

## Payment provisions

Key things you should know about payment provisions in construction contracts.

Every business that issues a construction contract must be aware of the payment provisions, which have caught out many unwary employers in the past. The payment provisions under the majority of construction contracts are governed by the requirements put in place by the Housing Grants, Construction & Regeneration Act 1996.

### What a construction contract will include:

- It will clearly outline the amounts and timing of **all** payments;
- It will also clearly explain that payments **must** be made in instalments, until the project is complete;
- There will be a 'payment due date' and 'final date for payment' for each instalment embedded in the contract;
- 'The payment notice' and the 'pay less notice' should be within five days of each payment due date – the payer should issue a payment notice.

Members of the Federation of Master Builders (FMB) have access to 'Plain English' construction contracts in the 'members section' of their website

### What is the payment notice?

The payment notice is the payer's valuation of the work carried out up to the payment due date.

If the employer fails to serve a payment notice, the contractor may submit its own payment notice, identifying the sum which it says is due by the final date for payment. (The application for payment may serve as the contractor's payment notice)

### What is the pay less notice?

- If before the final date for payment the payer has grounds for paying less than the original sum (e.g. liquidated damages) the payer must issue a pay less notice;
- The pay less notice must be served no later than a prescribed period before the final date for payment – if the prescribed period is not stated in the contract, the period is deemed to be seven days before the final date for payment;
- The penalty for failing to serve a pay less notice can be harsh – in the absence of a valid pay less notice, the employer has to pay the entire amount certified in the payment notice.





## What can happen if you don't stick to the payment provisions?

### **Case study**

There are many case studies that have been caught out by payment provisions, a recent case of Leeds City Council v Waco UK Ltd witnessed a contractor lose its right to payment. This case gives insight into the circumstances where the requirements of the Construction Act prevented the contractor from being paid.

The parties had entered into a JCT Design & Build contract, prior to practical completion; the contractor was to be paid on the 26<sup>th</sup> of each month. After completion, interim payments were to be made at intervals of two months. Most of the contractor's monthly applications for the payment were submitted late; nonetheless the contract administrator treated the applications as if they had been made on time. This continued after practical completion, making the applications for payment not follow the exact dates set out by the contract.

The contractor issued an interim application for payment number 21, to which Leeds City Council refused to pay, but did not serve a payment notice or a pay less notice. Following the refusal, the contract referred the dispute to adjudication, where the case was found in favour of the contractor on the ground that the council failed to serve the notices. After still refusing to pay the contractor issued proceedings in Court, to enforce the Adjudicator's decision.

The Court instead granted Leeds City Council permission to defend the case on the condition that it paid the contractor the sum awarded by the Adjudicator. The Council's argument was that the contractor has no entitlement to be paid on any dates other than those specified in the contract. Their argument was that the interim application was made six days early which rendered it invalid. The contractor's defence was that both parties had agreed to vary dates for payments, evidenced by a course of conduct: they had never followed any of the contract dates. The Court found in favour of Leeds City Council.

### **To learn from this:**

This case should provide warning to contractors not to be overly efficient and issue applications for payment early. If a contractor submits an application for payment early, an employer may challenge the application on the ground that it is premature. This case acts as a reminder to carefully check the contract payment dates and make sure they are adhered to.

**This is just a summary, for more information and guidance, you can call legal advisor Mike Green at [Phillips Green & Murphy Solicitors](http://www.pgmsolicitors.co.uk) on 01792 468684.**