

Centra News

Centra Consult LLP
Dispute resolution, claim preparation and delay analysis

December 2015

Volume 1, Issue 2

CHAIRMAN'S CHRISTMAS MESSAGE

IN THIS ISSUE :

CHAIRMAN'S CHRISTMAS MESSAGE.....P1

WHAT'S NEW.....P2

MATTERS OF INTEREST.....P3

So at the end of year 8 as Centra Consult what are my thoughts for the year? Well firstly, with the benefit of advice from my elders and betters, I am advised never to say anything in public that I might later come to regret. However, that advice smacks to me as avoiding either taking responsibility or admitting that sometimes, over time, we learn new things and come to a new understanding and adopt a different view. I believe that is only good practice and is what is expected of us all as professionals.

Having said all of that, I do find that I often retreat to my early days as a young surveyor and look towards 'the good old days'. The harsh reality is that in many ways, they were not the 'good old days' and great strides have been made in health and safety, welfare, working conditions, payments and cashflow in the industry. Great technological advances have been made with better technical standards and the greater use of prefabrication and mechanical equipment.



Alexander (Sandy) Dickson
Chairman

BSc, MBA, LLB, MCIQB, FCIARB

e : sandydickson@centra-consult.com

t : 0131 441 0803

m : 07882 486653

Sandy is the Chairman and founding partner of Centra Consult. Having graduated in 1983 he worked for a variety of well-known building and civil engineering contractors in commercial roles. In 1999 he left contracting and joined a firm of specialist consultants dealing with matters from the Royal Opera House in London to the repainting of the Forth Rail Bridge. In 2007 he founded Centra Consult to carry on delivering specialist consultant services to clients in a fashion tailored to meet their particular requirements.

CHAIRMAN'S CHRISTMAS MESSAGE CONTINUED

All the above should make me feel that as an industry and as a professional we have all made great strides but frankly, it does not. This year as ever, I have attended various seminars and in particular about how the construction world is changing and how government is driving this forward. My take, for what it is worth, is it is yet another attempt to fiddle while Rome burns, to the extent our wheel reinvention consists at best of a triangular wheel, easier to construct but a bit clunky in use.

I hear a lot about collaboration as the way forward but I am always reminded what collaboration gave rise to both during and after the second world war. It would be great if we all worked together to a common goal and had world peace or would it? We live in an adversarial legal system, our co - contractors are not there to help us, they are there to make profits for their own businesses. If your husband/wife spends all you available funds on something frivolous you are to a large extent

stuck with that. If your collaborators spend all the available funds on something frivolous are you really stuck with that? Well if you are, I suspect your business partners and/or boss may have something to say about it. So collaboration can only work up to a point and if the budget is sufficient.

I hear great things about new ways forward but I am still drawn to things I learned when I was a kid. Whenever I got an Airfix model I never looked at the instructions until I got halfway through and had to try and unstick all that I had stuck together. Construction always struck me as being the same. You need a clear set of instructions for the whole project before you start. That is the way it used to be and I still cannot see any reason for it being different.

Put it this way, if the construction industry built aeroplanes, would any of us choose to fly? The more we change, the more we stay the same.

At this time of year, it is time to put all of the 'nonsense' behind us for a short time and appreciate what we have and what we have had. Working, pays the bills but it is not a way to live your life. At the end of your days will you really look back and wish you had spent longer in the office? I lost an ex-flatmate to cancer this year and I am pretty sure he would have preferred to spend time with his family and friends rather than in the office. When you are young and your children are young, life passes in a blur of bills deadlines, taking to & from and later dealing with raging teenagers.

Now that they are off and running (more or less) on their own you can take time to look forward to spending a few days and hours in their company and this is the ideal time to do it. So I wish you all well for the Christmas and New Year period and just remember, it will all be over soon enough, and as my aged father used to say, then it will be back to 'old claes & porridge'. I look forward to seeing you all rested and refreshed, in the New Year.

SO WHAT'S NEW ?

Well our colleague Ana has graduated with a well-deserved Master of Business Administration which is all the more remarkable given that she is currently in her second year of the LLM at Strathclyde.

So our congratulations to Ana and very well done.



Ana Almeida Consultant

BSc (Hons), MBA, Chartered
Engineer (OE)

e : anaalmeida@centra-consult.com

t : 0131 441 0804

m : 07474 271426

Ana joined Centra Consult in 2014 from an international steel and cladding contractor and has extensive knowledge of complex steel structures. Ana speaks Portuguese, Spanish, English and French and has worked on contract utilizing each of these languages. Ana is currently studying for the LLM in Construction Law at Strathclyde University. Ana is a chartered engineer and has worked as far afield as Morocco where she has been both a construction project manager and provided the commercial lead role on these large projects. Ana's skills, analytical approach and experience allow here to deal with quantum and commercial matters.

MATTERS OF INTEREST

This month my colleague Michael Neil has addressed the matter of Payment Notices which seems still to be a source of surprise and dispute to various parties.

It should be of no surprise to anyone in the industry given that cashflow is so critical to all businesses from Contractor's to Consultants but still there is confusion about the statutory requirements.

Payment Notices & Applications for Payment Practical Considerations for Contractors

1. INTRODUCTION

One of the key issues that has left a mark on the construction industry in 2015 has been the emergence of a number of legal cases concerning payment notices and applications for payment. Consequently, it is widely acknowledged that this has led to an increase in the number of Adjudications on similar issues as parties attempt to utilise these judgements to their advantage.

Cases of particular significance include:

- ISG v Seevic - December 2014
- Caledonian v Mar - June 2015
- Henia v Beck Interiors - August 2015

The purpose of this article, therefore, is to consider some of the challenges that contractors can face when administering the payment provisions of construction contracts.

2. KEY ISSUES

The ISG judgement in late 2014 arguably lit the torch paper for much of what followed in 2015. In brief, this case reinforced the payment provisions of the Construction Act, as amended by the 2009 revisions.

This case demonstrated the serious consequences that can arise when parties fail to issue effective payment or payless notices. In this instance, the consequences were that Seevic had to pay ISG the total value of their payment application. This amount was far in excess of what Seevic believed the true value to be. Unfortunately for Seevic, due to the lack of a payment notice, ISG's application acted as a default payee notice which had the effect of determining the value of the work.

In *Caledonian v Mar*, Caledonian referred their case to adjudication on much the same basis as ISG had done. Namely, that in the absence of an effective payment / payless notice from Mar, they were entitled to full payment of their application. In the first instance the adjudicator agreed with Caledonian and their reference to the ISG judgement. However, at enforcement stage the Judge disagreed and did not enforce the decision.

The peculiarities in this case, which distinguished it from the ISG decision, was the format and precision (or lack of) in which Caledonian submitted their payment application. The judge considered that Caledonian had departed from the format of their previous 14 payment applications. The judge considered that these payment applications were clear in their intent, clearly set out and submitted in accordance with the appropriate contractual dates. The payment application that was referred to Adjudication was merely an email, which referred generally to the account and did not, in the judge's view, meet the criteria of an effective payment application. Particularly, when he compared it to their previous submissions which were unambiguous in their presentation.

2. CONTINUED ...

In this case you can detect that the judge is trying to redress the balance of the "smash & grab" approach that many consider has developed since the ISG case. Notably, he referred to the increased number of "smash & grab" cases and stated that "If Contractors want to benefit from these provisions, then they are obliged to set out applications / notices with sufficient clarity"

The case of *Henia v Beck* brought the precision in which contractor's submit their payment applications under further scrutiny. Beck argued that an application for payment which they submitted 6 days late, automatically fell into the next available valuation period. Subsequently, when Henia failed to issue an adequate payment notice, Beck sought full payment of their application. The judge disagreed with Beck on the grounds that their application for payment was not valid. It was clear that this application was intended for the end of April 2015 and was submitted late. It also included no cognisance for works carried out until the end of May 2015 which reinforced the view that it was, in reality, a valuation for works up until the end of April 2015. The inference being that Beck should have issued a fresh application at the end of May 2015 which should have been clearly labelled in its intent.

3. PRACTICAL CONSIDERATIONS

It is clear that Payment Notices and Applications for Payment are intrinsically linked. It is essential that contractors establish appropriate templates at the start of a project and that the document is clear in what it claims to be. Notably, Contractor's should not depart from this format during the project if they truly expect to get paid.

As a minimum, a valid payment application should consist of the following:

- Letter (or covering email) stating that the document is an Application for Payment in accordance with the relevant contractual provisions
- State the period that the application relates to (i.e. state that the application relates to the value of the works up to & including the relevant date)
- State the gross amount due at the relevant date
- State the basis on which the valuation is calculated
- State the amount that was previously certified
- State the nett amount due in the period
- State the date which the Employer is required to issue Payment / Payless Notices by
- State the date which the Employer is required to make the final payment by
- Served in accordance with the communication / notices clauses as stipulated in the contract.

Close attention needs to be paid to the contractual submission dates. Departing from these dates may affect the validity of the applications. The *Henia v Beck* case demonstrates that an application submitted late, may not automatically fall into the next available payment cycle. If a date is missed then it is advisable to establish the next correct date and resubmit with a clearly labelled and documented payment application. It would be unsafe to assume that adjudicators will award in favour of a pursuing party unless the intentions are clearly demonstrable.

3. CONTINUED...

There may be occasions when it suits both parties to operate out with the demands of the contract. Reasons for this could include operational time constraints / holidays / IT failure / continued negotiations on specific matters prior to finalising a payment certificate. Reaching agreements in the event of any of the above is entirely sensible. While co-operation between the parties should be encouraged, there are certain issues to consider such as:

- Accurately recording agreements to preserve rights and protections
- If you agree a revision to an application submission, the payment envelope can extend which may result in later payments which can have cash flow implications

From a main contractor's perspective, dealing with the employer under the main contract is arguably the easier part. Things can get slightly more complicated when you introduce the contractors supply chain. On an average project, it would not be uncommon for a main contractor to enter into up to 50 sub-contracts. These contracts can range from the smallest of packages, designers appointments and multi million pound sub-contracts.

These are all construction contracts and will all be subject to the revisions to the payment provisions of the 'Construction Act'. They will also all be affected by the developments in case law as previously described. The burden for the contractor is that, in many instances these contracts will not all be procured on the same terms. More specifically they may not be procured on the same payment terms.

Some sub-contractors may be signed up to fortnightly payments, some on 28 days, and in some extreme cases 60-90 days. The key point is that the utilisation of different payment dates can place subtle differences on the corresponding dates that notices are required.



Michael Neill Consultant

BSc (Hons), LLM (Construction Law), MRICS

e : michaelneill@centra-consult.com

t : 0141 613 2141

m : 07490 256321

Michael has recently joined Centra Consult from a national contractor where he was a Senior Quantity Surveyor. Michael, having completed the LLM is now developing his skills and putting into practice his studies and his related practical experience.

3. CONTINUED...

This necessitates that the project commercial team need to be fully aware of what notices are due and when.

Sub-Contractors come in all shapes and sizes. The main contractor will therefore encounter a broad range of commercial approaches. These can include contractually aware organisations that will comply stringently with the contracted payment provisions. There will also be organisations that partially comply with the contract but are inconsistent. You will also get organisations that are contractually naïve and issue financial correspondence randomly and in a variety of formats.

It is key that the contractor identifies a schedule of relevant application / notification dates for all of the sub-contracts that it enters into. If and when Sub-Contractors deviate from the submission dates, the contractor should issue clear correspondence outlining the non-compliance and request that the valuation is re-submitted in the correct form or at the correct date. At the very least the contractor should outline how they are intending treating the submission to alleviate any interpretation disputes arising in the future.

The contractor should always be aware of the contractual position and administer notices appropriately. Also, as with the payments under the main contract with the employer, the contractor should be mindful of the need to accurately record any agreements with their supply chain that deviates from the contractual requirements.

4. SUMMARY

Hopefully the developments of the case law in 2015 has meant that employers, contractors & sub-contractors have refocused the manner in which they approach payment notices and payment applications.

Whilst the Caledonian v Mar and Henia v Beck cases differ from the judgement in ISG v Seevic, it would seem that this is because the judges considered that the pursuers were being opportunistic and the payment applications were in any event, not valid. It would appear though, that had the applications been valid, the judge would have found in favour of the pursuers. The upshot being, that if an application is valid and you don't issue a payment or payless notice then you can expect an adjudicator or judge to order full payment of the application for payment.

Whilst cases continue to emerge that will develop this area of law based on a variety of specific circumstances, the fundamental issue remains the same. That is, to adequately protect your organisation, great care must be taken to ensure that payment applications, payment and payless notices are issued in the correct manner.

17a Spylaw Street
Colinton
Edinburgh
EH13 0JS

t : 0131 441 0800

Red Tree Business Suites
24 Stonelaw Road
Glasgow
G73 3TW

t : 0141 613 2141