

Applications for Payment



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THE SITUATION

An application for payment is a construction document that outlines how a contractor will be paid. As a Developer or Main Contractor employing up to 20 subcontractors per project, 'Applications' are often delivered in multiple different formats making it challenging to manage the process.

THE QUESTIONS

1

What must be included in a document for it to be considered a Bona Fide Application for Payment? Is an invoice to be considered an Application for Payment?

2

Given there is a reduced risk profile on smaller subcontract packages, should we have a different approach?

3

We'd like to take a more proactive approach during tendering to understand Pre-Qualification information quickly. Can we request standard documentation as part of our enquiry process and what's the best means to do this?

4

On smaller packages of work, Subcontractors often look to achieve 7-day payment terms as opposed to 30-day payment terms. In these cases, the time-periods for Due Dates and Pay Less Notices etc. becoming trickier – how do we comply with the Act in these circumstances?

THE ANSWERS

1

What must be included in a document for it to be considered a Bona Fide Application for Payment? Is an invoice to be considered an Application for Payment?

First

let's clear up the issue about the difference between an invoice and an application. An invoice deals with the collection of VAT on goods and services provided to a purchaser or client in accordance with the VAT regulations. This is a financial accountancy issue which does not deal with contractual entitlements to payments or valuation. Provided it complies with the requirements of the contract and/or the Housing Grants Construction & Regeneration Act 1996 (as amended) [The Act] and the Scheme for Construction Contracts [The Scheme], there is no reason why an invoice may not also qualify as an application for payment as well as dealing with accounting for VAT.

The case law on what constitutes a valid application for payment is well developed and the leading case on this is *Grove Developments Ltd v S&T (UK) Ltd* [2018] which summarises the body of case law that has arisen around the topic of applications for payment, payment notices and pay less notices.

For an application to be valid, it must be issued within time in accordance with the requirements of the particular contract, and it should be clear to the recipient, usually the Architect, Contract Administrator or Quantity Surveyor, depending on the terms of the contract, that it is a demand for money and that action is required in respect of it. In order for this to be the case it should provide sufficient information to show how the gross value of the works carried out up to the application date has been calculated. This needs to be in the same level of detail as the contract sum analysis or pricing document contained in the contract.

Where the Contract Sum is a lump sum, but stage or periodic payments are permitted by the contract, I would expect to see measurements or a breakdown of the proportion of the work value of the lump sum that has been carried out at the time. The application for payment should make deductions for retention, previous sums paid and any other deductions required by the contract to arrive at the sum that is being claimed (i.e. this is the amount that the contractor is saying he is due to be paid in that period). This last point is often over-looked and I have seen lots of detailed calculations of the gross valuation up to the application date, but no calculation for the sum that is claimed to be due – without this an application is invalid.

2

What gives grounds for us to reject an Application for Payment? What must be missing from an Application for Payment for it to be incorrect? Is simply missing the Application submission date grounds for rejection?



This question over-laps with the first.

The short answer is that the application must comply with the terms of the Contract. A valid application must state a sum that is claimed as due and provide a calculation to show how that sum is built-up.

I will give a qualified yes to the question about timing of the application. For example, if the contract says that the valuation date is the last day of the month and that an application may be issued no later than seven days before the valuation date then an application dated and submitted on 24th October would be valid for the payment cycle with a valuation date of 31st October; and an application submitted on 20th October would not be valid.

I will not complicate the response by dealing with the situation where an application is issued in default of a payment notice being issued by the employer (or main contractor under a sub-contract). The payment mechanisms in a contract complying with the Act can appear complex and the implications of failing to administer them properly can be far reaching so it is worth taking advice if there should be any doubt about them.

3

In the circumstance where an Application for Payment is rejected, what steps should the Payee take?

I am a little nervous with the term 'rejected'. The payer should ensure that valid payment notices or certificates are issued for every payment instalment that is due under the contract to avoid being caught in a position where it is obliged to pay a sum which has been claimed in default; and, where it fails to issue a payment notice or certificate, then make sure that a valid pay less notice is issued.

The

payer has two opportunities per payment cycle to ensure that it only has to pay what is properly due and there is generally little sympathy for failing to get this right.

From the payee's perspective the opposite applies. Where the contract provides that there are to be monthly instalments, the payee should monitor whether it's employer is issuing payment notices on time or at all and where there is a failure, should ensure that it has a valid application in place.

This all sounds like a very adversarial situation. As far back as 1971 Lord Denning said that 'cashflow was the life blood of the construction industry'. The Act was introduced, in 1996, as a measure to ensure that money should flow down through the contracting chain properly and that each company in the chain should know what it is going to be paid and when. That is the real intent of the payment clauses and we shouldn't lose sight of that.

4

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The Act says that the parties to a contract are able to agree 'the intervals at which, or the circumstances in which [payments] become due'.



is open to the parties to create their own payment regime dealing with whether applications are permitted or required, the due dates for payments, the final dates for payments and the timing for issue of payment notices and or pay less notices.

Provided all of these requirements are properly set out in the contract then there is no issue, it is only where the contract is deficient that the terms of the Scheme would be implied to make good any gaps in the payment regime.

I have seen contracts drafted for say labour only sub-contracts which provided for monthly valuations with instalments paid weekly through the month – so a proper valuation monthly with 'on account' payments in between.

Where these 'smaller packages' are for durations of less than 45 days, or 'estimated to be less than 45 days,' then there is no entitlement to 'payment by instalments, stage payments or other periodic payments' and the notices regime does not apply. It would be a matter of describing in the contract when and how the contract sum will be paid.

The key to achieving clarity and having clearly expressed, workable contracts, is by giving them careful consideration pre-contract – this will pay dividends in the long run.



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