



The Hon. Mr Andrew Griffiths MP  
Dept. for Business, Energy & Industrial Strategy  
1 Victoria Street  
LONDON  
SW1H 0ET

25 February 2018

Dear Mr Griffiths,

**RE: THE LATE PAYMENT OF COMMERCIAL DEBTS (AMENDMENT)**  
**REGULATION 2018**

Following the insolvency of Carillion and the abuse that has been exposed of its payment procedures to sub-contractors and suppliers, we can understand the reason for you wishing to enact a regulation enabling sub-contractors and suppliers being able to have abusive terms and conditions of a contract relating to long payment periods and very low interest being paid for late payment being declared ineffective.

However, as an organisation representing specialist contractors and sub-contractors in the construction industry, the above Statutory Instrument will have no effect whatsoever to the above mentioned payment abuse applied by main contractors on sub-contractors and suppliers in the construction industry.

Section 3(2) of the above Regulations states that they apply where the Late Payment of Commercial Debts (Interest) Act 1998 applies. All this Act requires is that a substantial remedy be incorporated in a commercial contract for late payment and the Technology and Construction Court held in Yuanda (UK) Ltd v WW Gear Construction Ltd that a reasonable interest rate incorporated into a commercial contract which would meet the requirements of the Act would be 4% or 5% over the Bank of England Base Rate. Following handing down this Judgment, the Joint Contracts Tribunal (“JCT”) which provides a family of construction contracts and sub-contracts, which are the most widely used in the building industry, incorporated within their contracts a clause requiring payment of interest at 5% over the Base Rate when late payment occurs.

Therefore, every JCT sub-contract incorporates a substantial remedy, as held by the High Court, and, therefore, the 2018 Regulations, which will come into force on 26 February 2018, are inapplicable as this threshold has been met in the contracts and sub-contracts.

Furthermore, where bespoke sub-contracts and purchase orders are issued by main contractors that incorporates rates of either 1% or 2% over the Base Rate may, in certain circumstances, be

held to be a substantial remedy for the late payment. Where this occurs, then those contracts will not be affected in any way by the above Regulations coming into force on 26 February 2018.

Because of the threshold that must be reached before the Regulations are effective, being that an interest rate enabling a substantial remedy for late payment is incorporated into the contract or sub-contract, there is the possibility, such as there were with some of Carillion's sub-contracts, that a clause requiring payment of interest for late payment will be incorporated into a contract at 5% over the Base Rate, but the payment period of invoices is 120 days. Because a substantial remedy has been incorporated into the contract for late payment, the 2018 Regulations cannot be used to seek an injunction making the 120 days payment period ineffective, because an effective remedy for late payment is duly incorporated into the respective contract or sub-contract as required by the Act.

With reference to Section 3(3) of the 2018 Regulations, you have not enabled individual companies to apply to the High Court, only representative bodies of an industry, of which we are one. However, the cost for obtaining a permanent injunction making terms and conditions of a contract or sub-contract ineffective will be approximately £30,000.00, because seeking an injunction is a two-stage procedure. First there is a requirement for obtaining an interim injunction, the cost of which would be approximately £10,000.00 and then, at a later date, there will be a further hearing to establish whether the interim injunction was correct and whether it should be handed down on a permanent basis. This would be looked at far more robustly by the Court and the cost would be a further £20,000.00.

As a representative organisation, we do not have the wherewithal to be able to risk £30,000.00 to obtain an injunction because a main contractor may, or may not, have a term or practice that is abusive in relation to the contracted payment period and the interest and compensation arising out of late payment if it is not made within the contracted payment period.

Furthermore, because the Regulations only provide for the handing down of a High Court Injunction, this means that statutory adjudicators and arbitrators do not have jurisdiction to make such a declaration in their Decisions and Awards. Therefore, these Regulations have no effect whatsoever in assisting SMEs in being paid within a reasonable period of time and to receive a reasonable amount of interest and compensation when they are paid late.

If you had wished effective Regulations to be issued dealing with grossly unfair payment periods, interest and compensation for late payment, then all Section 3(3) had to state was that where such terms are grossly unfair, they could be declared ineffective and the 30-day payment period incorporated in the above mentioned Act would apply, interest would apply at 8% over the Base Rate and compensation would also apply. More importantly, adjudicators and arbitrators would be able to consider the alleged grossly unfair terms in their Decision and Awards, which they cannot because you have restricted the sole tribunal to being the High Court and, therefore, the people that deal with most commercial disputes, especially in the construction industry, do not have jurisdiction to be able to consider whether the subject terms and conditions are grossly unfair, or not, in their Decisions and Awards under your 2018 Regulations.

In closing, it is notable that we were not notified of any consultation regarding these 2018 Regulations, despite the vast majority of our members being SMEs. In fact, from the report of these Regulations in the Sunday Times, only the CBI has been consulted upon them, which is surprising as you are the Minister responsible for small businesses and it is CBI members that impose unreasonable and grossly unfair payment periods, as well as low interest percentage for

late payment and offer no compensation in their contract, sub-contracts and orders. We also point out that the only representative body, as defined by the 2018 Regulations, that may have the funds available to seek High Court Injunctions are the CBI. No representative body for SMEs would have the finance to be able to pursue an injunction against a main contractor when its terms and conditions concerning the period of payment, interest rate and compensation when paid late is grossly unfair causing it to be injuncted from relying upon those terms and conditions.

Please would you confirm to us that before you review Section 3 of the 2018 Regulations that you consult fully with ourselves and other representative bodies of SMEs so that effective regulations can be put in place, in lieu of these knee-jerk regulations which you have chosen to enact following what has arisen from Carillion's abusive practice concerning payment of its sub-contractors.

Yours sincerely,