

Corinne Brooke
Prompt Payment Team
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

14.07.17

Dear Corinne,

We are writing regarding the **Duty to Report on Payment Practices and Performance** and related Government guidance and its application to construction contracts which fall within scope of the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act").

We understand that the idea behind the Duty to Report legislation is to foster a responsible payment culture by increasing transparency and making payment behaviour a reputational issue. Build UK fully supports these objectives and we write with a view to assisting BEIS in achieving them within the context of the construction industry.

Concern with Government Guidance

The Government guidance, which was published in January 2017, states that, for those statistics which count the days taken to pay, '*day 1 is the day after the date on which the business receives an invoice or has notice by other means of the amount to pay*'. It goes on to say that where an invoice is not present, as is generally the case for construction contracts which fall within the scope of the Construction Act, '*day 1 [should be counted as] the day after the date that the amount for payment is confirmed, whether by the customer or supplier*'.

Following our previous correspondence in relation to this issue in February 2017 (copy enclosed), we were disappointed to learn that BEIS intends to update the guidance to specify that for construction contracts within the scope of the Construction Act, 'day 1' should be the day after '*the date [businesses] receive an application for payment or, in cases where there is no application for payment, the date on which they receive a payment notice (or default payment notice) or on which they issue a payment notice - whichever is earliest*'.

If this new approach is adopted, the trigger for construction contracts will be the date on which the 'application for payment' is received. Build UK and its members are strongly of the view that this date is unsuitable for a number of reasons, most notably:

1. An 'application for payment' simply sets out the estimate of what the payee considers it should be paid. It is not definitive and is a contractual concept that may or may not be available to the payee.
2. An 'application for payment' often includes an element of estimated work due to be carried out during the period between the 'application for payment' and the 'valuation date' and is therefore often subject to discussion and revision between the parties.

3. The issue of an 'application for payment' does not, of itself, establish a contractual obligation to make any payment
4. Use of it would lead to a perception of late payments across the industry, even in respect of payments which are timely and in line with both legislation and the parties' respective contracts, thereby creating an inaccurate, unfair and misrepresentative data set which would risk undermining the very objectives of the Duty to Report legislation.

Proposed Solution

We believe that the correct date to use as the 'Day 1' trigger is the '**valuation date**' or '**assessment date**' (for periodic payments) or '**milestone dates**' (for progress payments).

As noted in our previous correspondence, valuation or assessment dates act as the cut-off dates up to which, and only up to which, there is an entitlement to payment. This is a solution to a particular issue in the construction industry, where very often construction works will be on-going and there needs to be a 'line in the sand' date up to which the works are valued and paid.

Up until these dates, the paying party is unable to begin to properly weigh up, value and decide what sum to pay in respect of the works carried out in the preceding period. It is therefore only at the point of the valuation/assessment dates that the paying party has an understanding of (or "*notice*" to use the wording in the legislation) of the "*amount for payment*" and can assess whether the sum applied for in the 'application for payment' was over or underestimated. It is our view that a data set showing how long construction companies take to pay from the point of the valuation/assessment dates would allow our members to be appropriately benchmarked and, with that, fulfil the objectives of the Duty to Report legislation.

Our previous correspondence proposed how the valuation/assessment dates could be used in practice and proposed some draft wording for the Government guidance.

In the event that you do not consider the valuation/assessment date should be used as day one for construction contracts, we would be grateful for a detailed explanation as to (i) the justification for rejecting our proposal and (ii) the use of 'application for payment' as a potential day one for construction contracts in light of the inconsistency with the objectives of the Duty to Report legislation.

We look forward to hearing from you.

Yours sincerely

Laura Smith
Communications Director