

**MINISTRY**

**PUBLIC WORKS**

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**NATIONAL ASSEMBLY**

**WRITTEN REPLY**

**QUESTION NUMBER: 3284 [NW3616E]**

**INTERNAL QUESTION PAPER NO.: No. 37 of 2017**

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**DATE OF REPLY: OCTOBER 2017**

**3284. Mr R W T Chance (DA) asked the Minister of Public Works:**

(1) With reference to the amended Construction Industry Development Regulations that was published for public comment in the Government Gazette No 38822 on 29 May 2015, what (a) is the current status of the proposed prompt payment regulations and (b) were the main points raised by the public through the consultation period;

(2) by what date does he expect that the amended regulations will be enforced? **NW3616E**

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**The Minister of Public Works:**

**REPLY:**

1. (a) The draft Regulations on Prompt Payment and adjudication for the construction industry which were published for comment by the Minister of Public Works in Government Gazette 38822 of 29 May 2015 have been withdrawn. The Regulations were published in terms of Section 33 of the Construction Industry Development Board (CIDB) Act, 2000 (Act no 38 of 2000). The much anticipated regulations were aimed at introducing automatic interest on late payment as well as statutory mechanisms to ensure progressive payment to contractors for work done.

In following due legal processes, the Minister submitted the draft Regulations to the Office of the Chief State Law Advisor to test its Constitutional validity and whether the draft Regulations were not ultra vires (meaning whether the Regulations did not go beyond the scope of the empowering provisions of the CIDB Act).

(b) The comments received highlighted the need for greater alignment of the adjudication provisions with the existing legislative framework for the administration of contracts, as well as the powers of the Minister in terms of the CIDB Act. Specifically, key comments received include (i) there are potential challenges that would arise if main contractors are expected to pay a sub-contractor within 30-days. Where verification of work is required, this may result in bad quality work being delivered, and as such, main contractors may be reluctant to sub-contract. This scenario may lead to price escalations

as a strategy to minimize the risk to main contractors. It would give a wrong impression to service providers that the payment is due to them irrespective of quality of work; (ii) payment of invoice within 30-days of submission will be impossible to implement by the public sector versus the current practice of within 30-days of issuing progress payment certificates after invoice have been verified; (iii) since the Regulations were proposing payment by main contractors to sub-contractors, it is argued that the conditions of contracts between the main and sub-contractors should take precedence.

1. The Minister received the legal opinion from the Office of the Chief State Law Advisor (the legal opinion) which emphasised that the Regulations were *ultra vires* and if challenged would not pass the Constitutional validity threshold. In essence, the legal opinion advised that the prompt payment and compulsory adjudication provisions of the draft regulations were substantive in nature and could not be categorised as any other matter for the better execution of the Act or in relation to any power granted or function or duty imposed by the Act (see section 33 (1) of the Act). The Chief State law advisor applied a restrictive approach for interpreting wide empowering provisions in respect of the making of the regulations and concluded that the draft regulations:

* extended the scope or general operation of the enactment;
* supported attempts to widen the purposes of the Act;
* provided for substantive matters relating to the law of contract as opposed to administrative measures to implement the substantive matters provided in the Act; and
* could not be categorised as authorising the provision of subsidiary means of carrying into effect what is enacted in the statute itself and covered what is incidental to the execution of its specific provisions.