



## Sheridan Gold LLP is a specialist law firm providing high quality legal advice to all parties involved in construction and engineering projects.

Our lawyers have an outstanding reputation for their knowledge and experience of construction and engineering law. We understand our clients' businesses (our lawyers have also worked in-house for leading contractors and consultants), and develop long-standing relationships with our clients. We provide a prompt, efficient service, and our advice is clear and commercially useful.

Peter Sheridan has published extensive material on adjudication and is author of the leading, award-winning practitioner's book *Construction and Engineering Arbitration*.



Castle Court  
41 London Road  
Reigate, Surrey  
RH2 9RJ

t 01737 735 088

www.sheridangold.co.uk

e info@sheridangold.co.uk

## PFI PROJECTS AND PAY-WHEN-PAID PROVISIONS

Anything that can assist the smooth running of PFI projects, or whatever new model for procurement involving the private sector replaces it following the current Treasury review, will be welcomed by the construction industry.

On a PFI project the authority (usually a central government department for health, transport or whatever the project concerns) enters into a concession agreement, which is the head contract. The concession company is normally a 'special purpose vehicle' (SPV) formed for the project. The contract for construction work is usually performed by a construction company under a subcontract with the SPV.

PFI projects generally operate on a pay-when-paid basis; the SPV normally has no significant assets and pays for the construction work with funds received under the concession agreement.

The expression 'pay-when-paid' refers to a contractual provision in a subcontract under which the contractor is obliged to pay the subcontractor for work undertaken by the subcontractor only when the contractor has itself received payment for the subcontractor's work under the main contract. The same principle applies to any similar contractual chain.

Under a pay-when-certified provision in a subcontract, the contractor is obliged to pay the subcontractor for work undertaken by the subcontractor only when the contractor has received certification for the subcontractor's work under the main contract, regardless of whether the contractor has also received payment.

Under the Housing Grants, Construction and Regeneration (HGCR) Act 1996, a pay-when-paid provision is invalid, except where the non-payment by the employer is as the result of insolvency.

Concession agreements are outside the scope of the HGCR Act and are not subject to the rule against pay-when-paid provisions in the HGCR Act. However, that is of no significance in respect of pay-when-paid provisions, as these provisions never occur in the contract at the top of any contractual chain but will always be needed in the subcontracts between SPVs and contractors. These construction subcontracts have always been within the scope of the HGCR Act.

The approach taken in the Local Democracy, Economic Development and Construction (LDED) Act 2009 has been to render pay-when-certified provisions invalid for construction contracts generally. But an Exclusion Order excludes the application of the principle of invalidity of pay-when-certified provisions from construction subcontracts placed by the SPV.

The effect of all these provisions is accordingly that where an SPV enters into its construction subcontract, it is permissible in that contract to have a pay-when-certified provision. However, pay-when-paid provisions are still not permissible for these contracts.

The commercial background to the PFI projects is that payment is ultimately made by central government, so that construction companies are not generally averse to a pay-when-paid regime, because, firstly, the risk of non-payment by the government is not perceived as a substantial risk and, secondly, the SPV is understood not to have the means to make payment itself. It is, therefore, difficult to see why the policy against pay-when-paid provisions is or should be persisted in for PFI projects, and it is recommended that these provisions be permitted.

**Peter Sheridan**  
**Managing Partner**  
**Sheridan Gold LLP**

**Tel: 01737 735 523**

**Email: psheridan@sheridangold.co.uk**

**Website: www.sheridangold.co.uk**