



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

Summary of responses



OGL

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Foreword

Nadim Zahawi, Parliamentary Under Secretary of State, Minister for Business and Industry

Specific construction payment and dispute resolution legislation has been in place for over 20 years, following its introduction in Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the 'Construction Act'). Its purpose is to create a framework for fair and prompt payment through the construction supply chain, and a resolution procedure for disputes.



Changes to this legislation were introduced in 2011, following extensive consultation with industry. As part of its commitment to better regulation, BEIS undertook a non-statutory Post-Implementation Review to establish how effective those amendments had been. To inform the review, a consultation was conducted. This also provided an opportunity to gauge the extent to which the existing construction payment and adjudication framework is working.

I am grateful to all those who took time to respond to the consultation and to participate in meetings and other discussions held on this issue, for the valuable contribution that they have made to this review. Responses were received from a range of organisations, from professional advisors, adjudicators, construction clients and large contractors, to smaller firms within the supply chain.

This document contains a summary of the responses and wider stakeholder engagement during the open consultation period and analysis. The information provided during the review will be used to inform the development of the Post-Implementation Review.

A handwritten signature in black ink, appearing to read 'N. Zahawi'. The signature is fluid and cursive, written on a plain white background.

Introduction

Three pieces of legislation work together to create a statutory framework for construction contracts and dispute resolution through adjudication in England:

1. Part 2 of the [Housing Grants, Construction and Regeneration Act 1996](#) (the 'Construction Act'). Amended by Part 8 of the [Local Democracy, Economic Development and Construction Act 2009](#).
2. The [Scheme for Construction Contracts \(England and Wales\) Regulations 1998](#). Amended by the [Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(Amendment\) \(England\) Regulations 2011](#).
3. The [Construction Contracts \(England and Wales\) Exclusion Order 1998](#). Amended by the [Construction Contracts \(England\) Exclusion Order 2011](#).

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 Contracts (the 'Scheme') is implied in the contract. In accordance with powers provided to the Secretary of State by the Construction Act, the Exclusion Order (as amended) has excluded the application of Part II of the Act to specified descriptions of construction contract. [Annex A](#) provides an outline of the payment framework under the statutory provisions.

Following extensive consultation with businesses in the construction industry and amongst its client base over a period of years, a number of changes to the Construction Act and the Scheme were made. These changes were commenced in October 2011. The objectives were to:

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

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

The Government said it would undertake a Post-Implementation Review (PIR) 5 years after the introduction of these changes to establish how effective they were proving to be in practice.

Conducting the consultation exercise

On 24 October 2017, the Government published a consultation paper which sought information to support a non-statutory Post-Implementation Review of the 2011 amendments to the Construction Act¹.

The consultation was open for 12 weeks and closed on the 19 January 2018. Over this period additional stakeholder engagement was also conducted.

The consultation set out the background to the legislation, the commitment to review the impact of the 2011 amendments and to gauge the extent to which the existing construction payment and adjudication framework is working.

Questions were set out in three sections and explored:

- Effectiveness of the 2011 amendments;
- Views on the overall framework set out under Part 2 of the Housing, Grants, Construction and Regeneration Act 1996 as amended; and
- Affordability of adjudication.

This consultation ran in parallel with another which sought information on [retention payments in the construction industry](#).

¹ The term “2011 amendments” 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.

Summary of respondents

A total of 54 responses to the consultation document were received via Citizen Space or the electronic response form. Citizen Space is the online portal for government consultations. A breakdown of these respondents is set out below:

Organisation Type:

- 21 - Individuals
- 13 - Construction and civil engineering businesses
- 6 - Other (includes consultants, arbitrators and adjudicators)
- 6 - Business representative organisations / trade bodies
- 6 - Legal representatives
- 2 - Declined to answer.

Organisation type was self-classified. The above include 13 adjudicators and dispute resolution professionals, which have been included within the categories of 'individuals' and 'other'. More detailed analysis identified respondents from 19 contractors and contractor associations, as well as 13 legal representatives amongst the respondent / organisation types.

Company Size: (number of direct employees)

- 13 - Large (>250)
- 10 - Medium (50 – 249)
- 3 - Small (10 – 49)
- 17 - Micro (<10)
- 11 - Declined to answer.

Supply Chain Tier Type: (of the construction and civil engineering businesses only)

- 4 - Tier 1 (Designers and contractors with direct contract to ultimate client)
- 5 - Tier 2 (Designers, contractors and suppliers with a sub-contract with the tier 1 contractor)
- 1 - Tier 3 (Designers, contractors and suppliers with a sub-contract with a tier 2 sub-contractor)
- 2 - Other
- 1 - Declined to answer.

Most respondents indicated that they had direct experience of the statutory framework for construction contracts and construction dispute resolution.

The consultation also welcomed other comments and evidence. A further 5 submissions were received. These included formal submissions from representative associations and individuals.

A list of respondents is provided in [Annex B](#).

Wider stakeholder engagement was conducted during the consultation with trade associations, organisations, individuals and other central government departments and agencies. Additional stakeholder engagement was also conducted during the analysis period, to supplement and clarify any issues arising from the consultation responses. For example, the use of payment notices by payers, jurisdictional challenges in adjudication and the cost of issuing payment notices.

This document provides a summary of direct responses to the consultation questions, written submissions and discussions with stakeholders during the consultation. It also includes any additional points arising out of the analysis.

In the following sections an initial summary is provided of the direct responses to the specific consultation questions (received via Citizen Space). This is supplemented by wider comments, evidence from the written submissions and stakeholder meetings. Percentages may not add up to 100% due to rounding.

The consultation questions are provided in [Annex C](#).

There are several points to take into account when reading this summary of responses and considering the responses to individual questions. Firstly, the summary reflects the views of the 54 respondents to the consultation on Citizen Space, and whilst these expressed a range of views, these are not necessarily reflective of the wider industry. Secondly, respondents also self-selected, and the distribution of these amongst different client and contractor groups is also not necessarily reflective of the sector. Thirdly, when reporting the quantitative results from Citizen Space, all respondents to the survey are accorded equal weight regardless of the size or nature of the organisation or whether they were made by individuals.

As a result, this summary should be treated as indicative, rather than fully representative of the range of views within the industry. We have also received a number of responses which did not answer all of the questions in the consultation or did not follow the format of the consultation document. These responses have been taken account of in this summary, in order that it accurately reflects the input of respondents to the consultation.

Summary of responses

Section A – The 2011 changes

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

The consultation sought views on the effectiveness of the Construction Act amendments 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.

Costs of adjudication

The 2011 amendments sought to prevent parties from making a contractual agreement on adjudication costs (unless it conferred powers on the adjudicator to allocate his own fees and expenses between the parties or was made in writing after the adjudication notice). The aim was to reduce 'Tolent'² contract clauses, so that parties would be responsible for their own adjudication costs and in turn remove the incentive to escalate costs beyond what is reasonably needed. These clauses could reduce the 'right to adjudication' for all, as small businesses may be precluded from instigating adjudication when faced with paying both parties' costs. The consultation sought information to help understand whether the costs of adjudication have reduced.

- Of the 44 responses in Citizen Space, 66% indicated that they had not been party to contracts over the last year with agreements on adjudication costs. 34% had been party to contracts which included contractual agreements on adjudication costs.
- The reverse holds true when considering contractor and contractor association responses. Of the 17 contractors and contractor associations who responded, 47% indicated that they had not been party to contracts over the last year with agreements on adjudication costs. 53% had been party to contracts which included contractual agreements on adjudication costs.
- Of the 49 responses in Citizen Space, 76% believed there had been no change in the average cost of an adjudication due to this amendment. 20% felt there had been a decrease in cost, whilst only 4% thought it had increased.

² Clauses in construction contracts which determine which party will pay adjudication costs regardless of the outcome. Either the referring party or a named party irrespective of which party seeks the adjudication. So called by virtue of *Bridgeway Construction Ltd v Tolent Construction Ltd* 2000.

- A number of views were provided:
 - it was difficult to attribute and apportion any change in the average adjudication costs due to this or any other specific amendment to the Construction Act;
 - 'Tolent' clauses were unacceptable and the amendment to the Construction Act reduced the incidence of such clauses. However, some believed these clauses were not that prevalent in the first place;
 - s108A of the Construction Act was poorly drafted and created scope for ambiguity, with some debate on whether the section actually removed the parties' ability to enter into an agreement on costs in advance of an adjudication;
 - the average levels of adjudication costs have not changed as a result of s108A. Only the party responsible for paying has changed, with potential empowerment to spend what they consider to be appropriate; and
 - further clarity would be helpful on the interaction between the [Late Payment of Commercial Debts \(Interest\) Act 1998](#) and the Construction Act with respect to the recovery of costs.

The 2011 amendments extended the application of the Construction Act to oral and part oral contracts. The aim was to extend the application of the Act to more contracts within construction and reduce the number of challenges to the jurisdiction of the adjudicator. The consultation sought information to help understand whether the costs of adjudication have reduced.

- Of the 47 responses in Citizen Space, 57% indicated that removing the requirement that contracts should be in writing for adjudication to apply had created no change to the average cost of an adjudication. 28% believed costs had greatly reduced or reduced and 15% held the opinion that costs had risen.
- Of the 4 business representative organisation / trade body responses, 25% believed that there had been no change to the average cost of an adjudication, 50% believed that costs had reduced or greatly reduced and 25% believed that costs had increased.

The consultation sought information on the frequency of adjudications over the last 5 years compared to the 5 years prior to the 2011 amendments.

- Of the 35 responses in Citizen Space who were in business prior to October 2011, 49% had been involved in more adjudications, whilst 40% had seen no change. 11% had experienced a reduction in the frequency of adjudications.
- Of the 3 business representative organisation/trade body responses, all reported being involved in more adjudications.

The question attracted considerable comment and variation in views both in Citizen Space and wider evidence.

- Those who believed there were fewer adjudications cited that the payment provisions, although more complicated, had concentrated the minds of parties on complying with the Construction Act. Others suggested that more disputes were settled prior to adjudication to avoid rising costs, unfavourable decisions and to preserve commercial relationships. Adjudication, it was suggested, is used when all other options are exhausted.
- Conversely those who felt there were more adjudications believed that this was in part due to the extension of the provisions of the Construction Act to cover oral contracts. In addition, over the period since 2011, confidence had increased in this method of dispute resolution, leading to more complex and higher value disputes using adjudication rather than arbitration or litigation. This was in part due to its successful operation, and compared to lengthy and costly court proceedings, adjudication being a more attractive proposition to resolving disputes.
- Many raised the emergence of ‘smash and grab’ adjudications³ following the 2011 amendments. However, some respondents believed the frequency of this kind of dispute has now reduced, in part due to increased awareness by the ‘payer’ of the consequences of not serving a payment notice or ‘pay less’ notice and a body of case law.
- Those who believed there had been no change in the frequency of adjudications pointed to data. Construction output verses referrals to adjudication shows no evidence that the number of adjudications has changed significantly since 2011. The number of adjudications has grown steadily since its trough in 2011, now approaching pre-2008 recession level, but still below its peak in the early 2000s (see Figure 1)⁴. The 2011 changes did not address the underlying payment culture of the industry but did address some poor practices and widened the net to enable more disputes to be resolved by the adjudication process.

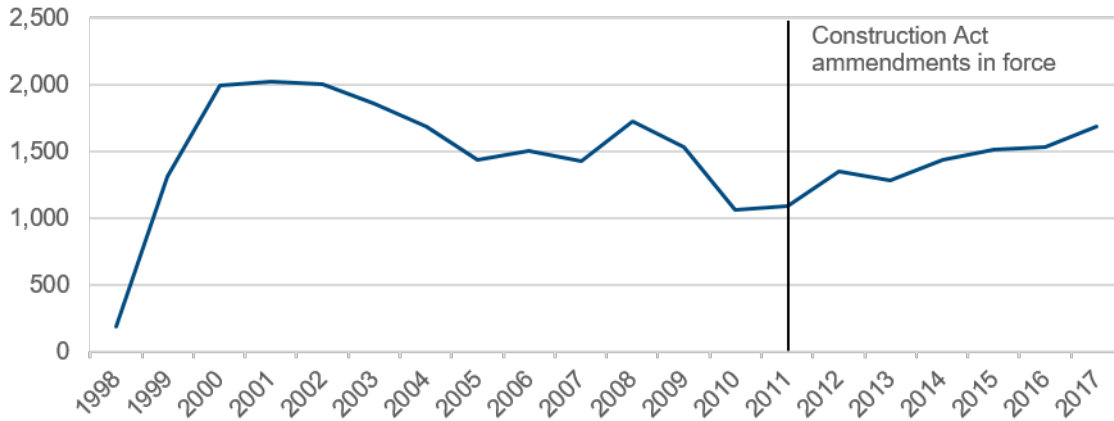
³ Failure by the paying party to issue a valid payment notice and / or pay less notice, thereby entitling the contractor or subcontractor to payment of the full amount set out in its application (the ‘notified sum’), whether or not that sum was an accurate reflection of the value of work performed.

⁴ [Report no.17, Adjudication Society, January 2019](#)

Figure 1: Number of adjudication increasing since 2011

Referrals to adjudication

Number from May each year to the following April



Source: Adjudication Society

Requirements for contracts to be in writing

Construction contracts frequently contain orally agreed terms or variations, in particular for small businesses. For disputes, it had become common practice for a party to challenge an adjudicator’s jurisdiction on the basis that not all the contract was in writing. It was a tactic to frustrate the process and increase costs. The 2011 amendments extended the application of the Construction Act to oral and partly oral construction contracts and in turn extended the right to adjudication. The intention was to reduce the number of challenges to a party’s ability to refer a dispute to adjudication.

The consultation explored the effect of removing the requirement for contracts to be in writing, particularly on the extent of challenges to an adjudicator’s jurisdiction to deal with an adjudication.

- Of the 42 responses in Citizen Space, 45% thought that over 75% of the adjudications that they had been involved in included jurisdictional challenge.
- Many respondents stated that the incidence of jurisdictional challenge is a standard part of a defence submission. A number of grounds for jurisdictional challenge were cited, including:
 - dispute not crystallised (dispute does not exist because the claim made has not been formally rejected yet);
 - no contract;
 - not a construction contract as defined;
 - dispute was in relation to excluded operations;
 - more than one dispute;
 - incorrect appointment of the adjudicator;

- adjudication notice or referral not served correctly;
 - previous adjudication on the same dispute (or part of); and
 - breach of natural justice.
- This was echoed in written submissions and wider stakeholder engagement. Some felt this was to introduce strategic delay or an automatic procedure for the legal profession to defend against potential professional indemnity claims. It was suggested that many challenges were without merit and serve only to create unnecessary cost and delay, working against the original intention of adjudication as an expedient dispute resolution mechanism. However, no sanctions exist for spurious challenges.
 - Many respondents within Citizen Space, written submissions and wider stakeholder engagement noted that the repeal of s107 of the Construction Act (provisions being applicable only to agreements in writing) had extinguished one of the common challenges to the jurisdiction of the adjudicator. Many felt this was a beneficial step, not only removing one of the main grounds parties regularly relied on to challenge the jurisdiction of the adjudicator but extended the number of users of the Construction Act, in particular to small businesses. Several business representative associations indicated that many SME members' contracts are not formally signed, and consist of either oral, or oral and partly written contracts.
 - Several respondents noted that removing the requirement for contracts to be in writing, removed a source of legal argument and therefore reduced adjudication costs. However, some suggested an oral contract or contract variation as part of a dispute can increase adjudication costs due to the intermediary exercise to establish the agreed terms of a contract based on evidence, before the primary substantive dispute can be decided on.
 - It was also suggested that the abolition of s107 was a retrograde step as disputes on oral contracts were not suitable for a summary procedure and provided opportunity for fraudulent claims.

Clarity and transparency of the payment framework

The consultation considered the 2011 amendments designed to improve the clarity and transparency of the payment framework.

Compliance in general with the 2011 changes to the Construction Act

- Of the 46 responses in Citizen Space, 57% said that during the last year over 75% of contracts they are party to comply (in general) with the 2011 changes to the Construction Act. A further 28% said 50 to 75% contracts complied.
- Several examples were provided where contracts do not comply with the Construction Act and 2011 amendments. The most common were:

- 'pay when paid' – linking the release of money by reference to another contract. Retention payments were frequently subject to this practice;
- lack of clarity of content and timing of payment notices; and
- adjudication costs to be paid by the sub-contractor.
- Wider stakeholder discussions regularly highlighted:
 - standard contracts were rare, with clause amendments rife. This inevitably leads to increased complexity of the payment framework. Respondents often saw use of out of date contract templates;
 - that the 'payer' often looked to push the legislative framework to its limit, with contract clauses often linking payment provisions to an event which the 'payer' controls (e.g. calling a meeting) rather than a neutral or 'payee' triggered event. Provision of a VAT invoice as an additional pre-condition of payment was common too;
 - subtle 'flexes' in the contract to ensure the 'payee' received longer payment terms than the 'payer' to help control cash flow and pass risk down the supply chain;
 - cross-project set off was regularly seen as a standard clause within contracts. This was commonly challenged by the 'payee'; and
 - compliance with the 'spirit' of the Construction Act was often lost.

Removing the restriction on who can serve a payment notice

The payment notice was required to be issued by a party to the contract (the payer). In certain circumstances this created duplicate notices – for instance where the main contract also required an architect's certificate to determine the amount due. The 2011 amendments allowed the payment notice to be served by the 'payer' or 'specified person' (such as an architect or contract administrator) as determined by the contract. The intention was to prevent unnecessary duplication. The consultation sought to establish the provision in contracts and actual use.

- Of the 41 responses in Citizen Space, 49% said that of all the contracts they had been party to over the last year, less than 5% contained the provision for the payment notice to be issued by either the 'payee' or 'specified person'. 20% said between 5 to 20%, and 32% said more than 20% of contracts.
- Some Citizen Space respondents and other stakeholders engaged through wider stakeholder discussion provided clarification on the practice:
 - that it was rare for the contract to specify the 'payee' as a 'specified person';
 - most main contracts between the client and main contractor will specify the 'payer' or a 'specified person' – typically more than 80% of the time;

- inclusion of a 'specified person' within a sub-contract was limited; and
- duplication of the payment notice is now limited.

Clarity of the content of payment and withholding notices

The 2011 amendments sought to increase the clarity of the payment framework, through requiring the 'withholding' or 'pay less' notice to take the form of a revised payment notice, and be issued even when the amount is zero. The new single format was intended to create greater clarity for the 'payee' on what they will be paid and how it is calculated, although it might require the 'payer' to issue a 'pay less' notice where previously that would have not been in the case – for instance when the payment was subject to abatement⁵.

- Of the 51 responses in Citizen Space, 51% said that the revised payment framework had increased or greatly increased clarity about the timing and amount of payment. 29% stated it had reduced or much reduced, and 20% saw no change.
- Of the 13 responses from legal representatives, 62% believed the changes had increased or greatly increased clarity. 23% believed clarity had been reduced or much reduced, and 15% reported they believed the 2011 amendments had neither increased nor reduced the level of clarity.
- However, this contrasted with the 12 responses from adjudicators and dispute resolution professionals. Fewer believed the changed had increased clarity, with 58% believing clarity had been reduced or much reduced.
- A number of comments were received through Citizen Space, written submissions and through wider stakeholder engagement. These included:
 - the payment framework has in general improved clarity, determined the amount to be paid at the due date and in turn defined the amount in dispute;
 - however, the framework has layers of complexity, and is less comprehensible and user friendly for many;
 - whilst the framework improved clarity on the timing and amount of payment, amendments to standard forms of contracts, together with voluminous documents can introduce conflicting provisions and confusion;
 - potentially no real change as a 'payer' may choose to not issue a payment notice, instead relying on the payee's application or fall-back notice and then will issue a valid 'pay less' notice within the payment cycle. Therefore, only providing a clear account of the amount due near to the final date of payment; and

⁵ 'Abatement' in construction is a defence against a claim for payment where it is argued that the amount being claimed is incorrect, usually because of defects in the work. If the defect is proven, the original amount due may be reduced by the same amount as the reduction in value of the work due to the defect.

- the payment provisions are dense and as a result, unclear and difficult to apply. This led to significant case law. Judgements have now given clearer interpretation but for many it is still difficult to understand.
- During wider discussions with construction contractors it was indicated that in order to avoid issuing a withholding notice many contractors address payment deductions at the initial payment notice.

Introduction of a 'fall back' provision

A 'payer' could simply omit to serve a payment notice, generating uncertainty for the 'payee' on what they were going to be paid. The 2011 amendments introduced a 'fall back' provision. In the absence of a payment notice by the 'payer', the 'payee' may submit their own notice. Where the contract permits or requires the 'payee' to submit a payment application this can be treated as the 'fall back' notice. The intention was to establish greater clarity on the sum due, subject to the issue of any subsequent 'pay less' notice.

- Responses in Citizen Space indicated a mix of experience in utilising a 'payee' notice in the absence of a 'payer's' notice. Of those that had used the 'fall back' provision, many felt it had been effective in establishing the amount due. Several respondents reported that over the last year they had not received a payment notice or a withholding notice for a contract payment.
- Within Citizen Space, written submissions and wider discussions, it was highlighted that there had been several court cases concerning the effectiveness of 'payee' payment notices. If the 'payee' payment application was used it was important to ensure it complied with the statutory / contractual requirements relating to timing and content. Several respondents suggested that the industry would benefit from further prescription on what details should be contained within all payment notices or even a statutory template.
- Of the 27 responses in Citizen Space, 70% indicated that less than 10% of 'payees' over the last 5 years had submitted a 'payee' notice in the absence of a payment notice from the 'payer'.
- In terms of the effectiveness of using such a notice to establish the amount due, of the 32 responses in Citizen Space, 66% believed a 'payee' notice was effective or very effective in determining the amount due to be paid. 25% believed it was very ineffective or ineffective, and 9% believed it was neither effective nor ineffective.
- Some felt it was ineffective in establishing the amount due as it simply prompted the 'payer' to re-value the amount due and illustrated that provided a 'payer' issued a pay less notice then there is little deterrent to not comply with any other notice.
- As raised in other sections of the consultation, reference was made to 'smash and grab' adjudications and the need to simplify the amount of notices within the payment framework.

Prohibiting payment by reference to other contracts

The Construction Act prevents the use of any contractual term which makes payment within a construction contract conditional on the performance of obligations under a superior contract, often referred to as 'pay-when-paid' clauses. Prior to 2011, some firms avoided this provision by making payment dependent on the issue of a certificate under a superior contract ('pay-when-certified'). The changes in 2011 closed this loophole.

- Of the 44 responses in Citizen Space, 41% said that they had not experienced contract clauses over the last year which made payment dependent on the performance of obligations under other contracts, while 11% indicated such clauses were present in more than 50% of contracts. Overall, 59% indicated it had occurred in contracts over the last year.
- The most common types of contract clause where this was applied was for retentions and cross-contract set-off.
- These practices were also highlighted in responses to the consultation on cash retentions in the [construction industry](#). Some felt it was less frequent and if identified in a contract, effectively challenged. Conversely others said it occurred regularly and was utilised as a stalling tactic for payment of retentions. Others cited instances where 'payers' are legally compliant with the requirements of the Construction Act but use other key triggers or events to delay payment of retentions.

The consultation asked whether the clarity and transparency of the payment framework has reduced involvement in disputes and adjudications over the last 5 years.

- Of the 45 responses in Citizen Space in business prior to October 2011, 51% said that there had been no change over the last 5 years in the number of disputes they had been involved in. 36% said there had been an increase.
- When looking at business representative organisation / trade body responses, a higher proportion said there had been no change. Of the 5 responses, 80% said that there had been no change and 20% indicated there had been an increase in the number of disputes.
- Of the 41 responses in Citizen Space in business prior to October 2011, 51% said that there had been no change over the last 5 years in the number of adjudications they had been involved in. 39% said there had been an increase.
- Of the 5 business representative organisation / trade body responses, 60% said that there had been no change in the number of adjudications in the last 5 years, 20% said there had been an increase and 20% indicated there had been a decrease.
- Comments included:
 - the framework has the potential to reduce disputes but in practice the industry is not good at following the process whether deliberately or through administrative error, or lack of knowledge;

- following the 2011 amendments, there was initial confusion on the interpretation of some provisions and new types of dispute were generated on what is exactly required. The role of courts in interpreting the provisions of the legislation and developing case law worked well – much quicker than litigation. These types of dispute have now reduced as the benefits were nullified;
- underlying payment disputes remain but the framework is now generally embedded and speeds up the process of payment disputes;
- reasons for dispute are generally on the valuation of works, contra charges (also known as 'set-off') and non-payment; and
- adjudication is a good forum for dispute resolution.

The right to suspend performance

Where a sum due was not paid in full by the final date and no effective notice to withhold was issued, a payee could suspend performance and not be in breach of contract. However, there existed disincentives to exercising the right to suspend performance, including the costs associated with suspending performance and a lack of clarity on whether the right to do so applied to some or all of the work.

The 2011 amendments allowed a 'payee' to suspend performance of some (but not necessarily all) obligations under the contract. It also required the party in default (the 'payer') to meet the reasonable costs and expenses of the party suspending performance (s112 amended in the Construction Act). This included time to remobilise on site and appropriately extend the contracted time period for the work to be completed.

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 consultation sought to establish whether the right to suspend performance is being exercised more frequently and the threat of suspension is leading to fewer disputes going to adjudication.

- Of the 39 responses in Citizen Space, 38% said that they had not suspended performance on any contracts during the past 5 years while a further 46% said they had suspended performance for less than 5% of contracts.
- Of the 15 contractors and contractors' trade associations that responded to this question, 67% said they had not suspended work or suspended on less than 5% of their contracts over the last 5 years. 13% of respondents said they had suspended performance on 11 to 20% of their contracts.
- Of the 27 responses in Citizen Space in business prior to October 2011 who said that they had suspended performance, 74% said that there had been no difference in terms of the frequency of suspension after the 2011 changes compared to the 5 preceding years. 19% of respondents said that they exercised the right to suspend more and 7% had suspended less.

- Of the 3 business representative organisation / trade body responses, 67% said that suspension of work had been more frequent and 33% said there had been no change.
- Of the 39 responses in Citizen Space, 31% had not used the potential to suspend performance to facilitate a payment over the last 5 years. However, 54% had used the threat of suspension between 1 and 10% of contracts.
- Of the 15 contractors and contracting trade associations that responded to this question, 13% said they had not used the potential to suspend to facilitate a payment, 67% said they had used the potential to suspend to facilitate a payment on between 1 and 10% of contracts. 13% said they used this potential to suspend on more than 20% of contracts.
- For contracts over the last 5 years, most respondents did not believe any adjudications had been prevented due to the right to suspend performance. A few suggested it was between 1 and 10 disputes, with a small number of individuals suggesting that they had effectively used suspension to settle a dispute.
- A number of comments on suspension of performance were received in Citizen Space, written submissions and wider stakeholder engagement. These included:
 - suspension is a remedy of last resort and with low incidence due to a combination of concerns. These concerns include the damage to the commercial relationship, potential unlawful application of the right to suspend and the need to transfer staff / resources to new work;
 - there is significant work required to ensure everything is correct before companies commence a notice to suspend;
 - many are still not aware of the right under s112 of the Construction Act;
 - when suspension does occur, it is often when insolvency of the 'payer' is predicted;
 - the threat of suspension can be a very effective means of focusing the attention of the 'payer' and an excellent provision in the Act. It is often used in discussions as leverage to progress and resolve a dispute;
 - some construction contracts will extend the notice period for intention to suspend from at least 7 days to 14 days, or even longer; and
 - a more effective route for resolving payment could be for the supply chain to report non-payment to the project client.

Section B – Overall effectiveness.

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

Payment frameworks

The consultation sought to explore the effectiveness of the Construction Act and its ongoing fitness for purpose.

- Of the 53 responses in Citizen Space, 58% believed the payment framework as a whole was unclear or very unclear. 40% believed the payment framework was clear or very clear.
- This contrasts with the views of adjudicators and legal representatives. Of the 13 responses from adjudicators and dispute resolution professionals, 69% said the framework was unclear or very unclear. 31% said it was clear or very clear. Of the 13 legal representatives who responded to this question 46% believed the framework was clear. 54% said it was unclear.
- Those who believed the payment framework was not clear outlined a number of views:
 - the statutory provisions are complex, in part due to the structure of the amendments (including too much cross-referencing and not all in one piece of statute) and the unusual terminology;
 - it is too complicated for a 'lay person'. The payment framework needs to be comprehensible to all;
 - the framework assumes professional practices and construction contractors work in the same way. Professional practices such as architects submit invoices. Typically, professional practices will not issue valuations of work unlike construction contractors;
 - the provisions are unwieldy for what should be a relatively straightforward process. There are superfluous notices. It should be simplified to just one 'payee' notice, a 'payer' withholding notice and then payment. This would reflect the model in [Northern Ireland](#); and
 - ambiguity in the 2011 amendments led to legal uncertainty and case law in relation to a number of provisions.
- Respondents who believed the payment framework was clear indicated:
 - generally, the framework and revised provisions work well. There will always be room for ambiguity and issues when applying a general framework to specific scenarios;
 - the framework is logical and generally effective in establishing the amount due. A default position is key;

- for those with an experience of statutes and a good working knowledge of the Act, the framework is clear. However, this is not typical of many within the supply chain, which limits confidence in its use. Even when the Act is understood, its provisions may not be used due to concerns on the part of firms about maintaining commercial relationships and the threat of losing future work; and
- the payment framework is clear. The operation of the framework is the issue. Whether through the failure of a party to properly administer this, or the generation of complex contract clauses to circumvent provisions, or through manipulating payment timeframes to accommodate upstream payment.
- The above was echoed through several written submissions and stakeholder discussion. Additional comments highlighted that ‘payers’ will adapt their procedures within the payment framework – some will always start with receipt of an application for payment and invest significant effort in ensuring the correct valuation and issue of the payment notice – negating the use of a ‘pay less’ notice and ensuring the ‘payee’ has a good and early understanding of the payment due. At the opposite end of the spectrum some ‘payers’ will simply issue a ‘pay less’ notice just before final payment;
- A number of responses believed that there had been no consideration given to some of the consequences of the 2011 changes. For example, ‘smash and grab’ adjudications. They could be viewed as a huge injustice to the ‘payer’ or simply a party exercising their rights.
- Of the 51 responses in Citizen Space, 61% believed the payment framework established a very clear or clear entitlement to payment. Many stated that the framework provided a logical mechanism for establishing the amount due and date for payment. Most parties to a contract knew the need to correctly apply for payment and the implications of not serving the correct notices. The existence of a ‘payee’ default has encouraged ‘payers’ to issue the requisite notices.
- 31% believed it was unclear or very unclear, stating particular provisions, such as s110 and s111 were complicated. Some felt that the payment framework was open to interpretation and if contracts were poorly drafted or purposely difficult then entitlement could be hard. A number of respondents also highlighted the proliferation of ‘smash and grab’ adjudications and high-profile court cases.
- Adjudicators had a different view compared to overall response. Of the 11 adjudicators and dispute resolution professionals that responded to this question, 45% believed there was a clear or very clear entitlement to payment, whereas 36% who believed it was unclear or very unclear.
- Of the 13 legal representatives who responded, 69% believed there was a clear or very clear entitlement to payment, compared to 31% who believed it was unclear.
- Of the 52 responses in Citizen Space, 67% believed the payment framework established a clear or very clear basis for a dispute. 25% believed it was unclear or very unclear.

- Respondents typically shared similar views whether they agreed or disagreed that the payment framework established a clear basis for dispute. The framework itself was reasonably clear and if parties don't comply with the mechanism then a dispute can arise. However, drafting amendments to contracts and / or lack of paperwork can complicate matters. In addition, there had been 'mission creep' – with disputes on form, nature and timing of payment notices rather than the substantive right to payment. Complex arguments had arisen on the operation and interpretation of payment provisions not the uncertainty of the payment framework itself.
- A number of further comments were provided on the overall effectiveness of the payment framework in Citizen Space, written submissions and wider stakeholder engagement.
 - the industry has been nudged into explaining what is being claimed, or paid, and why;
 - the Statute provides the overarching framework, whilst allowing the detail to be defined in contracts. The right of parties to freedom of contract is essential;
 - the payment framework is practical and gives the right tools to seek redress, but there is some industry reluctance to use certain provisions due to the desire to maintain existing business relationships;
 - 'pay less notices' can in practice be issued one day before final payment. This undermines the payment certainty intended by the payment framework and the spirit of the Act; and
 - consider regulating the profession not the payment framework – to act in a fair, impartial and prompt manner in the adjudication process.

Adjudication

The consultation sought to explore the use of adjudication, including frequency of use, effectiveness and greater transparency.

- Of the 40 responses in Citizen Space, 40% said they had used adjudication on more than 20% of disputes over the last 5 years. 30% said they had used the dispute resolution mechanism on 1 to 20% of disputes. However, 30% of respondents said they had not used adjudication on any of their disputes.
- With regard to costs of adjudication, of the 40 respondents in Citizen Space, 40% believed the costs of adjudication had not prevented them from using it on any of their disputes. However, 38% believed this had prevented them from using it on 1 to 20% of their disputes and 23% believed the costs had prevented them from using it on more than 20% of their disputes.
- Responses throughout Citizen Space illustrated that there were several factors that influence whether a dispute is taken to adjudication. The principle grounds were costs vs the size of claim, and preservation of the commercial relationship and securing

future work. Other grounds included the financial standing of the debtor, complexity of the case vs the size of claim, loss of key staff involved in the contract and lack of confidence in a watertight case.

- Of the 51 responses in Citizen Space, 51% believed there should not be greater transparency about the use of adjudication. 29% felt there should be greater transparency and 20% were unsure.
- However, of the 18 contractor and contractors' association responses, only 17% said that there should not be greater transparency about the use of adjudication. 44% believed there should be greater transparency.
- Those who did not believe there should be greater transparency outlined that the process should remain private, with confidentiality being one of the key attractions of adjudication. Concerns were raised on the potential uses of adjudication lists, including the opportunity for blacklisting. Some remained unconvinced on the benefit of a quarterly list other than for tracking and researching performance of the adjudication process.
- Conversely, given adjudication now forms the principle dispute resolution process in construction, some felt greater transparency would be beneficial to all parties, adjudicators and public reputation. It was suggested that an anonymised list could categorise parties and provide key details on the type of disputes and broad discussion to increase clarity and awareness on decisions and practices. There was also reference to improved visibility of the appointment of adjudicators.
- A number of further comments were provided on adjudication in Citizen Space, written submissions and wider stakeholder engagement. These included:
 - time, quality and monetary issues within the industry remain. Adjudication is a fast track and effective means to address disputes;
 - adjudication works. It is an excellent forum for dispute resolution that can be cost and time effective, provided there is a decision which is normally accepted by the parties;
 - the relatively few adjudications that go on to court is a measure of success of the dispute resolution process;
 - adjudication provides a mechanism for speedy resolution of payment disputes during the duration of a construction project, in turn maintaining cash flow. However, it was important to note that it was applicable to every dispute under every construction contract – it was not limited to just payment notices. This one size fits all approach was now being applied in a wider environment including technical matters, final accounts and professional negligence. Some suggest that the more complicated disputes cannot be dealt with effectively in the short timeframe and create difficulties for parties to respond;
 - adjudication has grown. Some felt it was a very effective means of quickly resolving a significant number of high value disputes. Adjudication provides decisions of a temporary binding nature, which are often a more attractive

proposition than expensive arbitration or court proceedings. Others felt such disputes were shoehorned into a process, which could not adequately consider these within the set timescales;

- adjudication does provide a better approach overall for small businesses, who previously would have had to use arbitration or go to court. However, in recent years, rising costs and the complexity of the legislative framework has made it harder for firms to understand and thus use the system, and disincentivises many from using adjudication. It was described by some as onerous and time consuming. It was suggested that it no longer provides a cost-effective process, typically where the value of claim is less than approximately £30k;
- some have utilised [Money Claim](#)⁶ for small claims under £10k;
- there has been increased engagement of professional representation to support parties in adjudication. Their approach may have added to the costs of adjudication; and
- some 'payers' are often willing to gamble on avoiding the dispute reaching adjudication due to the potential costs for the 'payee', coupled with the threat of further enforcement in court. The best defence is to make the other party unable to afford it.

⁶ The Money Claims Service is part of HM Courts and Tribunals Service for claims less than £10,000. A service that commences a county court claim between one claimant and one defendant.

<https://www.gov.uk/make-money-claim>

Section C – Affordability of adjudication

To what extent are the costs of adjudication preventing its use

The consultation questions sought to further understand the affordability of adjudication.

Value of dispute

- Responses in Citizen Space suggested that the value of sums claimed in a notice of adjudication varies considerably. Typically, the higher values claimed typically ranged from more than £500k to many millions. The smallest claim typically was £50k or less.
- Of the 38 responses in Citizen Space with involvement in adjudications in the last 5 years, 51% said that either 25% or 50% of adjudications related to the final account. However, in wider stakeholder discussions it was suggested that many more disputes relate to final accounts.
- Of the 36 responses in Citizen Space, 19% would decline to take a matter to adjudication if the value of dispute was less than £10k. 39% indicated between £10 – 20k and a further 19% said between £21 – 30k.

Costs of adjudication

- Respondents in Citizen Space indicated that the majority of adjudication decisions were not reached in 28 days. The most common response was that it took 42 days to reach a decision.
- Written submissions and wider stakeholder engagement supported this. However, some felt that approximately half of decisions took longer than the initial 28 days. 28 days was typically described as providing a starting point but flexibility was required to deal with every type of dispute. All parties, including adjudicators want to achieve a fair decision, so will normally agree to an extension of time.
- Concerning the average cost of adjudication, responses ranged from approximately £5k to £75k. Of the 25 respondents in Citizen Space, the average cost borne by firms over the last 5 years was £28k⁷.

The consultation sought views on whether the amendments in 2011 clarified the time and amount of payment in dispute reduced the average costs of adjudication (excluding the adjudicators decision).

- Of the 40 responses in Citizen Space who had taken part in adjudications after 2011, 60% believed there had been no change to the average costs of adjudication and 28% felt that costs had increased. Only 13% believed the costs had reduced or much reduced.

⁷ Cost of adjudication expressed in 2017 prices.

- However, of the 10 adjudicators and dispute resolution professionals who responded, 60% believed that the changes in terms of clarifying the amount and timing of payment in dispute had increased adjudication costs. The remaining 40% believed there had been no change.
- Of the 11 respondents in Citizen Space who reported that the average adjudication costs had risen, 9 gave responses when asked to estimate the proportion by which costs had risen. 67% of these respondents believed adjudication costs had risen by 10 to 25%, whilst 22% believed costs had risen by 26 to 50%. 11% believed costs had risen by over 75%.
- Those who felt there had been little change in the average cost of adjudication outlined that any improvements to clarity on time and amount in dispute had been overtaken by arguments on the payment provisions and validity of notices.
- Where it was felt costs had increased, most suggested this was due to greater use of party representation such as claims consultants and professional legal advisors, including barristers, as well as adjudicators fees. There has also been considerable argument on the validity of notices. This had generated a wealth of case law and in turn payment disputes becoming increasingly complex.

Time taken for adjudication

- Of the 29 responses in Citizen Space, 55% indicated that they took 2 to 3 months before issuing the notice of adjudication for adjudications in the last 5 years. 21% indicated 1 month or less and 17% said 4 to 6 months. The remaining 7% said 10 to 12 months.
- Of the 2 business representative organisation / trade body that responded, both said it took 2 to 3 months before issuing notices of adjudication.
- Written submissions and wider stakeholder engagement highlighted that the time frame for preparation of both the referral and notice was dependent on the type and nature of the dispute.
- Of the 32 responses in Citizen Space, 63% indicated they had not experienced 'ambush tactics' (such as voluminous documents with minimal timeframes for review) or had experienced them in 25% of adjudications taken against them. 28% indicated that they experienced ambush tactics all or 75% of adjudication taken against them.
- It was outlined that most disputes will have been alive for some time so both parties will generally be aware of the issues and likelihood of an adjudication notice. In addition, the adjudication process gives an inherent advantage to the referring party in that they have more time to prepare and test arguments, whilst the respondent has a matter of days. Generally, adjudicators are alert to the practice and will endeavour to ensure the respondent is given a fair opportunity to respond. However, a variety of ambush tactics were described as 'alive' including:
 - preparation of long and complex referrals, often with irrelevant documents;

- minimal content to the referral notice, but following the response to the referral by the respondent, provision of voluminous submissions (if permitted by the adjudicator) by the referring party;
- timing of adjudications launched to cause the most inconvenience to the respondent e.g. when certain key people are absent and during holiday periods; and
- ‘smash and grab’ adjudications.

The consultation sought views on the overall impact of the 2011 amendments to the Construction Act.

- Of the 54 responses in Citizen Space, 56% indicated that overall, the 2011 amendments have had a positive impact. 31% said they were not sure and 13% indicated that there had been a negative impact.
- Those who felt there had been a positive impact, typically stated:
 - that the Act had clarified what was required and levelled the playing field;
 - helped to crystallise the amount due at final date of payment;
 - it had empowered ‘payees’ to press for timely payment and ‘payers’ to establish a rigorous system;
 - default payment provisions were a positive disincentive to non-payment, albeit the terminology / drafting allowed scope for argument and gave rise to a large body of case law;
 - inclusion of oral contracts was positive and opened adjudication to more users; and
 - adjudication was a good dispute resolution process.
- Those respondents who were unsure suggested that there was still opportunity for non-compliance and payment abuse. The principles of the Act were positive, in particular adjudication, but the payment process was too complicated for most users and exacerbated by complex contracts aiming to stretch the limits of the Construction Act.
- Those who felt there had been a negative impact, typically stated:
 - the key to good implementation of legislation is ensuring the industry understands its provisions, but the Construction Act is difficult to decipher. The payment provisions remain misunderstood and dense;
 - complexity of the payment framework led to disputes on form and timing of notices rather than substance or what should be paid;
 - the unjust element of ‘smash and grab’ – what is the true valuation of a sum due vs the amount in a valid notice; and

- missed opportunity to revisit s104 (construction contracts) and s105 (meaning of “construction operations”) of the Construction Act.

Further comments that might aid the consultation process as a whole

Throughout the consultation document, opportunity was provided for further comments that might aid the consultation process. Written submissions and discussions with stakeholders also delivered a variety of additional views. The comments illustrated the breadth of views within the sector on the Construction Act and 2011 amendments. A number of views were expressed:

- It is important to remember statutory intervention in contracting vs freedom of contract. The Construction Act requires the parties to construction contracts to undertake certain actions. It does not generally specify how, leaving that for the parties to agree freely in contract. Conversely some felt there was a need for more focused statute as too much is left to commercial interpretation. A contract was described as ‘an agreement commercially driven to protect a party’.
- The 2011 amendments were in general positive, seen through payment provisions, enhanced rights of suspension and contracts not required to be in writing. The payment framework sets out a mechanism for establishing the amount to be repaid. Problems arise through amendments to standard contracts, avoidance clauses and in the administration of those contracts.
- There have been a significant number of disputes and legal challenges on the amended payment framework. Some cite lack of clarity on the provisions and others suggest an expected result of any new statutory measure being tested through the courts. However, a number of respondents suggest that the challenges have led to increased disputes on procedure and content rather than the substance of entitlement to payment.
- There is a wealth of experience with some good clients and companies who pay fairly. Unfortunately, they are outweighed by poorer practices of other companies.
- The culture of the industry cannot be changed by legislation alone. The overarching principle of fairness is missing in the industry. The spirit of the Construction Act needs to be brought back by all rather than constantly looking for loopholes to exploit.
- Always assumed that unequal bargaining power against the ‘payee’ but there are some circumstances and trades, where this is reversed.
- The supply chain welcomes the principles of the Construction Act. Overall the Act and Scheme are an invaluable means of maintaining cash flow in the industry particularly for small businesses. One respondent stated, “Thank God for the Act”.
- It was difficult to attribute and apportion any change in the average adjudication costs due to this or any other specific amendment to the Construction Act. Many factors were in the mix including economic considerations, developments in dispute resolution,

increased confidence in adjudication resulting in higher value and more complex disputes, increasing legalistic approach etc.

- The industry would benefit from a targeted programme of education and guidance on the Construction Act and developments in case law. This could provide greater clarity for all parties in a construction contract. Some highlighted that this had been previously done by main stakeholder organisations and assistance continues to be provided to the industry. Others felt there should be caution on the content and perhaps focus on discreet issues.
- A range of measures should be considered for disputes including conflict avoidance and low value adjudication. Several stakeholders were already giving consideration and early development to these methods.
- There was acknowledgement by many that the costs of adjudication discourage many in the supply chain. A range of views were provided for some form of low value adjudication procedure, perhaps even online. Some felt it could be a simple process with fixed steps, limited documentation, non-extendable duration and capped / scaled fees. There was suggestion that 'junior' adjudicators could cut their teeth on this type of adjudication. Caution was given on creating a different regime and the importance of ensuring no conflict of interests – any scheme needs to be statutory.
- There needed to be greater control over the quality of adjudicators. External audits by nominating bodies and formal training of adjudicators and regular assessment of competence.
- A more effective route for resolving payment could be for the supply chain to report non-payment to the project client – both public and private.
- Automate the payment framework. There are several software systems and digital platforms that could assist in the application of the payment process.
- Reference was made to alternative adjudication processes. This included the Financial Ombudsman, Northern Ireland and international comparisons, such as New Zealand and Australia.

The consultation primarily sought to test the effectiveness of the amendments to the legislation to assist in the delivery of the Post-Implementation Review. There was a mix of opinions regarding whether the current legislation would benefit from further amendments. On the one hand, some respondents argued against any further changes to the provisions of the Construction Act; whilst some of the 2011 amendments were not ideal, in general they were now embedded. As such, they suggested that revised legislation would generate even further case law and increase costs. On the other hand, other respondents commented that there was opportunity to review the Construction Act (as amended) further. The proposals for further amendment are set out below.

- Simplify the legislative framework, ensure the payment provisions are clear and simple in one place and publicise widely – the payment provisions have become dense and difficult to follow through the Act, Scheme and their amendments.

- Streamline the payment notice regime as it is unnecessarily complex – reduce the number of notices to be issued; (a) a payment notice from the payee to the payer; and (b) if required a pay less notice from the payer to the payee.
- If the payment process fails to comply with the Act, it should be entirely replaced with the Scheme (similar to adjudication). The Scheme should also be consistent with the provisions of the Act.
- The exclusion of certain activities from the definition of ‘construction operations’ within s105(2)(c) of the Act should be reviewed. In particular for process plant. Plant supported by steelwork is currently excluded but plant supported by other structural materials is not. Major projects for steel can be a mix of excluded and included operations. This gives rise to hybrid contracts and mixed payment regimes.
- With advancements in offsite manufacturing for construction, consideration should be given to the definition of construction operations.
- Drafting of s108A on adjudication costs is difficult to understand and has created scope for argument as to its meaning. It should be made clear that each side should bear its own costs, unless agreed expressly after the adjudicator is appointed.
- Further clarity would be helpful on the interaction between [the Late Payment of Commercial Debts \(Interest\) Act 1998](#) and the Construction Act with respect to the recovery of costs.
- Remove the rights of parties to agree intervals or periods. Maximum payment terms should be 30 days.
- In practice, pay less notices are often issued one day before the final date for payment. If the payment cycle (from the due date to the final date for payment) is unduly long (e.g. 60, 90 or 126 days) the issuing of a pay less notice one day before the final date for payment wholly undermines payment certainty.
- There have been a number of significant cases in the Technology and Construction Court concerning the effectiveness of notices. The industry would benefit from greater prescribed details for all types of payment notices or even statutory templates.
- Repeal s113 in the Act that which allows ‘pay when paid’ when there is an upstream insolvency.
- Refocus of the adjudication timeline – to redress the balance in favour of the referring party. Look to extend adjudication time to 42 days, with a minimum 14 days for a response to be served.
- 42 days should be the absolute maximum timescale for an adjudication. If it cannot be addressed within that period, then it is likely not to be the vehicle to provide a solution.
- Do not allow a party to a dispute to manipulate allocation of an adjudicator. In adjudication, the adjudicator may be nominated but does not have jurisdiction until the notice is received. If amended (similar to the appointment of an arbitrator) this may stop parties from repeat requests for a more favoured adjudicator.

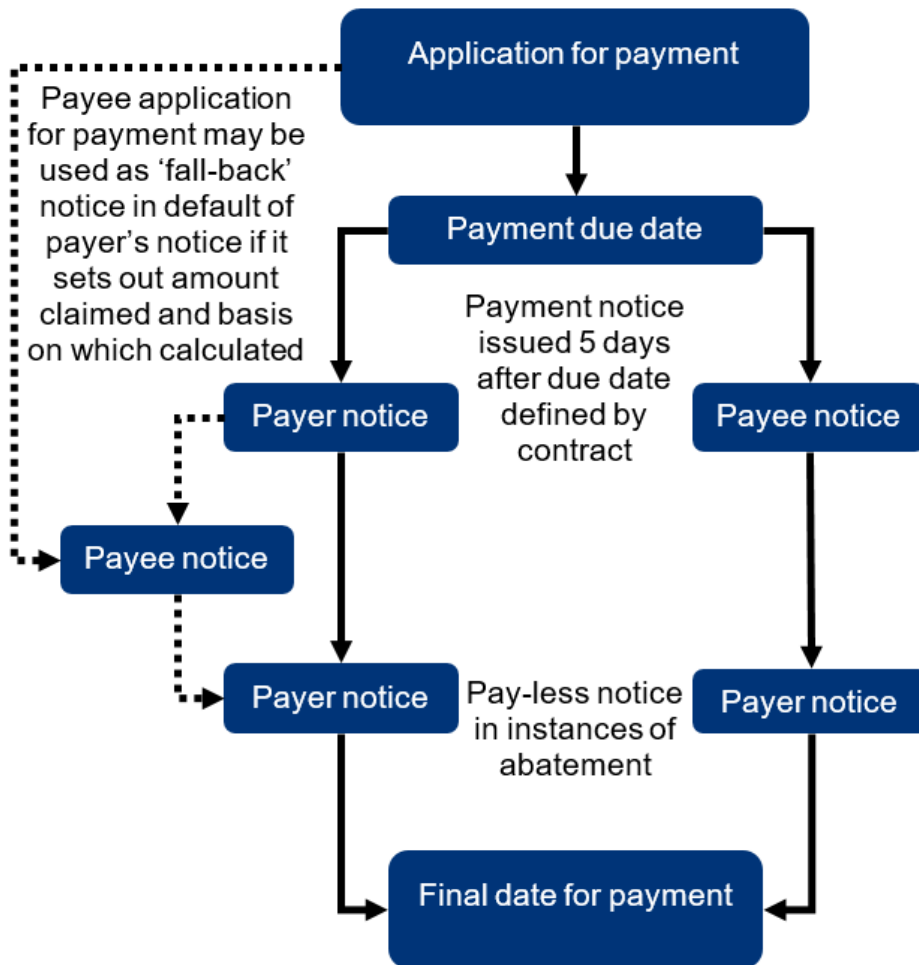
- Amend the legislation to allow more than 1 dispute to be adjudicated by the same adjudicator within a single referral.
- A statutory definition of costs and expenses that could be recovered.
- Section 108(3A) of the Construction Act provides that qualifying construction contracts must include a clause permitting the adjudicator to correct a typographical or clerical error in their decision. The Adjudicators Slip rule remains too narrow and should be aligned with arbitration.

Next steps

The consultation has provided a useful basis for future work. It has illustrated the breadth of views within the sector on the Construction Act and 2011 amendments given the nature and complexity of the construction supply chain.

The Department will now take forward the Post-Implementation Review.

Annex A: Outline of payment provisions



Annex B: List of respondents

Respondents included:

- BD Structures Limited
- BESA
- Birkett Long LLP
- Birketts LLP
- British Constructional Steelwork Association Ltd
- City of London Law Society
- CMS Law
- Confederation of Construction Specialists
- Construction Dispute Resolution
- Contractors Legal Group
- Eamonn T Cookson & Company Limited
- ECA
- GHD Livigunn Ltd
- Gracia Consult
- Henry Cooper Consultants Limited
- John Reid & Sons (Strucsteel) Ltd
- MAX RENEWABLES Ltd
- MCMS Limited
- Mills & Reeve
- N T Killingley Ltd
- Pinsent Masons LLP
- R A Gerrard Ltd
- Royal Institution of Chartered Surveyors (RICS) Dispute Resolution Service

- Severfield plc
- Specialist Engineering Contractors' (SEC) Group
- Sum Limited
- TECBAR
- TeCSA
- WSP

A number of individual responses were also received.

Annex C: Summary of consultation questions

- | Number | Question |
|--------|--|
| 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) 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). |
| 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? |

- | Number | 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”? |
| 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? |
| 11. | Over the last year, what proportion of contract payments you have been party to has a “payer’s” payment notice been issued in addition 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 not 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 5 years. If you have not been involved in any adjudications, please move to question 18a.

What proportion involved no issue of a payment notice? |
| 17b. | What proportion involved no 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? |

Number	Question
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 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 through the payment notice?
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?

- | Number | Question |
|---------------|--|
| 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? |
| 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? |
| 40. | Over the last 5 years, approximately what proportion of adjudications you have been party to have related to the final account? |
| 41. | At what value of dispute would you decline to take a matter to adjudication? |
| 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? |

- | Number | Question |
|---------------|---|
| 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 average adjudication 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 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", 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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