



How do Sub-Contractors Get Paid?

What to do when faced with non-payment



A lot of the disputes we are faced with at Quigg Golden revolve around payment (or a lack thereof). In the current climate, possibly more than ever, getting paid on time is of prime importance.

So, if you are a Sub-Contractor how do you maximise your chances of getting paid?

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Know how you will be paid under the contract

Firstly, it is important to know and understand your contract. This is your agreement, and should detail the finer points of your obligations, alongside your entitlements (including payment). You should always read and be familiar with your contract.

All too often, failing to read the contract properly leads to major disputes down the line, with parties having little understanding of the obligations they have signed up to. Do not let this happen to you. Know what type of contract you have, what the amendments are and how you get paid under it.

Waiting until there is a dispute before you read your contract in detail can cause problems. It can often be the case that *“the horse has already bolted”*. You find yourself trying to limit the damage rather than maximise recovery.

When reading the payment provisions of your contract, here are the key elements to look out for:

- Note what you are entitled to be paid for;
- Note when you are to be paid – what are the intervals of payment;
- Note anything which may be a condition precedent to payment (i.e.

anything which must be done, or which must occur before payment is made);

- Note any other barriers to payment – anything which may give the paying party a reason or excuse to withhold payment; and
- Understand fully the requirements which you must meet to get paid; for example, what you must include in your application, and how, when and to whom that application is to be submitted.

What if the contract is ambiguous regarding payment?

Contracts can often be ambiguous or lacking in requisite detail and so the Government has sought to give parties seeking payment some additional tools. Again, we strongly advise that you are familiar with the rights and obligations afforded by the legislation. Whilst the legislation can be useful, if you do not want to rely on luck, you should know what you should do and not do in advance of making your application for payment.

What UK legislation applies to payment under construction contracts?

The Housing Grants, Construction and Regeneration Act 1996 as amended by

the Local Democracy, Economic Development and Construction Act 2009 (the “*Construction Act*”) provides the mechanism under which Sub-Contractors can seek payment. One of its primary aims is to ensure that payments are made promptly, ensuring adequate cash flow is maintained throughout the supply chain.

It attempts to do this by establishing a due date and final date for all payments, both interim and final, in the absence of compliant contractual provisions. It also sets out the mechanics around establishing a notified sum. In short, this can be summarised as follows: if the Sub-Contractor makes a valid payment application which is not replied to on time by the contractor via a detailed payment notice or payless notice, then the amount claimed by the Sub-Contractor in the payment application is the notified sum which is to be paid in full.

As usual with the law, there are lots of ‘ifs’, ‘ands’ and caveats to the above, but that is the starting premise.

The above applies equally to the relationship between Employer and Main Contractor as it does between Sub-Contractor and Main Contractor, and between Sub-Contractor and Sub-subcontractor etc. Basically, the paying party under the construction contract (payer) and the payee.

The Scheme for Construction Contracts (England and Wales) Regulations (“*the Scheme*”) supplements the Construction Act and may be relied upon where the contract itself does not include the necessary payment provisions. The Scheme helps to fill in the dates for when things should happen if the contract between the parties fails to meet the legislative requirements.

What legislation applies in Northern Ireland, Scotland and the Republic of Ireland?

Northern Ireland has its own version of the Construction Act (The Construction Contracts (Amendment) Act

(Northern Ireland) 2011) and Scheme (The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999). Scotland also has its own version of the Scheme – The Scheme for Construction Contracts (Scotland) Regulations 1998.

The Republic of Ireland has its own Act, the Construction Contracts Act 2013, with the similar aim of ensuring adequate payment mechanisms are applied to construction contracts.

What should you do when you don’t get paid?

There are several routes to explore when facing non-payment on a construction project, all of which must be considered carefully. These include:

- Continuation of the works
- Suspension
- Termination
- Dispute Resolution

Continuation of the works

Whether or not to continue the works is a commercial decision. Some Sub-Contractors may choose to wait until the end of the project in the hopes of payment being settled then. However, it is worth considering whether your leverage starts to fade as the contract reaches its end.

Suspend or terminate the works

If you choose to suspend or terminate the works, you must ensure you follow the correct procedure. Be sure to check the provisions of your contract (including any amendments) and the legislation. Whilst there is no wider legal right to suspend for non-payment (i.e. because you do not like the amount which has been certified), there is a right under the Construction Act to suspend for non-payment of a notified sum.

Whilst it may be difficult, ensure you do not act rashly and aim to seek legal advice if possible and talk through the correct procedure.

Dispute Resolution

Finally, dispute resolution procedures can prove both an efficient and cost-effective way of achieving a commercially suitable resolution to a payment dispute. Again, ensure you check the dispute resolution procedures outlined in your contract; these can include Adjudication, Mediation, Conciliation, Arbitration or Litigation. It is worth noting that the Construction Act affords parties to construction contracts an automatic right to adjudicate, even if an adjudication provision is not contained within your contract.

As specialists in these procedures, Quigg Golden can provide advice and support to assist in any dispute you may have. Please get in contact if you would like advice on any of the abovementioned issues by emailing Michelle.Travers@QuiggGolden.com

