

Construction Act Payment processes: Getting it right

ACostE and ICES Training Session

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Payment processes: Getting it right

- The legislation
- What can go wrong?
- Consequences of getting it wrong
 - Getting it right in practice
 - Digging yourself out of a hole
 - Mock Adjudication

The Legislation

Amended Housing Grants Construction and Regeneration Act 1996 will apply to all “construction contracts” entered into on or after 1 October 2011.

Definition of “construction contract” and “construction operations” remains the same.

Scheme for Construction Contracts (as amended) will apply where the contract does not provide an adequate mechanism for determining how and when payments become due.

“pay when paid” is still prohibited (in most cases).





The Key Points

Due date for payment

Payment Notice

Default Payment Notice

Pay Less Notice

Final date for payment



**2 dates & (up to)
3 pieces of
paper!**

The Payment Notice



Payment Notice to be given by:

- Payer; or
- Specified person (on behalf of the Payer); or
- Payee.



Parties can choose who is to give the notice.

The default position (i.e. The Scheme) is the payer.

The Payment Notice

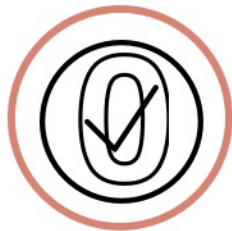


Notice to be served not later than 5 days after the "due date for payment":

This period cannot be extended by agreement; Parties can agree that a notice be served earlier.



Notice must state: the amount considered due at the "due date"; and the basis on which that sum has been calculated



Notice is required even if the amount considered due is nil.

If the Payer or specified person is meant to give a Payment Notice and fails to do so the Payee may serve a payee's default payment notice at any time after the payer's payment notice was due to be served.

If the payee is obliged or permitted to give a notice which complies with S.110A(3):

- 1) Prior notice counts as a default notice; Payee is not entitled to serve another;
- 2) A self-billing invoice or application for payment might count as a default payment notice;
- 3) No need to send a 'reminder' that an application is deemed to be a default notice.
- 4) Final date for payment may be postponed, but won't be if the sub-contractor's application counts as the default notice.

The legislation: Default Payment Notice

Payer must pay the amount stated in the Payment Notice/Default Payment Notice (the "notified sum").
Unless....

Payer serves a Pay Less Notice - a notice that states:

- The amount considered to be due on the date the notice is given; and
- The basis on which that sum has been calculated

Must be served on time:

- Default is 7 days before the final date for payment;
- Parties are free to agree the exact timing, provided it is not after the final date for payment.

The legislation: Pay Less Notice



Pay Less Notice can include the payer's own valuation of the works as well as other deductions and set-offs.

Can't combine a Payment Notice and Pay Less Notice into one single notice.

Must serve a Pay Less Notice if there is any risk that a Payee's Default Payment Notice has been given (e.g. an application).

The legislation: Pay Less Notice

What can go wrong?



Contract terms are not clear:
"due date" not clearly
defined



Final date for payment
not clear



Not clear who's doing
what: Self-billing
process, application or
payer's payment notice?
Interim applications after
completion?

What can go wrong?



Payment Notice or Pay Less
Notice not served or are
invalid



Wrong format:
Employer has set up a
Framework contract that is not a
"construction contract".
Individual task orders issued
under the Framework are
separate "construction
contracts"
Employer needs to serve a
separate Payment or Pay Less
Notice for each individual
construction contract.



Wrong content:
Does not set out the basis
on which the sum
considered due has been
calculated.

What can go wrong?



Notice is served late.



Real life examples:

Pay Less Notice has to be served on the same date as the Payment Notice (which wasn't served either);

Sent to the wrong address;

Sent using the wrong method of service;

Did not allow time for 'deemed service' under the contract (e.g. 2 days after posting etc).

What can go wrong?

"We didn't know why the sub-contractor was sending us payment applications rather than X (who was the right person) so we put them in the bin"...

..."We didn't serve a payment notice but we didn't get a letter saying there was a default notice"

Consequences of getting it wrong...

No valid Payment or Pay Less Notice



No opportunity to counter-claim that the correct value of the works is £x regardless of the notice(s)



Potential risk that sub-contractor can issue a winding-up petition.

Deemed to have agreed the amount stated in the sub-contractor's payment notice/default payment notice



"a cheque that can be cashed"?



Right for sub-contractor to suspend its works and claim reasonable costs (e.g. de-mobilisation and re-mobilisation).



Consequences of getting it wrong...

Options



Option #1

Rely on technical arguments:

- No right to make an application;
- Didn't know that the application was an application;
- Application doesn't comply with the contract/Act;
- It's all very unfair; Insolvency.



Option #2

Start Court proceedings regarding the proper value of the works.



Getting it right in practice...



Check the contract makes sense and all the team are clear as to their roles:

Who?

What?

When?

How?

**Who is going to
serve the Payment
Notice?**

**When are they
going to serve it?**

**When is the "due
date"?**

**When is the final
date for payment?**

**When is the last
date for serving a
Pay Less Notice?**

**Will you serve a Pay
Less Notice in every
case?**



How are you going to serve the notices?

What information needs to be included?

Can you serve one notice for more than one task order/works order?

Check for yourself: Don't rely on what someone tells you

Who's covering holidays/absences?



Map it out in a way that works for you

Produce a glossary of all the necessary terms and what they mean (e.g. due date)

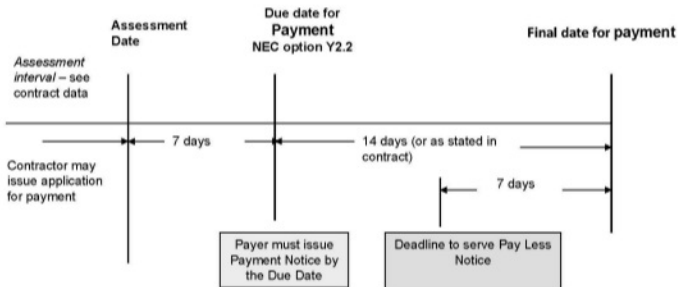
Produce your own timeline or flowchart of the dates that apply to your contract

Create a table of the relevant dates throughout the duration of your works so that you have a monthly timetable

Stick to the monthly timetable!



NEC3 – due date / final date



Mock Adjudication



Cantilever (Main Contractor) and Mitchell Bros. (Subcontractor) Framework Contract.



3no. Task Orders based on the NEC 3 Contract, Option A.



Assessment interval – 4 weeks

Starting date is 15 May 2015



PM decides the first assessment date is 1 June 2015. Therefore, the “due date” for Application No.1 is 8 June 2015. Payment Cert issued and paid

Roll on a few months...



Mitchell's Application No.6. Sent to the PM on Friday 23 October 2015.



Dear Clive

Please find enclosed our application for Ramsbottom and Minchley (A and B) for month ending September 2015. The total sum due is £728,562.28 plus VAT.

Yours sincerely

Mitchell Bros. Ltd

Roll on a few months...

<u>Ramsbottom</u>	£456,230	See Tab 1
<u>Minchley A</u>	£799,500	See Tab 2
<u>Minchley B</u>	£706,287	See Tab 3
<i>Less paid to date</i>	(£1,233,454,72)	
This application	£728,562.28	



Roll on a few months...

Meeting minutes dated 3 November 2015:

"8.0 Commercial

8.1 PM explained that Minchley B missed a Key Date and so Cantilever will be deducting £565,450 plus LDs on Ramsbottom means nothing due this month."



Roll on a few months...

Nothing is paid against Mitchell's Application No.6.

No Payment Notice or Pay Less Notice issued by PM.

30 November 2016 Bulldog claims consultants acting for Mitchell issue a Notice of Adjudication to Cantilever claiming £728,562.28 in respect of Application No.6 as a "smash and grab" adjudication.

Jacob Marley LLB is appointed as Adjudicator by Wheel of Fortune adjudicator nominating body.



Mock Adjudication: The Referral

Bulldog:

The assessment date for payment for Application No.6 was 1 November 2015 and the due date for payment was 8 November 2015.

The final date for payment was 14 days after the due date i.e. 22 November 2015. So, the last date for the PM to issue a Pay Less Notice was 15 November 2015.

No pay less notice has been issued so Application No.6 is payable in full.



Mock Adjudication: The Defence

Cantilever:

The assessment interval is 4 weeks. The assessment date for application No.6 was 19 October 2015. The due date was 7 days later – 26 October 2015. Mitchell's application was submitted too late.

The application does not adequately set out the amount due and the basis on which that has been calculated. Not a valid payee's default payment notice.

The meeting minutes of 3 November 2015 were a valid Pay Less Notice.



Mock Adjudication: The Reply

Bulldog:

The parties operated a monthly payment cycle in practice. The assessment date was the 1st of each month and the due date was 8 days later. So, our application was in time.

Anyway, if Cantilever is right then the meeting minutes are not a valid pay less notice because the deadline for a pay less was 2 November and Mitchell didn't get the minutes until 3 November 2015.

Meeting minutes can't be a valid pay less notice anyway.



Mock Adjudication: Further Submissions

Bulldog:

We sent a hard copy as well.
Everyone used email.
Here are the date of the previous applications, they (mostly) match up.

Cantilever

Mitchell sent the application No.6 by the wrong method – email.
The contract stipulates post or by hand.
No written variation to the contract regarding payment cycle.

You emailed it to Amanda, who had left.
The postal address on your letter is our registered office, not the project office.

You Decide



The Adjudicator's Award



Any Questions?

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Thank You



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