



STEEL INDUSTRY
GUIDANCE NOTES

Money: the most important thing

Money is the most important thing in any contract. During the tender process time is always at a premium but it is worth spending some time on checking the contract conditions to make sure you understand their implications before a binding contract is in place. Once it is, it's too late. Provisions affecting money do not only appear in the payment clause. Many clauses can have an impact on money. Some of these may be unexpected and some will be onerous.

Here are some questions every organisation should ask itself.

When does payment actually start?

Does the payment cycle start with work undertaken off site or does it begin only when work has started on site?

But another question also arises. Is there something in the contract conditions that delays the start of the payment cycle? More and more frequently clauses appear providing that payment will not start until all the types of security required (for instance, performance bond, parent company guarantee, warranties) have been issued and delivered.

What are the payment terms?

This is not always the simple question it seems. It is not unusual to find amendments to amendments; supplementary conditions, schedules and annexes; orders, numbered documents and minutes, all saying something about what must be paid and when (and more to the point, what is not to be paid or not paid yet). All of these have to be read in the context of the 'Construction Act', if it applies. It is sometimes next to impossible to trace exactly what the payment terms actually are.

The what and when of payment needs to be clarified early as they will have a real impact on cash flow.

What does the price cover?

Surely the price covers what was quoted for?

Not always; you should remember this is not about what has been quoted for; it's about what the contract conditions provide. It is becoming increasingly common to see harsh terms in the contract. For instance, the contract may require the subcontractor to check the work of other subcontractors. It is not reasonable to expect companies to have the requisite skills to do this, let alone to have included for it in the quotation.

Are retentions to be held?

Retentions are still the bane of the contractor's life.

The first half of retention is usually paid upon practical completion. The second half is more problematical as it is commonly not paid until completion of the whole project. For contractors early on site, this may be some years ahead. Also, as payment is tied to completion of the whole project, problems down the line may prevent any of the retention being paid. It is also worth checking whether the retention is held on a 'pay when paid' basis, which is not enforceable on contracts covered by the 'Construction Act'.

Many enlightened clients are moving away from the use of retentions in their projects and in these cases, no retentions should be held in any part of the supply chain.

Alternatively, it is worth offering some form of security in place of cash retention

Whose work am I liable for?

You may find that you have made yourself liable for more than your own and your subcontractors' work. In the case of the *Co-operative Insurance Society Ltd v Henry Boot (Scotland) Ltd*, a contractor undertook the development of a consultant's design. Based on the wording of the contract, the court found that the contractor was liable for the consultant's work.

What does the contract allow as damages?

In the event that a claim arises for payment of damages, what does the contract allow? Some clauses only allow a subcontractor to recover what can be recovered by the main contractor under the main contract.

In this case, a subcontractor cannot recover for loss caused by the default of the main contractor himself or of

another subcontractor. As an exclusion clause, this is quite possibly not effective but who wants to have to go to court to find out?

Are there indemnities in the contract conditions?

An indemnity is an agreement to make good a loss suffered by another. The party indemnified does not have to take reasonable actions to minimise the loss (mitigate the loss) which would be necessary in ordinary contractual claims, neither does the loss have to be reasonably foreseeable.

Additionally, indemnities can be long lasting. They can extend the usual 6 or 12 year limitation period during which you are at risk

Can the works be suspended for non payment?

Where a contract is covered by the 'Construction Act', there is a statutory right to suspend performance of obligations under it where a sum due is not paid in full by the final date for payment.

The Act requires that at least 7 days' notice is given. Many contracts try and increase this period but, arguably, a longer notice period is not enforceable. Beware however that collateral warranties may also require longer notice periods and this will be enforceable.

Two problems arise with suspension for non payment. It can be tricky to be certain that a sum is due and the consequences of getting it wrong could be catastrophic. Also, although the contract period will be extended by the length of the suspension, there is no statutory right to extra time for remobilisation (although some contracts allow this). This may change in the future.

Costs in adjudication

There are two different things covered in this item – the adjudicator's own costs and the parties' costs. It is up to the adjudicator, subject to the law and applicable adjudication procedure, to decide what happens concerning adjudicator's costs.

As far as the parties' costs are concerned, the courts have decided that – subject to anything to the contrary in the adjudication procedure - parties can agree that the adjudicator should be able to decide how costs are paid. That agreement may be very informal and ad hoc.

Many contracts now require the party referring the dispute to adjudication to be responsible for all the costs of both parties, whatever the outcome of the adjudication. The referring party has no control over what costs the other party incurs.

The Government has said it intends to outlaw this practice but it has not done so yet and for the time being, such clauses remain enforceable.

What is the interest rate on overdue payments?

The statutory rate is 8% above base, the idea being to discourage late payment rather than simply compensate for it. But the contract can vary the right to statutory interest provided the overall remedy for late payment is 'a substantial remedy'. Check what rate you are being offered and challenge it if necessary.

Don't forget that in addition to interest you are entitled to (small amounts of) compensation for late payment:

- £40 for debts up to £999.99
- £70 for debts between £1,000 and £9,999.99
- £100 for debts of £10,000 or more.

Key Points

1. Money is the most important issue in any contract.
2. Provisions affecting money may appear throughout the contract, not just in the payment term.
3. Many of these provisions may be unexpected.
4. Terms are not always clear.
5. Not all provisions will necessarily be enforceable at law, but it is not wise to rely on this.
6. Clients may accept security in lieu of retention.
7. Indemnities can often be onerous.
8. It may be possible to suspend work where payment has not been made on time.
9. There is some good news as well in the form of statutory interest for late payment. The rate is set high to discourage late payment although this can be altered under some circumstances.

Further sources of Information

www.payontime.co.uk contains a lot of useful information. The Department of Trade and Industry's web site www.dti.gov.uk, also provides a number of helpful factsheets as does the Small Business Service, www.sbs.gov.uk. The Specialist Engineering Contractors' Group maintains a list of clients that do not hold retentions on its website – see Feb. 06 edition of 'Focus' on www.secgroup.org.uk. Many firms of solicitors also have useful, general information available on their websites.