

Not getting paid? Want to get paid?

Then read on...

This is the first in a series of articles by Robert Gemmell aimed at contactors who would like to know more about how they can get paid, how to get paid sooner and how to get paid what they are entitled to.



Let me start off with a brief introduction. My name is Robert Gemmell and I am a quantity surveyor, chartered arbitrator and adjudicator representing main contractors and subcontractors who are in dispute over payment due to them.

Many contractors end up in protracted disputes to recover money they are owed. I get a call from time to time and it is usually the same old story: "I have invoiced my client but they won't pay me." Does this sound familiar?

How to make a difference

If it does then I have a few pointers that could really make a difference:

Firstly, make sure you have a written contract in place before work begins or, at a push, as soon as possible after work starts. If you do not have a written contract in place and you end up in dispute over payment, your only option if negotiation fails is to go to court. That can take years in some cases, and could cost you a fortune.

Secondly, if you do have a written construction contract in place, what are the payment provisions? Do those payment provisions comply with the Construction Act? If they do not comply then the relevant provisions of the Scheme for Construction Contracts will apply. You must be very clear about what payment provisions apply as this will affect the amounts you are entitled to, what notices need to be issued etc.

If your contract is a construction contract in writing, you can refer your dispute to an adjudicator who has 28 days to make a decision. The party having to make payment then has to make that payment, usually pretty quickly. If they do not then you can have the decision enforced by the court within a matter of weeks.

This year I have represented two family run businesses in adjudications. They were both small subcontractors, and in both disputes the main contractor refused to pay them the amount they had applied for. In both cases, I thought, and so did the adjudicator, that the subcontractors were entitled to the amount applied for. In both adjudications the adjudicator awarded the subcontractors over 95 percent of the claimed amount and they got an enforceable adjudicator's decision within five weeks of commencing adjudication proceedings.

What would their positions have been had there been no written construction contract?

In order to find out what the current payment problems and issues are in the construction industry, I have been sending out a short questionnaire (please e-mail me for a copy) and the response has been very encouraging. However, the findings are not. I am shocked at the number of contractors not getting paid the amount they consider they are entitled to.

My next article will provide a simple step by step procedure on the payment provisions that a construction contract must contain – if it does not then certain other payment provisions will be implied into your contract by law. Do you know what they are? My final article will be on how to get paid using adjudication: a simple step by step procedure for the adjudication process.

Robert J. Gemmell is an associate director at the Birmingham office of MCMS Limited and can be contacted on robert.gemmell@mcms.co.uk or telephone 0121 222 4117

Payment provisions

This article aims to provide an overview of the payment provisions a construction contract must contain – if your construction contract does not contain these provisions then certain other payment provisions will be implied into your contract by law.

The Housing Grants, Construction and Regeneration Act 1996 ('the Act') came into force on 1st May 1998. If the parties to a 'construction contract' do not include in their contract the minimum payment provisions set out in the Act then the relevant provisions of the Scheme for Construction Contracts (England & Wales) 1998 Regulations ('the Scheme') are implied. This means that the parties to a construction contract retain their right to receive payment in accordance with the procedure set out in the Scheme even when no payment provisions are set out in their construction contract.

Most of the standard form construction contracts now include payment provisions that comply with the minimum requirements of the Act. However, some bespoke construction contracts, amended standard form construction contracts and many simple contracts do not comply with the Act. As a result, the provisions of the Scheme apply to payment under those contracts.

What the Act states

The Act states that your construction contract must contain the following payment provisions:

- An entitlement to payment by instalments, stage payments or periodic payments, unless the duration of the work will be, or is estimated to be, less than 45 days.
- A mechanism for determining what payments become due and when, and a final date for payment in relation to any sum which becomes due.
- The giving of a notice by the paying party, not later than five days after the due date for payment, specifying the amount paid or proposed to be paid, and the basis on which that amount was calculated.
- Payment cannot be withheld unless an effective notice of intention to withhold payment has been given at the appropriate time.
- Payment must not be conditional on the payer receiving payment from a third party, unless the third party is insolvent.

The relevant provisions of the Scheme will be implied into a construction contract that does not comply with the Act. The Scheme provides mechanisms for calculating:

- An entitlement to stage and/or final payments.
- The amount of payment to be made.
- The dates for payment.

Therefore, if the parties to a construction contract have not recorded the mechanism for calculating amount(s) of payment(s) or the intervals for payment(s) in their contract then the Scheme will imply terms that set out how to calculate the amount, when that amount becomes due and the final date for payment of that amount.

What you are entitled to under the Act and Scheme

So, if your construction contract does not contain a full set of compliant payment provisions then, because of the Act and the Scheme, you will still be entitled to:

- Interim payments (if the work is more than 45 days) of the value of the works performed from the start of the contract less



Robert J. Gemmell is an associate director at the Birmingham office of MCMS Limited and can be contacted by e-mail robert.gemmell@mcms.co.uk or by telephone 0121 222 4117.

the amount previously paid.

- Interim payments will be due every 28 days or on the making of a claim for payment, whichever is later.
- Final payment, which will become due on the expiry of 30 days following completion of the work, or the making of a claim for payment, whichever is later.

If the sum due has not been paid by the final date for payment, and no effective notice to withhold payment has been issued, then the payee has a statutory right under the Act to suspend performance.

And finally

'Pay when paid clauses' are outlawed. The Act contains a provision that any clause making payment under the construction contract conditional on the paying party receiving payment from a third party is unenforceable, unless that third party is insolvent.

Not getting paid?

Want to get paid?

Adjudication?

This article provides an overview of the adjudication provisions that a construction contract must contain – if your construction contract does not contain these provisions then adjudication provisions will be implied into your contract by law.

Yes, it is the Housing Grants, Construction and Regeneration Act 1996 (“the Act”) again. If the parties to a ‘construction contract’ do not include the minimum adjudication provisions set out in the Act in their contract then the adjudication provisions of the Scheme for Construction Contracts (England & Wales) 1998 (“the Scheme”) are implied. You see, just like the payment provisions, the parties to a construction contract retain their right to adjudicate even when no adjudication provisions are included in their construction contract.

What is adjudication?

Adjudication is a procedure under which the adjudicator, within a 28-day fixed time period (or an extended period if the parties agree) and in accordance with agreed procedures, will give a legally enforceable decision on a dispute, which must be complied with. Adjudicators are people who are trained and qualified in your profession.

If negotiation, mediation or whatever else you would usually try to resolve your dispute does not get you anywhere, (or fails), then adjudication is probably the quickest and cheapest method of resolving your dispute.

Parties to a construction contract have the right to adjudicate even if the dispute resolution clause in their contract states that litigation, arbitration or any other form, or no form of dispute resolution will apply. Parties to a construction contract have the right to take their dispute to adjudication at anytime, whatever the procedures that may be listed in their contract.

Adjudication procedure

If there is a dispute then the party who decides to refer the dispute to adjudication must inform the other party of its intention by a document usually referred to as a “Notice of Adjudication”. The Notice of Adjudication should contain sufficient information to define the dispute, along with whatever is required by the contract, either by reference to documents or by a short description.

The adjudicator will need to be selected and appointed, in time for the dispute to be referred within seven days of the date of the Notice of Adjudication. The procedure for the selection and appointment of the adjudicator will be stated in the contract or, if not, will be implied by the Scheme. In most cases, the parties can even agree who they want to adjudicate.

The party referring the dispute will need to refer the dispute to the adjudicator within seven days of the date of the Notice of Adjudication by issuing a Referral Notice which sets out the dispute.

The adjudicator will review the dispute referred and will set out a



Robert J. Gemmell is an associate director at the Birmingham office of MCMS Limited and can be contacted by e-mail robert.gemmell@mcms.co.uk or by telephone 0121 222 4117.

timetable for the proceedings. Unless otherwise agreed, the initial timetable will be based on a strict 28 day period as this is a requirement of the Act. The adjudicator will generally ask for a response to the referral within a specified period and the response should address each relevant point in the referral. There may be no formal entitlement to submit any further submissions but the adjudicator should give each party a reasonable opportunity to respond to what has been said by the other side.

In addition to the formal exchange of submissions, the adjudicator may ask for further information to clarify the submissions already made. The adjudicator will decide whether to conduct the adjudication solely on the basis of the documents submitted or to call a meeting with the parties. However, the parties can request a meeting and the adjudicator will usually take that request into account.

Quick, enforceable decision

The adjudication process is aimed at getting a quick and enforceable decision at a reasonable cost to the parties. The parties bear their own costs, therefore, if you lose the adjudication you will not be liable for the other side’s costs, just your own.

I have prepared a booklet that details the payment and adjudication provisions I have briefly discussed in this and my previous article. If you would like a copy please contact me either by e-mail or phone.

My next article will look at your right to suspend work if you are not getting paid.