



Certainty of payment

Agreeing 'how much' and 'when'



Certainty over how much and when payment is made builds trust between supply chain members and underpins collaborative working to achieve value for money projects for clients.



OGC Guide to Best 'Fair Payment' Practices

Please note that this guidance is designed to give general guidance on best practice; it is not intended to provide legal advice. NSCC and the organisations responsible for its content do not accept any liability arising in any way from relying on this guidance. If you require advice on a specific issue, you should seek your own independent legal advice; NSCC Specialist Contractors can contact the NSCC legal and contractual helpline provided by Wedlake Bell on 0870 066 6871.

Wedlake Bell

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Introduction

Specialist Contractors routinely suffer from both late and reduced payment. Although the Housing Grants, Construction and Regeneration Act (the 'Construction Act') provides 2 remedies for this in the form of adjudication and suspension, neither of these are employed as widely as they should be by Specialist Contractors. This is because there is so much uncertainty about *how much* is due for payment and *when* it should be received. If Specialist Contractors don't know *how much* is in dispute or on which items, how can they adjudicate? If they can't be certain of *when* a payment becomes due and payable, how can they be sure that they have the right to suspend work?

The lack of certainty of payment amongst Specialist Contractors is largely the result of flaws within the current legislation. The Construction Act requires a contractor to tell his sub-contractor what he intends to pay him but it does not include a sanction should he fail to actually do so! NSCC believes that proper and timely payment throughout the supply chain is a fundamental right, and supports an application-based payment process, whereby the amount applied for becomes due and payable if it is not contested within a certain period of time.

This guidance note is one of a series published by NSCC as part of its Fair Payment Campaign, which was launched in September 2007 to improve payment practices in the construction industry. The campaign has 3 objectives: certainty of payment, which is dealt with in this guidance note, 30-day payment periods and the removal of retentions. For advice on achieving 30-day payment or removing retentions from your contracts, you can download the appropriate guidance note from www.fairpaymentcampaign.co.uk.

By following the advice in this guidance note and implementing the campaign objectives within your business, you can help NSCC to change payment practices and make the construction industry a fairer place for all Specialist Contractors.

To show your support for the NSCC Fair Payment Campaign, sign up to the campaign at www.fairpaymentcampaign.co.uk and use the campaign logo on your company stationery and invoices.

The Construction Act's Missing Link

At first glance, the Construction Act would appear to ensure that sub-contractors are told *how much* they are going to be paid and *when* they are going to receive it.

The Act requires all construction contracts to provide an 'adequate mechanism' for determining what payments become due and when. Under Section 110 (2), the contractor is required to issue a notice to his sub-contractors not more than 5 days after the date on which payment becomes due, telling them the amount that he intends to pay them and the way in which he has calculated this. This makes sense: the provision of this information establishes if there is a difference of opinion regarding the value of the works early in the payment cycle, and gives the parties the opportunity to resolve it.

Unfortunately, appearances can be deceptive. Although the Construction Act requires the obligation under Section 110 (2) to be written into contracts, it doesn't require that it is actually met! This is because it doesn't impose a penalty for not meeting the requirement of Section 110 (2), representing a missing link in the legislation that renders it largely ineffective.

The fact is that on many construction projects, contractors do *not* issue Section 110 (2) notices to their sub-contractors. In practical terms, this means that, until a sub-contractor receives (or doesn't receive) his money, he will have no idea what exactly he is going to be paid or whether any of the items he has claimed are in dispute. So if the payment he receives is for a different amount to that claimed, it is difficult for him to take action by going to adjudication because the 'dispute' is unclear: all he can say to an adjudicator is 'I asked for £X; he paid me £Y – I don't know why he hasn't paid me £X, but can you tell him to pay the difference between £Y and £X?'

It is not only the amount of payment that is often unclear; more ambiguous wording in the legislation means it can also be difficult to determine *when* payment becomes due. The widespread use of 'pay-when-certified' provisions, which provide that payment to a sub-contractor only becomes due on the issue of a certificate under the main contract, means that sub-contractors do not know when their payments have become due or payable because they have no idea if and when the certificate was issued! As a result, a sub-contractor that has not received payment is unable to suspend work because he cannot be sure what the final date for payment was nor whether it has passed.

Why Certainty Is Key

Certainty of *how much* is due for payment and *when* gives Specialist Contractors an effective opportunity to make use of the sanctions provided by the Construction Act if payment is not received. More importantly, it offers Specialist Contractors the chance to discuss any differences in the value of the work with the contractor *before* payment is made, allowing them to try to reach agreement amicably. Certainty of payment on both sides means that disputes come to light sooner and the nature of them is more transparent, so they can often be settled more quickly, easily, and cheaply.

Greater certainty of payment will not just benefit Specialist Contractors; it will improve the industry as a whole. Knowing *how much* is due to be paid and *when* will allow all parties in the supply chain to insist on proper and timely payment, which will improve cash flow, decrease financing costs and reduce the number of small business failures. This in turn will boost available working capital, leading to greater investment in all aspects of the construction process including health and safety, training, and plant and equipment, and resulting in improvements in the overall quality of products and services that the industry can offer.

In order to obtain certainty of *how much* and *when* for Specialist Contractors, NSCC is calling for a default position whereby, if the contractor fails to respond to an application for payment within an agreed period of time, the amount applied for by the sub-contractor automatically becomes due and payable. This would allow all Specialist Contractors to use adjudication and suspension with confidence if they have not received payment by the final date for payment.

Agreeing ‘How Much’ And ‘When’

In addition to lobbying for a default position, which would see the amount applied for becoming due and payable in the event that it was not contested by the contractor, NSCC is seeking the abolition of ‘pay-when-certified’ so that payment becomes due and payable on a defined calendar date. It is anticipated that both of these issues will be dealt with in the future as part of an ongoing review of the Construction Act. However, in the meantime, there are a number of simple things that you can do to achieve greater certainty in relation to your payments.

Fixing payment dates

Obtaining certainty of *when* payments become due is relatively straightforward. The Construction Act requires that your contract determines:

1. the dates on which payments become due – the ‘due date’
2. the dates on which payment should actually be made – the ‘final date for payment’.

You can achieve this quite simply by making sure that, for every payment, the application, due and final dates for payment are calendar dates or calculated by reference to calendar dates (e.g. the last Friday of the calendar month).

Ideally your contract should include a schedule of calendar dates for application, due and final dates for payment as follows:

Schedule of Interim Valuations/Payment Time Scales

<i>Valuation No.</i>	<i>Sub-contractor's application date</i>	<i>Value up to and including date</i>	<i>Due Date</i>	<i>Notice date to sub-contractor* (latest)</i>	<i>Payment to sub-contractor (latest)</i>
1	Fri 24 Aug 2007	Fri 31 Aug 2007	Fri 31 Aug 2007	Wed 5 Sep 2007	Sun 30 Sep 2007
etc.					

Sub-contractor's application date denotes date by which the sub-contractor application must be received at the site office marked for the attention of the Project QS.

* This refers to the Section 110 (2) notice. If you do not receive this notice, your right to payment will not be affected. However, you will not know how much the contractor intends to pay you or why.

You should never accept payment provisions where any of the dates in the payment cycle are determined by an event under the main contract (such as the issue of a certificate or an application). So called 'pay-when-certified' provisions link *your* due date to the issue of the main contract certificate by stating that an amount only becomes due to you when the contractor receives *his* certificate from the employer (an event which you have no control over or even knowledge of). This means that, if the certificate is issued late, the due date (and by extension the final date for payment) for your payment slips.

Beware!

“Within 14 days of receipt of a certificate under the main contract (‘the Notice Period’) where such certificate includes an amount in respect of the sub-contractor’s application, the contractor shall give written notice to the sub-contractor setting out the sum which will become due to it in respect of that application and the basis upon which that sum has been calculated by the contractor. The sum so notified will become due to the sub-contractor on the day following the expiry of the Notice Period.”

You should also watch out for clauses that have long periods between the application date and the final date for payment, which give the impression that payment terms are more favourable than they really are. Clauses such as the one below stating that payment becomes due 30 days after the valuation date suggests 30-day payment terms; however, there are actually a further 30 days until the final date for payment which is when you get your money!

Beware!

“Interim payments shall be due at intervals not exceeding 30 days after the Valuation Date and the final date for payment of interim payments shall be not later than 30 days after the date when they become due.”

If you have your own terms and conditions, a payment clause that you can use to ensure certainty of when payments become due is:

The first payment shall become due on the last Friday in the calendar month in which work under the contract commences. Subsequent payments shall become due on the last Friday in each calendar month. The final dates for payment shall be 30 days from the dates that the payments become due.

Establishing the amount due

The best way of obtaining certainty of *how much* is due for payment is the 'default' process referred to earlier in this guidance note, whereby the amount applied for becomes due and payable in the event that the contractor does not tell his sub-contractor otherwise. It is anticipated that this may eventually be incorporated into the Construction Act and, as part of its campaign for certainty of payment, NSCC is calling on all Specialist Contractors to implement this system for their payments. By including the following wording in your standard terms and conditions, you can ensure that, where your terms and conditions are agreed, your applications for payment would be the amount due and payable unless you received a counter valuation from the contractor:

- 1. The sub-contractor shall make applications for payment at [monthly] intervals commencing one month after the commencement of the works [or start on site].*
- 2. Not later than 5 days after the receipt of an application for payment, the contractor shall give a written notice specifying the amount of the payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates and shall pay the amount proposed no later than the final date for payment. The amount so notified shall be the amount due.*
- 3. Not later than 5 days before the final date for payment of an amount due pursuant to clause 2, or in the absence of a notice pursuant to clause 4, the contractor may give a written notice to the sub-contractor specifying any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.*
- 4. Where the contractor does not give any written notice pursuant to clause 2 and/or clause 3, the amount stated in the application for payment shall become the sum due. The contractor shall pay the sub-contractor this amount by the final date for payment.*
- 5. The final date for payment of an amount due as an interim payment shall be 30 days from the date of receipt by the contractor of the sub-contractor's application for payment.*

For these clauses to become effective, you must ensure that they are incorporated into the final agreement that you reach with the contractor. It is not enough to include them in your offer; the contract must expressly refer to them or provide that, where there is a conflict between terms, yours take precedence.

Getting what you are owed

Having established certainty of *how much* you are due and *when*, there are a number of things that you can do at the application stage to give yourself the best possible chance of actually receiving your money:

- > **Follow the rules** – Make sure you follow the procedural requirements for the submission of applications, so that you don't fall foul of a technicality. Always send applications on time, to the right place, in the correct format with the required number of copies.
- > **Include supporting information** – Provide as much detail and supporting documentation in respect of the amount claimed as you can (e.g. by means of an attached schedule showing how the amounts claimed have been calculated). This will make it difficult for the contractor to dispute or reduce your payment.
- > **Get the paperwork right** – Send your CIS, insurance and VAT registration details with every application to avoid giving the contractor an excuse not to pay you.
- > **Obtain proof of receipt** – Get confirmation that your application and all the necessary paperwork have been received, and that your application has made its way into the contractor's payment system.

Security Of Payment

There is no point in going to the trouble of establishing certainty of *how much* is due and *when* if the contractor does not actually have the money to pay you! Therefore, before entering into a contract with any contractor, you should satisfy yourself that he has the financial ability to pay you for the work that you are going to carry out.

When you allow contractors time to pay, it should be a conscious decision based on knowledge – if you knew a contractor was about to go bust, it is unlikely that you would allow 30 days credit. By conducting basic checks on contractors, you can greatly increase your chances of getting paid.

The following are simple ways of checking a contractor's credit-worthiness:

- > **Your records** allow you to check, if you are in the habit of recording your experiences with contractors, whether you have had any problems with a contractor in the past.
- > **Bank references** are quite reliable because they reflect the current cash position of a company; however, they are notoriously vague and will not simply state 'do not extend credit to this company'.
- > **Trade references** from a contractor's regular suppliers can offer an insight into his payment practices e.g. whether he pays on time.
- > **Company accounts** at Companies House – www.companieshouse.gov.uk
- > **Register of County Court Judgements** contains details of all money judgments from the County Courts of England, Scotland, Wales and Northern Ireland.

NSCC Credit Checking Service

The best way of checking whether your client is credit-worthy is by obtaining a credit rating from a credit-reference agency. NSCC provides its Specialist Contractors with access to a free credit checking service. Contact your trade organisation with the name of the company that you wish to credit check, and it will conduct a search on your behalf and email a report directly to you.

In addition to checking out the contractor, it is also advisable to research his client, as it is legal for a contractor to include terms that allow him to avoid paying you if he does not get paid as a result of his client going bust. However, to be effective, so-called pay-when-paid on insolvency terms such as the one below must be agreed. Do **not** sign up to them or you will bear the consequences of the contractor's bad judgement when his client goes bust!

Beware!

"Where either the employer or any third party is insolvent payment shall be due upon receipt of any such payment by the contractor..."

Credit Insurance

If you consider a contractor a risk for whatever reason, you can take out credit insurance to protect yourself, ensuring that you get paid even if the contractor doesn't pay you or goes bust.

NSCC service

In partnership with Credit Shield, NSCC offers its Specialist Contractors access to an exclusive credit insurance facility. Credit Shield can rate the contractors that you work for to help you be more selective, and, subject to underwriting, will provide credit insurance, which will guarantee your cash in the event that your client does not pay you or goes bust.

For an information pack or to take advantage of this facility, call 0870 066 6902.

Credit  Shield

What To Do If You Don't Get Paid

Following receipt of your application for payment, a contractor may issue a 'notice' telling you how much he intends to pay you and/or how much he is going to withhold if he disagrees with the amount you have claimed. Alternatively, he may do nothing until he makes (or doesn't make!) payment.

If possible, you should always try to determine the contractor's intentions *before* your payment becomes overdue. The best way of doing this is to establish a contact within the companies of each of the contractors that you work for – having a 'friend' is likely to prove valuable when you have queries to resolve! As a back up, you should have a mechanism for reminding you of any overdue payments on a regular basis, as this will allow you to chase them up by contacting the companies concerned to prompt them that payment is late.

Following receipt of a payment notice

If you receive a notice from the contractor detailing your proposed payment (either before the final date for payment or together with the payment) and you disagree with it, you should write to the contractor explaining why you disagree with it and requesting an urgent meeting to discuss it. In your letter, you should state that, if you do not resolve the disagreement to your satisfaction, you will consider that a dispute exists between you, and you will reserve the right to refer it to adjudication. See letter 1 on page 12.

In the event that agreement cannot be reached and you wish to adjudicate, NSCC has published its Top 10 Tips for Adjudication, which contains a wealth of useful information designed to increase your chances of success – for a free copy, call NSCC on **0870 429 6351** or go to the 'Information' page of the NSCC website at **www.nsc.org.uk**.

Free Adjudicator Nominations



NSCC Specialist Contractors are eligible for free adjudicator nominations from the Association of Independent Construction Adjudicators (AICA). AICA acts for NSCC, a named Adjudicator Nominating Body in the JCT contracts. In the event of a dispute with a contractor, you can approach AICA to nominate an adjudicator without having to pay the AICA nomination fee of £300.

For further information or a free nomination, contact AICA on 0870 429 6353 or visit **www.aica-adjudication.co.uk**.

Letter 1 –

Disputing a contractor's payment notice

<Insert address of contractor>

<Insert date>

Dear <Insert name of contractor>

Re: Payment Notice – <Insert reference>

We are in receipt of the above payment notice relating to our works carried out at <insert name of project> for the period <insert details of valuation period for amounts in dispute>. Unfortunately, we do not agree with your valuation of the works/your decision to withhold <insert amount withheld> for <insert ground(s) given for withholding>* and would be grateful to understand your reasons for this.

In order to discuss this matter, we request an urgent meeting within the next 3 working days.

If we cannot resolve this issue by <insert date>, we will consider that a dispute exists between us, and we will reserve the right to refer it to adjudication in accordance with the contract.

We look forward to hearing from you.

Yours sincerely

<Insert signature>

<Insert name>

* delete as appropriate

On receipt of no payment or a reduced payment

If you receive no payment or a reduced payment with no explanation, you should still write to the contractor to request a meeting, but this time ask for an explanation in advance of the meeting of the amount that he considered to be due for payment (see letter 2 on page 14). You are asked to send a copy of this letter to NSCC to assist NSCC in compiling evidence on contractors that do not pay their supply chains properly.

If you are certain (but only if you are certain!) that payment was payable on a given date and it has not been paid, you can write to the contractor giving at least 7 days' notice of your intention to suspend work until payment is received. However, if you are considering suspension, you are advised to contact the NSCC legal and contractual helpline provided by Wedlake Bell on **0870 066 6871** as wrongful suspension will almost certainly amount to a breach of contract on your part.

Checklist

1. Make sure that for every payment the application, due and final dates for payment are **calendar dates** and recorded in your contract in the form of a schedule.
2. Try to agree a **default application process** whereby the amount you apply for becomes due and payable in the event it is not contested by the contractor, and look out for contractual tricks designed to prevent you from achieving certainty of payment.
3. **Credit check** your clients to satisfy yourself that they have the financial ability to pay you, and consider taking out credit insurance – all NSCC Specialist Contractors have access to a unique credit insurance facility via Credit Shield; for further information, call **0870 066 6902**.
4. Get your **applications for payment** right – send them on time, to the right place, in the correct format with the required number of copies.
5. **Don't accept late and/or reduced payment** – be firm, know your rights, and make use of the remedies available to you under the Construction Act.

Letter 2 –

Requesting an explanation of the amount paid/not paid

<Insert address of contractor>

<Insert date>

Dear <Insert name of contractor>

Re: Application for Payment – <Insert reference>

We are in receipt of your payment of <insert amount of payment received> in respect of the above application for payment/Our records show that we have not yet received payment of the above application for payment* for works carried out at <insert name of project> for the period <insert details of valuation period for amounts in dispute>.

In order to discuss this matter, we request an urgent meeting within the next 3 working days. In advance of the meeting, we would be grateful if you could provide us with details of the amount that you consider/considered* due for payment, and how you calculated this.

If we cannot resolve this issue by <insert date>, we will consider that a dispute exists between us, and we will reserve the right to refer it to adjudication in accordance with the contract.

We look forward to hearing from you.

Yours sincerely

<Insert signature>

<Insert name>

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