

Payment Provisions/Adjudication – The Designers



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As everyone who operates in the construction industry should now be fully aware of, there are specific payment mechanisms that must be adhered to by statute.

Many of my chums in the legal profession have written detailed articles about who must do what and when and there is little need or benefit in me simply restating what has already been most eloquently already said.

However, it occurred to me that what is sometimes not said is to whom these requirements apply? Many of the articles and cases concentrate (and quite rightly) on the payments to Contractors and Subcontractors. It is fairly obvious that this is a fertile ground for disputes and that the sums involved are often very substantial.

What is slightly less obvious, but equally important (in my view at least) is that these rules also apply to the various consultants and thereby the Employer.

Section 104 of the Housing Grants, Construction and Regeneration Act 1996 (Part II) incorporating the amendments introduced by the Local Democracy, Economic Development and Construction Act set out the definition of what comprises a construction contract as follows:

(1) In this Part a “construction contract” means an agreement with a person for any of the following-

- (a) the carrying out of construction operations;**
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise**
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.**

(2) References in this Part to a construction contract include an agreement-

- (a) to do architectural, design, or surveying work, or**
- (b) to provide advice on building, engineering, interior or exterior decoration or the laying-out of landscape**

So, whilst we are all familiar with the Employer/Contractor/Subcontractor battles, what seems less obvious is that the design team is also entitled to the protection offered by the Act. Design team practices are like any other business; they need cash flow to stay in business. There is very little point in a 'profitable' business that has no cash – it cannot pay its staff or its bills.

The members of the design team are essentially in the same position as the Contractor and the Subcontractors, they should as a matter of course, ensure that any agreements that they enter into, automatically entitle them to make application for payment, on a regular basis to their Employer (who may actually be a Contractor under a Design and Build arrangement). Similarly, if there is a disagreement about the terms of appointment or level of service, this is also open to be resolved by adjudication, at the instigation of either party).

Of course it is then important that the members of the design team take up this option and do apply for payment in line with the agreed terms. If they believe they have provided additional services in accordance with the terms of the contract, then apply for payment for such services as well.

For a very long time Client's in the construction industry have been used to getting their own way and to a very great extent the industry has allowed this to happen. I suspect that this situation has arisen, at least in part from the influence of 'MBA' style thinking – the customer is always right. It is often the case that what the customer wants, has been talked into and can afford are quite different.

You will often read in the construction press about risk and reward and how well the various elements of the industry are at managing such matters. Then, you will often read about the 'bottom line' and 'margin' and how these are managed effectively.

Allow me to shed some small light on what such terms really mean to an outsider. I had some recent dealing with a client whose primary business is very far from construction related. So far in fact that he deals with financiers and venture capitalists on a regular basis. As many of you will know from experience, despite the recent press reports, the banks are still extremely reluctant to lend money in the construction sector. Consequently other sources of finance have to be found to support ongoing developments. Such sources of finance may be keen to provide finance but may seek perhaps a 35% return for the associated 'risk'. Most construction businesses (of all types) that I know would be over the moon to recover 35% from their endeavours.

The provision of construction and construction services are far more complex than simple money lending. In many instances significant technical and logistical challenges have to be overcome. One might consider that the reward for achieving same would be commensurate with the risks taken but this is infrequently the case. Perhaps it is the case that in fact, despite all of the challenges that have to be met, very little 'risk' is actually undertaken except under very particular circumstances (design and build and guaranteed maximum price contracts)

If you sell services, you need to be paid and you should not be afraid to ask for payment and then demand payment in the event it is not forthcoming. Credit searches and an organisations reputation are built on historical data and are no indication of their current financial health, who would ever have guessed that RBS was on the verge of collapse and that Lehman brothers would collapse or indeed that the value of VW would plummet overnight?

If a 'blue chip' organisation cannot pay its bills, exactly how safe are your outstanding accounts with a local developer or contractor? So, best not let them be outstanding any longer than they need be.

A point that is often raised is about 'upsetting the client'. My answer to that is how upset is the client going to be when all you are asking is to be paid, what he has agreed to pay, when he agreed to pay it? What right does the client have to be upset and, if he is, is that the sort of client you wish to build your business with? Has anyone every even attempted to negotiate the price of goods and payment terms at the checkout? So why expect better than agreed terms after the service has been provided?

All types of contracting would be much simpler for all involved, if the parties simply followed the rules and did what the agreement requires them to do instead of dreaming up all sorts of excuses for deviating from the agreed processes.

A sensible client will immediately resolve a late payment issue but if they do not, does that not speak for itself?

So, adjudication is there for a reason and it and the legislation in relation to Payment Notices and Payless Notices applies to the design team services as well as the contractors and subcontractors. Do not be afraid to use it. If the appropriate notices are not issued by your client, then you may well be due to be paid everything that you have asked for, whether it is agreed or not.

If in fact you do not know or are not sure what the appropriate processes are and what notices are relevant, then speak to someone who does.