



Implementing the Construction Supply Chain Payment Charter

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Guidance Note

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Introduction

Fair payment is essential for a successful construction industry with a strong and sustainable supply chain capable of meeting its clients' needs and delivering the necessary infrastructure and built environment across the UK.

The Construction Supply Chain Payment Charter contains 11 commitments, which Build UK members have agreed set out what best payment practice in construction looks like, including 30-day payment terms by 2018 and no retentions by 2025.

Signatories to the Payment Charter are free to interpret *how* the 11 commitments are given effect in contractual provisions and this Build UK Guidance Note sets out how to meet the intent, as well as the letter, of the 11 commitments and what should and should not be included within a contract that truly complies with the Payment Charter. For the purposes of this Guidance Note, the term *Client* means the employing/paying party under the contract regardless of tier and the term *Contractor* means the party providing the goods and/or services and to whom payment will be made.

Implementing the Payment Charter

The Payment Charter applies to 'construction contracts' as defined by the Construction Act¹, which is set out in the introduction to the 11 commitments, meaning that supply contracts are outside of the scope of the Payment Charter. However, signatories are encouraged to implement the spirit of the Payment Charter, particularly in relation to payment terms, for supply contracts as well as construction contracts.

The Payment Charter has set payment terms of 45 days (reducing to 30 days from January 2018) and signatories will be expected to pay 95% of their undisputed invoices within this timeframe or show that non-payment was due to exceptional circumstances.

Standard forms of contract such as JCT and NEC generally satisfy the commitments within the Payment Charter and both produce suites of contracts for use from Tier 1 to at least Tier 3. By far the simplest way to meet most of the commitments is to use standard forms of contract throughout the supply chain with only such amendments as necessary to ensure compliance.

Commitments

1. We will make correct full payment as and when due for all work properly carried out, or products supplied, in accordance with the contract. We will ensure any withholding of payment due to defects or non-delivery is proportionate, and clearly, specifically and demonstrably justified in line with the arrangements set out in the contract.

This commitment is divided into two parts, both of which should be sufficiently widely worded to enable you to comply.

"***Correct full payment as and when due for all work properly carried out***" seems very straightforward but is intended to prevent practices such as:

- ❖ Linking payment to long and/or high value milestones; or
- ❖ Making payment conditional on specific KPIs having been satisfied.

¹ The Housing Grants Construction and Regeneration Act 1996 as amended by the Local Democracy Economic Development and Construction Act 2009.

You should always ensure that the payment terms in your contract are clear, fair and result in regular payments being made for the correct value of the work.

In order to be confident that any **withholding of payment** is "*proportionate, and clearly, specifically and demonstrably justified*", you should look to provide the same level of justification as you would if making a claim for extra payment. This should include proving both the cause and effect to the reasonable satisfaction of the other party, including substantiating the loss.

Ensure you use clear language to set out the procedure for withholding, which should include, as a minimum:

- ❖ The reason(s) for the withholding, including reference to the specific contract requirement(s) that have not been met,
- ❖ The nature of the loss or additional cost that the *Client* has suffered as a result, and
- ❖ A detailed build up to the amount deducted including substantiation.

You should not include provisions that permit:

- ❖ Deduction of costs that have not yet been incurred, including bona fide estimates of likely future costs,
- ❖ Deduction of costs from monies due under other contracts between the *Client* and *Contractor*, or
- ❖ Withholding of payment for work on suspicion that it might be defective.

2. We will not deliberately delay or unreasonably withhold payment.

It is rare for even bespoke contract provisions to expressly allow a *Client* to "*deliberately delay or unreasonably withhold payment*" so this commitment is more about behaviour in practice.

Best practice suggests you should **not** include the following in your contract:

- ❖ Clauses to the effect that the *Contractor* "recognises that from time to time payments may be made late and has allowed for this in his pricing"
- ❖ Payment schedules that omit payments in certain months, typically at year end and half year end reporting dates
- ❖ Very low rates of interest, which could suggest an expectation of late payment and a desire to mitigate its consequences.

3. For all new construction contracts we will ensure that payments are made to our supply chain not more than 45 calendar days from the end of the calendar month in which the work is carried out or products are supplied. From January 2018 that will decrease to not more than 30 days.

Bespoke contracts often include payment provisions whereby **payments** become *Due* within what appears to be a reasonable period, say 30 days, but the *Final Date for Payment* is then a further period of time after that, often another 30 days or more. Alternatively they provide that "a payment becomes *Due* at the end of the month following the month in which work is carried out" and the *Final Date for Payment* is a further period after that. Such provisions give the impression of 30-day payment but in reality it is much longer.

This commitment removes any confusion by defining the *longest* period between performance and receipt of cash as 45 days (reducing to 30 days from January 2018) from the end of the month in which performance takes place. By way of example, for any work performed in April, payment must be received by the middle of June and, from January 2018, by the end of May.

To comply with this commitment in the fairest way to all parties, valuation dates should be the last calendar day of each month. However, in practice, they are often the second or last Friday or a fixed date in each month. Whilst there is no reason why mid-month valuations cannot continue to be used, the *Client* will be required to pay for a portion of the work in less than 45 days in order to comply with this commitment.

To avoid unnecessarily elongating the timetable for payment:

- ❖ Do not impose unnecessary, awkward or vague requirements on the *Contractor's* payment applications and do not challenge their validity on technical and/or tenuous grounds
- ❖ The information required for a payment application to be considered should be no more than the requirement under the Construction Act, namely to state the amount the *Contractor* considers to be due and the basis on which it is calculated
- ❖ Any requirements for supporting documentation should be no more than are reasonably necessary to allow assessment of the value of work performed and they should be built into the timetable.

Is it a Construction Contract?

Contracts for the supply of goods or for time-related labour or professional services are not subject to the Construction Act and are therefore out of scope of the Payment Charter. *Contractors* are free to invoice for their services at any time after they have provided them and it is customary for *Clients* to pay for such goods or services within 30/45 days of the end of the month in which the invoice is received which would be compliant with this commitment. However, if the contract imposes a minimum period after supply or an earliest date before which invoices may not be issued, it is unlikely to be compliant.

4. Public authorities are already required to pay within 30 calendar days. On central Government contracts, payment will be made to Tier 1 within 14 days, to Tier 2 within 19 days and to Tier 3 within 23 days of the due date, which will be 7 days after the common assessment or valuation date established by the client in the Tier 1 contract.

This commitment applies to all parties on **central Government contracts**, whether they are signatories to the Payment Charter or not, as a result of The Public Contracts Regulations 2015. Over [400 central government departments and agencies](#) have a commitment to pay at least 80% of undisputed invoices within 5 days, with the remainder paid within 30 days, and details of their performance is [published every three months](#).

The most important point about this commitment is that ***all*** the payment periods for the various Tiers are ***calculated from the same dates***. Tier 1 contracts should include a schedule of Assessment or Valuation Dates and contracts at Tiers 2 and 3 should include ***the same*** schedule, together with a mechanism for calculating further dates if required.

The NEC or JCT standard forms provide the necessary contractual tools to meet this commitment.

NEC publishes [Additional Public Sector Z Clauses](#) for inclusion in central Government contracts. These clauses create a contractual obligation on the parties at all Tiers to ensure that the central Government payment timescales are passed on through the entire supply chain.

JCT has introduced the concept of a common valuation date in its 2016 forms, including the Standard Building and Design and Build Contracts, which meets this commitment.

5. We will either not withhold cash retention or ensure that any arrangements for retention with our supply chain are no more onerous than those implemented by the client in the Tier 1 contract. Our ambition is to move to zero retentions by 2025.

The easiest way to demonstrate compliance with this commitment between now and 2025 is for the *Client* to reproduce the **retention** arrangements from the Tier 1 contract in the contract that they enter into with their lower Tier *Contractor*. The *Contractor* can then verify at a glance that the amount of retention (if any) being held by his *Client* is no more than that being held at Tier 1.

Both JCT and NEC forms for Tier 2 contracts include requirements to reproduce particulars from the Tier 1 contract, including retention arrangements. If the standard forms are not suitable for a particular project, you could demonstrate compliance by including a simple statement to the effect that “the retention percentage under this contract is less than or equal to the retention percentage being held under the contract between the Client and the Main Contractor for this Project”.

Obviously parties at any Tier are free to agree zero retention whether retention is being withheld from them or not. Every instance of retention removal or reduction will be a step closer to achieving the ambition of zero retentions by 2025.

6. We will issue ‘pay less’ notices at the earliest opportunity and no later than 7 days prior to the final date for payment.

This commitment is very simple to comply with. The Construction Act requires that all construction contracts include a “prescribed period prior to the Final Date for Payment” for the issue of any **Pay Less Notices** so the *Client* simply needs to state that this period will not be less than 7 days in any contracts with his *Contractors*.

The NEC standard forms require Pay Less Notices to be issued not less than 7 days before the Final Date for Payment, so using and complying with these forms without amendment will automatically satisfy the commitment. The JCT standard forms require five days but can easily be amended to read seven days instead of five.

7. We will have processes in place to enable the effects of contract variations to be agreed promptly and fairly and payments for such variations to be included in the payment immediately following the completion of the varied works.

Meeting this commitment requires cooperation and effort from both *Client* and *Contractor*. A *Client* cannot reasonably be expected to agree the cost and time effects of a **variation** until they have been explained and supported with reasonable detail but, once such information has been submitted, a *Contractor* should not have to wait indefinitely for it to be reviewed and agreed.

Whilst what amounts to prompt and fair agreement of variations is invariably subjective, you should ideally have processes in place to cover three basic scenarios:

- ❖ Planned or proposed variations from the *Client*
- ❖ Reactive variations directed by the *Client*
- ❖ Variations notified by the *Contractor*.

Planned or proposed variations from the Client will generally require a negotiation over the amount of any adjustments to cost and/or time.

Where possible, agree the effects of such variations before the work is carried out so that payment can flow as the additional or varied work is performed. Both JCT and NEC provide detailed mechanisms for this process, which include the level of detail required to support the *Contractor’s* quotation and the timescales for the *Client* to respond.

Reactive variations directed by the Client often mean there is insufficient time to allow a full quotation, review and negotiation process to take place before the additional or varied work is begun.

To help overcome this, ensure your process:

- ❖ Expressly permits assessment of variations on a fair and reasonable basis within the valuation period in which additional or varied work was performed
- ❖ Sets out an appropriate level of detail required from the *Contractor* to allow a reasonable, provisional assessment to be made

- ❖ Allows for payment of at least the cost incurred by the *Contractor* to be made, pending agreement of the final adjustments to the contract.

JCT forms require variations to be valued by the *Client* where prior agreement has not been achieved and these valuations are required to be included in each payment. The level of detail as to how the valuation should be done varies from one form to another but in all cases there is a requirement for it to be fair and reasonable.

NEC forms do not expressly permit *any* payment to be made for variations (compensation events) until the variation is *implemented*, which is after agreement. The standard NEC process for notification and agreement of compensation events takes a minimum of five weeks and this can be as long as 10 weeks if resubmission of quotations is required. These periods are longer for lower Tier contracts.

Whilst unamended NEC provisions would comply with the commitment for a “*fair*” process for agreement, it may not be considered “*prompt*” and they would not strictly meet the commitment to payment “*immediately following completion*”. *Clients* should improve compliance by shortening the standard periods for submitting and replying to quotations. They could also include express terms to the effect that work carried out on compensation events that have not been *implemented* can be included in payment assessments pending final determination.

Variations notified by the Contractor require processes to determine whether or not there is agreement *in principle* to an entitlement to adjustments to the contract, before moving onto the issue of quantifying the effects. It is important that the issue of entitlement *in principle* is determined quickly to allow the process of valuation and assessment to take place within a timescale that is consistent with this commitment.

This can be achieved by ensuring your processes:

- ❖ Require the *Contractor* to notify his opinion that a variation has occurred, to provide reasonable details of the factual and contractual basis for this opinion, and to provide an indication of the likely effects
- ❖ Expressly require the *Client* to notify in turn whether or not he agrees in principle that an entitlement exists. If he does, the process simply moves onto the evaluation stage, as outlined above; if he does not, the *Contractor* may decide whether or not to pursue the matter as a dispute (see commitment 11).

You should be careful not to impose unreasonable time limits or other unnecessary, awkward or vague requirements for the provision of notices and supporting information for variations. In particular, do not deny the *Contractor* the right to seek redress if such deadlines are not met.

Both JCT and NEC have processes that meet the necessary requirements. The NEC process requires the *Client* to notify his decision within one week of receipt of the notification from the *Contractor*, allowing the valuation stage to be dealt with in a short timescale that is consistent with this commitment. NEC also includes a further provision in relation to both agreement *in principle* to and *evaluation* of compensation events. In both cases, a failure to respond, after a further notice, results in deemed acceptance by the *Client*.

The 2016 edition of the JCT contracts include timescales for response but at Tier 2 level this is 42 days which does not strictly comply with the requirement for payment “*to be included in the payment immediately following the completion of the varied works*”.

8. We will make payments electronically unless agreed otherwise.

Most businesses are now capable of making and receiving **payments electronically** so this commitment should be very simple to comply with.

9. We will use Project Bank Accounts on central Government contracts where specified by the client.

Central Government departments are required to adopt **Project Bank Accounts (PBAs)** unless there are compelling reasons not to do so², in order to provide security and certainty of payment to the supply chain.

Whilst not specified within the commitment, if a *Contractor* is unaware of or unfamiliar with PBAs, it should be made clear where they are to be used and support should be provided to establish the facilities and help the *Contractor* to understand and comply with the processes.

Similarly, for contracts below the Tier 1 contract, provision should be made for payments due to lower Tier contractors that are not payable by the project client. For example, a lower Tier contractor may have an agreed price for an item of work, which is higher than the price agreed between the higher Tier parties. As payment of the full amount due will never be made into the PBA, arrangements for payment of the difference need to be included.

10. Where Supply Chain Finance schemes allowing members of the supply chain to secure earlier payment are offered, we will not impose fees or costs for receiving payment within the terms set out in the contract.

In practice, this commitment means that receipt of payment within the periods set out in commitment 3 (or any shorter periods agreed in a particular contract) would never result in a charge to the *Contractor*. If a *Client* has standard payment terms in excess of the periods set out in commitment 3, no charge should be made for reducing those standard terms to Payment Charter signatories under a **Supply Chain Finance scheme**.

To ensure compliance with this commitment, expressly state in any Supply Chain Finance Scheme that charges of any kind are prohibited, except where payments are made earlier than the timescales agreed in the construction contract. Supply Chain Finance Schemes often exist alongside construction contracts and their terms (which sometimes set Final Dates for Payment at 120 days or more), not those in the construction contract, govern the definition of the period of “early” payment for which fees are charged.

11. We will adopt a transparent, honest, and collaborative approach when resolving differences and disputes.

A common way of giving practical effect to this commitment is to include a dispute “ladder” in the contract, which sets out procedures and timescales for raising **disputes** at various levels within the organisations of the parties to the contract. This is followed by less adversarial third party solutions such as mediation with arbitration and/or litigation as solutions of last resort. This approach does not prevent or delay a party from referring a dispute to Adjudication at any time, provided the dispute has crystallised, as this is a statutory right. However, a clear process for dispute resolution by negotiation, within reasonable defined timescales, is often sufficient to avoid such escalation.

Ensure dispute ladders are effective by providing for the following:

- ❖ The decision making to be elevated away from individuals directly involved in the disputed issues
- ❖ A simple procedure for dealing with the dispute, such as a written statement from each side of a reasonable but limited length
- ❖ Strict, short timescales, ideally aiming for a resolution within four weeks of a notification.

² Policy Procurement Note 2/2010

Signatories

A current list of organisations signed up to the Construction Supply Chain Payment Charter who have agreed to meet the commitments within the Payment Charter can be found on the [Construction Supply Chain Payment Charter website](#).

To apply to become a signatory to the Payment Charter, an organisation must first sign up to the [Prompt Payment Code \(PPC\)](#). Signatories to the PPC that operate in the construction sector will then be listed in a drop down menu on the [Construction Supply Chain Payment Charter website](#) and they will be validated before being sent a link to the online application form for the Payment Charter. To sign up to the Payment Charter, organisations will need to provide information on their standard payment terms, retentions and any Supply Chain Finance scheme they operate.

To challenge the status of a signatory to the Payment Charter, organisations should complete the form on the [Construction Supply Chain Payment Charter website](#).

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