Getting Paid for Your Work

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“Cash flow is the lifeblood of the construction industry”

Lord Denning
If Payment Issues Arise

Carry on Regardless?

• Commercial decision
• Promises of being looked after at the end of the project
• Contractor focuses on pleasing Client and Architect, not claiming money
• Does not want to rock the boat
Tools Available

• Credit Checks
• Construction Act
  – Payment Notices
  – Suspending Work
  – Adjudication
• The Contract
  – Notices and Conditions Precedent
  – Determination
  – Interest
• Records
Credit Checks

• Services like www.duedil.com
• Prior to entering in to a contract
  – Poor credit scores should warn off or be used as a negotiating tool
• During works
• Prior to spending money chasing payments
Construction Act
Provisions
The ‘Construction Act’

• The Housing Grants Construction and Regeneration Act 1996
• Amended by the Local Democracy, Economic Development and Construction Act 2009
• No substitute for reading the actual legislation in full
• They can all be found at www.bailii.org. or at www.QuiggGolden.com
Payment Notices
Payment Notices

• The Basic Premise
  – A construction contract will have a provision to give Notice of the Notified Sum, that is the amount due on the Payment Due Date, which shall then be paid by the Final Date for Payment.
Paying the Notified Sum

• The reason that payment notices are important is that they generate a ‘Notified Sum’ which must be paid

• The Notified Sum is to be paid by the Final Date for Payment (section 111)

• Default period in Scheme is 17 days
The Payment Notice

• The contracts can specify that the Notice stating the amount due can be given either by:
  – the payer this is a 110A(1)(a) notice, or
  – by the payee, this is a 110A(1)(b) notice

• If the contract does not state who is to issue the Notice, the payer is to
The Payment Notice

Three typical scenarios:

1. Payee is to give Notice
2. Payer is to give Notice and does so
3. Payer is to give Notice but does not
The Payment Notice

• Whoever gives the Notice, it must

  – be given not later than 5 days after Payment Due Date

  – specify the sum due at the Payment Due Date and the basis on which it is calculated

  – be given even if amount due is £0.00
Default Notice

• What if a Payment Notice should have been issued by the payer, or a specified person, but was not?

  – the payee may serve a notice at any time after the Payment Notice should have been issued by the payer
  – The Notice must comply with the requirements of section 110A(3)
Default Notice

• The payee should act quickly as the time to the Final Date for Payment starts from when the Default Notice is served (section 110B(3))

• If the contract permits the payee to make an application and he does so then that application will become the Default Notice and no new one can be given
Payless Notice (section 111(3))

• A payer may serve a ‘Pay Less Notice’, if he intends to pay less than the Notified Sum

• A Pay Less Notice must:
  – be given before the prescribed date (7 days prior to the Final Date for Payment in the Scheme)
  – must specify the sum due (even if £0.00) on the date of the Notice and the basis on which it is calculated
How it Looks

- The standard position (this can be altered by the contract)

It is important to remember that who issues the Payment Notice is governed by the contract. If the contract is silent, it will be the payer.
Suspending Works
Can I walk off site?

- Suspend works – follow the procedure
  - Notice of intention to suspend
  - Reasons for suspension
  - If no payment received, works can be suspended
  - Extensions of time available under contract

- JCT SBC 2011 Cl 4.14
- NEC3 ECC Y2.4 (under Y(UK2)) – as a CE
Adjudication
Adjudication

• All Construction Contracts must have an adjudication provision. If not Part II, Section 108, the Housing Grants Construction and Regeneration Act 1996 (as amended) implies a right to adjudicate disputes
Adjudication

- A right to refer a dispute to an adjudicator who will make a temporarily binding decision on that dispute within 28 days

- Can be extended up to 42 days with the consent of the Referring Party and beyond this period with the agreement of both parties
Adjudication

• The decision is ‘temporarily binding’ and may be finally decided in arbitration or court

• However statistically, adjudication has been shown as being the final forum for the majority of disputes (empirical evidence: 95% of decisions are accepted)
Adjudication

Typical Process – Stage 1

• Timing

• Notice of Intention to Refer
  – Jurisdiction

• Appointment of Adjudicator
  – Contractual Provisions and ANBs
Adjudication

Typical Process – Stage 2

• Referral Notice
  – Drafting Pleadings
  – Exhibits
  – Witness Statements
  – Precedents
Adjudication

Typical Process – Stage 3

• Evidence
  – no discovery
  – generally no cross-examination
  – possibly witness statements

• Hearing / Meeting
Adjudication

Typical Process – Stage 4

• Decision
• Costs/Fees?
• Interest
• Slips
Statutory Demands

- Useful where no dispute
- Effective is >£750 owed
- Often useful for recovering retention
- No cost attached to issuing
Contractual Provisions
Notices and Conditions
Precedent

• JCT SBC 2011 Cl 2.27.1:
  – If and whenever it becomes reasonably apparent that progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Architect/Contract Administrator...

• NEC3 Cl 61.3:
  – If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date...
Notices and Conditions

Precedent

- Concerns about giving notices
  - Don’t want to sound contractual
  - Too busy trying to get the work done
  - Didn’t know the requirements
  - Wasn’t aware of the communication protocol
Liquidated Damages

• Often better to have LADs
  – NEC3 – Secondary Option Cl X7
  – JCT Contract Particulars
  – What if no or ‘nil’ entry?

• What rate for subcontract LADs?
Ending the Contract

• Ending or Terminating your Contract
• If **Determination** – follow the rules exactly as set out in the Contract
• If **Termination** – need a fundamental breach which is accepted

• Risk laden area - be careful before proceeding
Claiming Interest

• JCT 2011
  – Simple interest
  – Interest rate for the period until such payment is made

• ICE 7th Edition
  – Compound interest
  – 2% over base of bank specified in Appendix

• NEC 3
  – Calculated on a daily basis at the interest rate and is compounded annually
Interest on Late Payments

• Late Payment of Commercial Debts (Interest) Act 1998
• 8.5% rate
• Late Payment of Commercial Debts Regulations 2012
Records, Records, Records

- Why keep records?
  - Burden of Proof
  - Standard of Proof

- Show what was planned
- Show what was actually done
- Show why it changed
Dispute Resolution

- Mediation / Conciliation
- Adjudication
- Arbitration
- Litigation
Questions?

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