respondents
    4.1 Payment Claim Initiative
    4.2 Payment Schedule Initiative
5. Excessive Timeframes
    5.1 Adjudication Response Initiative
6. Service of adjudication documents
7. Abolishment of the Authorised Nominating Authority (ANA)

1. Complex Claims definition

The Amendment Bill provides for a classification regime on a distinction between a "standard" claim and a "complex" claim which states that anything not classified as a "complex" claim is a "standard" claim.

A standard claim is one that is not a complex claim. A complex claim is defined as:

(a) any payment for an amount more than $750000 or, if a greater amount is prescribed by regulation, the amount prescribed;

(b) a latent condition under the relevant construction contract;

(c) a time-related cost under the relevant construction contract.

Issues for consideration questions

- And/or Criteria?
- What is a Latent condition claim?
- What is a Time-related condition claim?

And/or Criteria?

The Amendment Bill defines the different criteria for a complex claim as "Or" provisions.

It is suggested this definition will classify unnecessarily too many applications as "complex" and that the better outcome would be achieved to have complex claims based on latent "and/or" time related

conditions with a monetary value as an "and" criteria. This will make the definition clear and not all encompassing as the current definition is framed and will capture claims which are truly "complex".

What is a Latent condition claim?

Latent Conditions has been defined as *"A latent condition arises when the physical conditions of the site are materially different to the conditions which could reasonably have been expected by the contractor when the contract was executed".*[1]

Most subcontractors do not know or understand what a latent condition is even if there are latent conditions provided in the construction contract. The definition needs more clarification.

What is a Time-related condition claim?

Time related claims generally can be defined as claims based on delay claims related to EOT claims which could potentially relate to a myriad of scenarios.

Again most subcontractors do not know or understand what a time-related claim is even if they are specified under the construction contract. The definition needs more clarification

Many subcontractors / consultants are engaged on an hourly rate (time related) basis and many have an entitlement under their contract to can claim interest on outstanding payments (time related). Under the Amendment Bill all these subcontractors / consultants will have all these claims classified as a "complex" claim. It is suggested clarification is needed to exempt some common time-related claims.

Submission – It is suggested:

1. Complex claims are defined as a claim greater than $750,000 (inclusive of GST) **and** includes a claim for a:
   - latent condition; **and/or**
   - time related
2. Latent conditions should be specified more precisely;
3. Time-related claims should be specified more precisely and there should be exemptions specified to exclude claims relating to claims on time related rates, interest and retentions.

2. Penalty for not declaring an application "complex"

The Amendment Bill at Clause 15 a new provision at s25(7) which states:

(7) If an adjudicator decides the payment claim for the adjudication application has been incorrectly identified as a standard payment claim, the adjudication application is taken to be withdrawn

This is a penalty provision which penalises a claimant for incorrectly identifying the type of application.

Most subcontractors don't even understand the difference between a payment claim and a tax invoice. Most are not legal practitioners, project managers or contract administrators and they just want to build things and get paid for what they do. They won't be able to understand the difference between a standard claim and a complex claim so the expectation within the Amendment Bill that claimants (and indeed respondents) will understand is not agreed.

Submission –it is suggested the:

1. Amendment Bill Clause 15 s25(7) should be deleted

3. Standard & Complex Claim Classification

The legislation needs to be simple to understand and use. The Amendment Bill has taken a concept of natural justice and has created a nightmare of twists and turns that will fail everyone.

Rather than letting the parties decide on the classification of a claim, it is much better to have an independent expert to classify the payment claim and set the rules for the adjudication process.

That person is obviously the adjudicator.

Submission –It is suggested the following simplified provisions should be considered:

1. the default classification of the payment claim is "standard" unless otherwise classified by the claimant;
2. the respondent may make a proposal within a payment schedule that the payment claim is a "complex" claim;

[1] Earthmover and Civil Contractor Article Dec 2010 – Matt Bradbury McCullough Robertson Lawyers

3. the claimant may disagree with the respondent's "complex" claim classification and may submit a counter argument in the adjudication application as to why the payment claim is not a complex claim;
4. If a claimant classifies the claim as "complex" then the adjudicator is bound to decide the claim as "complex" (as per Amendment Bill Clause 15 s24(6));
5. the adjudicator will make a decision as to the classification of the claim and advise the parties of this decision within the adjudicator's acceptance notice;

4. Lessening the Burden for Respondents

Introduction

The Wallace Report spends a fair amount of time on the "burden" on respondents to manage payment claims under the Act and that the difficulty to know which claim may eventuate in an adjudication application may mean wasted resources in gathering information from experts etc to qualify the reasons.

It is noted that the Amendment Bill restricts the timelines for the claimant to make payment claims and the courts have already made clarifications which further restrict the claimant's opportunity to claim. Therefore the potential for "ambush" claims to be received has already been significantly reduced.

Additionally, of the potentially billions of claims for payment served each year less than 800 proceed to adjudication under the current legislation.

It is acknowledged that a very real problem maybe that the respondent does not know which of the many claims they receive will proceed to adjudication. So it is logical to alleviate the problem at the time of the claim for payment and not after the adjudication application by identifying upfront the payment claims that may proceed to adjudication.

The Amendment Bill does not provide provisions which will identify claims for payment that may proceed to adjudication, other than the current endorsement, but attempts to mitigate surprises (ambushes) and provide natural justice with a system which is too wieldy and complex and which will not really solve the problems espoused in the Wallace Report but will in turn frustrate and confuse industry.

So what simple provisions can be introduced into the legislation which will identify claims for payment that may proceed to adjudication and reduce the purported "burden" to respondents?

4.1 Payment Claim Initiative

One simple initiative is that the Payment Claim should be served using a statutory approved form.

Subcontractors who just simply endorse their invoices will not be making payment claims under the Act. Subcontractors who just use standard form claims under the construction contract will not be making payment claim sunder the Act. Adhoc emails with an invoice attached will not be compliant.

It is suggested the concerns raised within the Wallace Report as to which claim is captured under the legislation disappears and will dispel the vast majority of concerns raised and reduce the purported "burden" immediately

The claimant will have to consciously download the latest statutory form and attach invoices, contract forms etc to trigger the legislation. The respondent can rest easy if they don't receive the form but are immediately put on alert when they do receive the form.

It is suggested, if this one proposal is adopted, the number of payment claims under the legislation will immediately reduce and the billions of claims for payments without the statutory approved form will be processed by respondents when they want to and without any urgency on time to do so.

Respondents will be alerted of those few claims that may proceed to adjudication immediately and therefore expenditure of resources in addressing payment claims overall will be significantly reduced.

Respondents can immediately from the date the payment claim has been received start considering what material they will need to provide reasons for withholding payment. They will be able to start engaging consultants to undertake expert reports and start correlating project documentation for the payment schedule and the adjudication response.

Respondents can also start immediately to negotiate settlement for the benefit of the project and contract relationships.

A counter argument against introducing an approved form is that claimants will just automatically use the form as the norm when claiming payment.

This can be simply overcome by the Registrar updating the statutory form in the regulation with a new fresh revision on a regular basis. It will encourage claimants to concentrate on accounting issues and

negotiation first before reverting to the legislation to solve disputed claims. It is much better to inconvenience the Registrar a few times a year rather than burdening the industry on a daily basis.

This initiative will save respondents a huge amount of resource expenditure processing claims and firmly bring the respondent's attention to claims which have a high risk to proceed to adjudication.

Submission – It is suggested:

1. A payment claim should be in the form of a regulated approved statutory payment claim which is reviewed and updated by the Registrar on a 3 monthly basis

4.2 Payment Schedule Initiative

If the payment claim initiative (paragraph 4.1) is adopted the "ambush" claim scenario has been significantly reduced and respondents will be focussing their resources on the significantly reduced number of claims under the legislation. Therefore the respondent should be able to provide reasons for withholding payment in the s18 payment schedule and not rely on new reasons in the adjudication response.

It is however agreed that the respondent may not have at the time of the payment schedule the full detail of the reasons they are pronouncing and they may need time to correlate that information. It is therefore suggested the legislation clearly states that the respondent must provide all the reasons for withholding payment in the payment schedule and put the claimant on notice that "new material" will be provided in the adjudication response in support of those reasons for withholding payment only.

If this initiative is taken then the current 10 business days (2 weeks) for a s18 payment schedule appears to be satisfactory for all classification of claims since the respondent has the knowledge up front at the time of receiving the statutory form payment claim that the matter has a significant chance to proceed to adjudication and gives the respondent time to gather information leading up to the adjudication response.

Taking into account 10 business days for the payment schedule, 10 business days for the application, 5 business days for the adjudicator acceptance and 15 business days for the adjudication response, the respondent has 30 business days (6 weeks) to gather the information for submission in the response.

The respondent should be allowed to introduce new material (not new reasons) within an adjudication response if the respondent specifies the reason for withholding payment in the s18 payment schedule and states the form and type of new material that will be included in the adjudication response in support of the reason. Example might be expert reports, reconciliation reports, statutory declarations etc

Submission – It is suggested:

1. S18 payment schedules should remain at 10 business days for all application types
2. For S18 payment schedules only the respondent may state (in the payment schedule) an intention to introduce new material in the adjudication response in support of any or all reasons for withholding payment and in doing so must state the form and type of the new material it intends including;
3. New material can be defined as documentation not previously served on the claimant prior to the payment claim date.

5. Excessive Timeframes

Introduction

Currently, where there is a s18 payment schedule, the maximum timeframe for completion of an adjudication decision is **35 business days (7 weeks)** from the date the payment claim is received.

Under the Amendment Bill, where there is a s18 payment schedule, the maximum timeframe for completion of a standard adjudication decision is **40 business days (8 weeks)** and appears to be **105 business days (21 weeks)** for a complex adjudication decision.

It is suggested that the **additional 70 business days (16 weeks)** for the complex adjudications is disappointing and unnecessary.

Simplicity to enable industry to use the legislation should remain as a high priority. The current Amendment Bill is complex, convoluted and open to interpretation creating a high risk of criticism and challenge.

It is strongly suggested the Amendment Bill needs to be substantially simplified and amended to ensure the Amendment Bill timeframes provide an effective and efficient dispute resolution to ensure cash flow is maintained and projects are completed on time and within budget.

5.1 Adjudication Response initiative

If the payment claim initiative (paragraph 4.1) and the payment schedule initiative (paragraph 4.2) are adopted there is no need to provide the overcomplicated scheme in the Amendment Bill for the additional times for rights to reply and extensions of time.

The Payment Schedule Initiative (paragraph 4.2) provides 30 business days (6 weeks) to correlate the new material (not new reasons) and submit the adjudication response. This should be more than adequate for even the very large applications.

If a respondent has decided to not serve a s18 payment schedule then the claimant has to wait for the due date for payment and then serve another notice of its intention to proceed to court (s20) or adjudication (s21). The respondent has effectively gained potentially another 4-5 weeks to put their material together.

It is suggested there should be a penalty for not submitting a s18 payment schedule. That penalty can be a reduction in time to submit an adjudication response and the removal of the entitlement to submit new material in the adjudication response.

Does the claimant need the same amount of time for the right to reply? The answer is probably "yes" for natural justice reasons especially where new material is provided and therefore it is suggested the claimant's right to reply should be unilateral across all applications and be given a time period that reflects the various time periods allowed for the adjudication response.

Additionally by introducing the payment schedule initiative (paragraph 4.2) there is no need to allow the respondent the opportunity to submit new reasons and as such no need to allow extension of time to the claimant and respondent in dealing with new reasons introduced into the adjudication response.

The payment claim initiative (paragraph 4.1), the payment schedule initiative (paragraph 4.2 and the adjudication response initiative (paragraph 5.1) are offered as a practical option to potentially save 40 business days (8 weeks) of additional time for complex claims and to resolve payment disputes without severely compromising the intent of the Amendment Bill and the Wallace Report.

Submission – It is suggested:

1. Adjudication response times should be set at:
   - Where there is a s18 payment schedule - 10 business days for a standard claim and 15 business days for a complex claim;
   - Where there is a s20 or s21 payment schedule - 5 business days for a standard claim and 10 business days for a complex claim;
2. Where the payment schedule was served under s18 of the legislation the respondent may introduce new material in the adjudication response in support of a reason for withholding payment where in the s18 payment schedule the respondent had stated the form and type of new material that the respondent intended introducing in the adjudication response
3. No new material is allowed to be introduced where the respondent did not state in the s18 payment schedule the form and type of new material that the respondent intended introducing in the adjudication response
4. No new material is allowed if that material does not specifically relate to a reason for withholding payment expressed in the payment schedule;
5. No new material is allowed where the payment schedule was served under s20 or s21 of the legislation
6. the claimant has a right to reply to the adjudication response within the same equivalent period of time set for the adjudication response.
7. There should be no provision allowing the respondent an opportunity to seek extension of time to submit an adjudication response;
8. There should be no provision allowing the claimant an opportunity to seek extension of time to submit a right to reply to the adjudication response
9. The adjudicator is to complete his/her decision within 10 business days for a standard claim or 15 business days for a complex claim from the receipt of the claimant's right to reply or from the date the claimant's right to reply period expires, whichever is the earlier date.

6. Service of adjudication documents

The Amendment Bill has attempted to resolve an issue which has been a problem for some time in that the claimant does not receive the adjudication response. The Amendment Bill at Clause 14 s24A (8) states:

> *(8) A copy of an adjudication response must be served on the claimant no more than 2 business days after it is given to the adjudicator.*

This does nothing if respondents continue to serve the adjudication response outside the timeframe.

It is probably better to simply allow the adjudicator to serve the adjudication response onto the claimant where non compliance occurs and allow the adjudicator to charge the respondent for that service. It is also important to the adjudicator, from a jurisdictional view point, that all documents are served correctly as required by the legislation. The Amendment Bill falls short on this point in that it specifies timeframes and responsibility but no consequences. This is unhelpful and confusing.

Submission – It is suggested new provisions are added to clause 15 s25 "Adjudication Procedures":

1. That where a document has been served onto the adjudicator by a party but was not served onto the other party the adjudicator may serve the document received onto the other party outside time restrictions specified under the legislation (if any) and that service will be deemed to be compliant under the legislation.

7. Abolishment of the Authorised Nominating Authority (ANA)

The Wallace Report has made recommendations which have been accepted by the government and regardless of what one thinks of those recommendations there was a process in place for the Wallace Report which appears to have been followed with due diligence.

However the same cannot be said for the strategy undertaken in developing the Amendment Bill provisions abolishing ANAs under the BCIP Act.

The Wallace Report did not recommend the abolishment of ANAs yet in implementing the recommendations government has made a critical service delivery decision on what they think is the best strategy to achieve the Wallace Report recommendations without apparently undertaking any further open and transparent type analysis to ascertain whether the decision taken represented the best option available or that the current system was so fundamentally flawed to warrant the abolishment of ANAs.

The QLD Government has provided a dispute resolution process under the legislation and therefore it is the government's responsibility to ensure the procurement of the adjudication service delivery is defendable and undertaken in an environment that fits the Queensland Procurement Policy delivering the maximum benefits for the QLD government and community.

In relation to the legislation that means identifying and implementing the most effective and efficient service delivery system to cater for the $875M per annum of disputes under the legislation.

The Amendment Bill indicates, on the face of it, a hasty decision making / procurement process to implement a strategy to meet the Wallace Report recommendations.

There has been no demonstration that appropriate due diligence has been followed or that a full comprehensive, open and transparent analysis through an independent procurement process has been undertaken to consider and evaluate all the options available to achieve the best outcome for the operation of the legislation and its impact on the QLD community.

Submission – It is suggested:

1. that the QLD Government refrains from abolishing the Authorised Nominating Authority under the Amendment Bill and retains the current Authorised Nominating Authority (ANA) system until a comprehensive, open and transparent review of the current adjudication service provision under the BCIP Act has been undertaken with the view to implement the most appropriate adjudication service delivery available to government.

Thank you for requesting submissions to the Amendment Bill and please do not hesitate contacting me on [redacted] or [redacted] if you require any clarifications to these submissions.

Yours Faithfully

[redacted]

Jon Facey
Managing Director
Able Adjudication Pty Ltd