



Payment Applications

5 Top Tips from your Construction Solicitors

It's hard to think of anything more important for a business than getting paid on time and in full. Readers will be all too familiar with stories of construction companies that haven't survived because they were starved of cashflow.

There are, however, some easy wins when it comes to improving your chances of getting paid promptly and in full. Having a good working knowledge of the payment mechanism under the "Construction Act" is essential.

In this article, we share our 5 top tips on how to navigate that process and stay one step ahead when it comes to your payment applications.



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1. Know the key dates (and how to calculate them)

The Construction Act introduced the terms “Due Date” and “Final Date for Payment”.

Contrary to what you might expect, the Due Date is not the deadline by which you should receive payment (that’s the Final Date for Payment).

The Due Date can be any date that you and your client agree upon. The sole purpose of the Due Date is that it is used as a reference point for calculating other key dates (the Final Date for Payment, as well as the deadlines for your client to issue any Payment and/or Pay Less Notices).

Unfortunately, many construction contracts do not expressly state what the Due Date is. This means it is not always obvious what any of the other relevant dates are.

Where a contract does not specify the Due Date (or any of the other key dates for that matter), there is a piece of secondary legislation, known colloquially as “the Scheme,” which will set those dates for you. However, calculating the Due Date is not entirely straightforward under the Scheme. And let’s be frank, no one wants to be cross-referencing their contract with a piece of secondary legislation and trying to piece together the different parts of the payment timetable.

This is why our Top Tip number 1 is to make sure your contract clearly sets out when the Due Dates are. Preferably it would also confirm the Final Date for Payment (but if it doesn’t, the Scheme will set it at 17 days after the Due Date).

2. Beware of payment schedules

Payment Schedules should have appropriate column headings. The key things you need to see as a contractor are:

1. Any deadline for submitting your applications
2. The Due Date
3. The Final Date for Payment

Beware of Payment Schedules that use alternative column headings instead of these. They can lead to confusion as to what they actually mean and, therefore, their effect.

Columns which show your client’s deadlines for Payment and Pay Less Notices can be helpful, but are not necessarily vital for you.

The other issue to be conscious of with a payment schedule is whether it continues indefinitely or has an expiry date. Delays happen. You will want to ensure that if the project continues beyond the last date on the payment schedule, there is a mechanism which allows you to continue to make interim applications (either by having contractual payment clauses to fall back on, or by having a contractual provision which automatically extends the payment schedule with applications (and payments) being made on the same periodic cycles). The Courts have held that where neither of these things are in place, the contractor has no further right to interim payments and must wait until the final account stage to be paid for any further works.

3. Timing and format is key

The timing and format of payment applications can be just as important as their content. Many contracts include “conditions precedent” in relation to payment applications. In essence, conditions precedent require you to do something specific failing which you lose a right or entitlement. Often these are used to specify how and when an application must be made, to whom it must be sent and by what method, and even the format it must take. Clauses are typically drafted to provide that if you fail to comply strictly, you will not be entitled to any payment in that cycle.

For example, a contract might state that:

“Payment applications must be sent by email to paymentapplications@XXXXX and copied to the address given in the Contract for the Project Manager, not later than 4:00 pm on the seventh day before the Due Date, with the subject line “Interim Payment Application” and using the Employer’s Payment Application Template, with all necessary supporting information and evidence. Strict compliance with this clause is a condition precedent to the validity of the Contractor’s application and its entitlement to payment.”

You should, however, be aware that it will not necessarily use the words “condition precedent”. It is the effect of the clause that dictates whether or not it is a condition precedent.

Always read payment provisions carefully, renegotiate any that are unnecessarily onerous and ensure those who are responsible for submitting your payment applications understand the importance of following these ‘to a tee’.

4. Issue Cumulative Applications or Deduct “Previously Paid”

If you’re not already submitting cumulative payment applications, it’s well worth starting (unless your contract requires something different).

The gross figure at the top of a cumulative application should be the total value of all work completed on the project to date, rather than just what’s been done in a single payment period.

Each new application therefore restates what you believe you are entitled to (even if a proportion of it has previously not been certified by your Employer). This can be particularly advantageous in circumstances where the Employer fails to issue a valid Payment or Pay Less Notice and the sum applied for becomes due by default.

When calculating the net amount due, it is preferable to deduct the “previously paid” figure rather than the “previously certified” figure. Provided your contract doesn’t prevent that (some will require you to specify the “previously certified” sum), deducting the “previously paid” figure means that the net figure at the bottom of the application will always reflect the actual (total) amount of cash you believe your client needs to pay you as at the Due Date.

Where a client has previously certified a sum, but not paid it, this can cause problems when you only deduct the previously certified sum on the next payment cycle. This is because the net sum due won’t reflect the amount of cash you are actually expecting to receive.

Again, deducting “previously paid” rather than “previously certified” can simplify things in the event that the sum applied for becomes due by default (i.e. where there is no valid Payment/Pay Less Notice).



5. Spotting Invalid Payment and Payless Notices

Just because you receive a Payment or Pay Less Notice, that does not necessarily mean you are only entitled to be paid what your client has certified. You always have a right to formally challenge their valuation if you think it is wrong, but a simpler point to consider in the first instance is whether or not their Notice is in fact valid. If it's not, it is of no effect and you may be entitled, by default, to the sum that you have applied for.

There are a number of things that can invalidate payment or pay less notices. Recognising an invalid notice can give contractors a significant advantage.

Timing

Payment Notices must be given not later than 5 days after the Due Date (highlighting the importance of knowing the Due Date). The parties are free to agree the deadline for Pay Less Notices. If it's not set out in your contract, the Scheme will set it at no later than 7 days before the Final Date for Payment. If a Notice is late, it won't be valid.

Calculation

A Payment Notice must include a calculation of the sum considered due at the Due Date. A Pay Less Notice must include a calculation of the sum considered due at the date of the Pay Less Notice. Omitting the calculation, or calculating it to the wrong date for the relevant notice will invalidate that Notice.

Condition Precedents

If you are contracting on your terms, rather than your client's, you may have included conditions precedent in relation to Payment or Pay Less Notice (which if not complied with, may invalidate those Notices).

Careful review of any Notices received, against the statutory and contractual requirements will help contractors identify when they are invalid and when their applications may instead determine the sum which is due for payment.

In Summary

Payment applications are not just a monthly administrative exercise, they are your way of getting paid what you are owed. Make it standard practice to review contract terms at the outset, set up a clear and flexible schedule and (provided the contract permits it) use cumulative applications supported by accurate records.

Follow any conditions precedents to the letter (or better still, don't agree to any) and check any and all Payment/Pay Less Notices received for mistakes which invalidate them.

With these measures in place you can significantly improve your prospects of getting paid in full and on time.

How We Can Support You

If you require expert assistance in reviewing or drafting contracts which work well for you, or help in understanding or enforcing the payment mechanism which applies under the "Construction Act" the National Association of Shopfitters' National Legal Partner, Holmes & Hills can assist. **Their specialist team of construction lawyers can be reached on 01206 593933.**



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