



# **New South Wales Government Procurement System for Construction**

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## **Procurement Practice Guide**

# **Managing payment claims**

**July 2008**

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## **Important notices**

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### **Current version**

The current version of this Procurement Practice Guide is maintained on the Internet at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Reference-material/Procurement-practice-guides.aspx>

### **Amendments**

Refer to the Procurement Practice Guide Amendments Log which is available on the Internet at:

<http://www.nswprocurement.com.au/psc/ppg/amendments.doc>

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# Managing payment claims

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## Managing payment claims

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### The Principal's obligations

The Principal's obligations to make progress payments are governed by the terms of the contract between the Principal and the contractor or service provider and by the *Building and Construction Industry Security of Payment Act, 1999* (NSW) ("the Act").

The Act is available on the Internet at:

[www.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/](http://www.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/)

The Act provides a statutory right to progress payments for a person (or company) that has undertaken to carry out construction work or to supply related goods and services under a construction contract.

Related goods and services are defined in sections 5 and 6 of the Act and include "architectural, design, surveying or quantity surveying services in relation to construction work". [See section 6(1)(b)(ii) of the Act]. An agreement with a consultant or project manager providing services in relation to a construction project may be a construction contract as defined in the Act.

### Requirements of the Act

#### The Payment Claim

Under the Act, a person "who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment". [See section 13(1) of the Act].

Notwithstanding anything to the contrary that may be stated in the contract, a payment claim is a valid payment claim under the Act if it meets the criteria set out in section 13(2) of the Act, which states:

13(2) A *payment claim*:

- (a) must identify the *construction work* (or *related goods and services*) to which the *progress payment* relates, and
- (b) must indicate the amount of the *progress payment* that the *claimant* claims to be due (the "claimed amount" ), and
- (c) must state that it is made under this Act.

#### The Payment Schedule

The Principal, as the person liable for making payments under a contract, is known under the Act as the *respondent*. The respondent must respond to the payment claim by issuing a payment schedule to the claimant.

It is most important to issue a payment schedule within the period stated in the contract or within 10 business days of receipt of a payment claim, whichever period expires earlier. Under the Act, a business day is any day other than a Saturday, Sunday, public holidays or 27, 28, 29, 30 or 31 December.

If a valid payment schedule is not issued within 10 business days (or less if specified in the contract) of receipt of a payment claim, the Principal becomes liable to pay the claimed amount on or before the due date for payment. [See section 14(4)(b) of the Act].

The standard form contracts in the NSW Government *Procurement System for Construction* require that a payment schedule be issued within 10 business days of receipt of a payment claim, consistent with the provisions of the Act.

To satisfy section 14(2) of the Act, a payment schedule:

- (a) must identify the payment claim to which it relates, and

- (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*).

If it is proposed to pay an amount that is less than the amount claimed, it is most important to include in the payment schedule reasons why the amount is less. These are the “reasons for withholding payment” referred to in the Act.

The claimant may refer a payment claim for adjudication under the Act if:

- the scheduled amount is less than the claimed amount and the claimed amount is not paid in full by the due date; or
- the respondent does not issue a payment schedule within time; or
- the respondent fails to pay the scheduled amount in full.

If the claimant makes an adjudication application, the respondent may make an *adjudication response* justifying the Principal’s position. The reasons given in the payment schedule form the basis of any adjudication response. Further, the respondent cannot include in the adjudication response any reasons for withholding payment that were not included in the payment schedule. [See section 20(2B) of the Act]. The effect of this is that, if the respondent has not issued a payment schedule, the adjudicator cannot take into account any reasons the respondent has for withholding payment. The most likely outcome of the adjudication process would therefore be that the claimant receives the claimed amount in full.

The reasons given in the payment schedule must be justifiable and should refer to provisions of the contract, such as the claimant’s failure to meet the requirements of the contract or the respondent’s entitlement to make deductions for costs incurred. It is advisable to obtain advice on drafting the reasons for withholding payment that are to be included in a payment schedule, particularly if the claimant is likely to disagree.

### **Calculation of the Progress Payment**

Section 9 of the Act states that the amount of the progress payment is to be:

- (a) the amount calculated in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

The standard form contracts in the NSW Government *Procurement System for Construction* provide for documenters to specify how a progress payment is to be calculated. If the contract makes no express provision, the value of the progress payment is to be determined under section 10(2)(b) of the Act:

... having regard to:

- (i) the contract price for the goods and services, and
- (ii) any other rates or prices set out in the contract, and
- (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
- (iv) if any of the goods are defective, the estimated cost of rectifying the defect

### **The Due Date for Payment**

It is most important to pay the progress payment on or before the due date for payment. The due date for payment is the date on which payment becomes due and payable in accordance with the terms of the contract, or, if the contract makes no express provision with respect to the matter, the date occurring 10 business days after a valid payment claim is received.

Contracts should contain express provisions in respect of the due date for payment. They may include requirements that the contractor or service provider must fulfill before becoming entitled to payment, such as:

- provision of a signed statutory declaration that all employees, subcontractors and suppliers have been paid; or
- provision of security; or
- copies of current insurance policies; or
- provision of certain information.

These are sometimes called “Conditions Precedent” to payment.

For example, the standard form Agreements for consultancy and project management services provide for the due date for payment to be within:

- (a) 20 Business Days after the Principal receives the Consultant’s payment claim, or
- (b) 5 Business Days after the Principal receives the documents specified in clauses 5.8 and 5.9, or
- (c) 5 Business Days after the Consultant has provided the Principal with the access or information specified in clause 10.2

whichever period expires later.

### **Payment process**

Upon receipt of a payment claim, assess the amount of the progress payment to which the claimant is entitled. Base the assessment on the provisions of the contract or, if there are no express provisions, on section 10(2) of the Act, as described above. As the payment schedule will indicate the amount the Principal will pay, it may be necessary to obtain approval to issue the payment schedule from an officer with the appropriate financial delegation. Issue a payment schedule that complies with section 14(2) of the Act (see above). Refer to [Sample letter 13D \(Minor Works\)](#) or [Sample letter 63A \(GC21\)](#) or the generic [Sample payment schedule](#) for other forms of contract.

If it is proposed to indicate in the payment schedule a scheduled amount that is less than the claimed amount, or if it is intended to withhold any part of the claimed amount, include in the payment schedule all of the reasons why the scheduled amount is less or payment is to be withheld. If the claim states that it has been made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) and there is likely to be disagreement over the amount paid, obtain advice on drafting the reasons for withholding payment. These will form the foundation of an adjudication response if the payment claim is referred to adjudication.

Determine the due date for payment having regard to the date of the payment claim, the date of receipt of any documents or information required before an entitlement exists under the provisions of the contract, and whether a statutory declaration has been received.

Obtain all necessary approvals for payment of the scheduled amount. It may be necessary to obtain approval from an officer with the appropriate financial delegation to authorise payment of the scheduled amount.

Ensure that the scheduled amount is paid on or before the due date for payment.

### **Statutory declaration**

The standard form contracts in the NSW Government *Procurement System for Construction* require that before a payment is made under the Contract, the Contractor must submit a Statutory Declaration that payments due have been made to employees, subcontractors and suppliers.

### **Form of statutory declaration**

To simplify the preparation of an acceptable statutory declaration, the standard form contracts in the NSW Government *Procurement System for Construction* include a pro-forma of the declaration required. Note that it is essential that a statutory declaration is supplied as an original. Any declaration submitted which is not in the prescribed form and / or not an original must be rejected.

The pro-forma Statutory Declaration indicates the people who would be eligible to witness the Declaration.

### **Procedures when the Contractor gives a statutory declaration which includes unpaid amounts**

A Contractor would very rarely submit a Statutory Declaration that shows it has not paid its employees, subcontractors and suppliers what is due and payable under the Contract and in accordance with the *Industrial Relations Act 1996* (NSW).

If the Contractor does provide a Statutory Declaration itemising amounts not paid to any employee, subcontractor or supplier, pay the Contractor the monies otherwise due but reduce the payments by the amounts stated in the Statutory Declaration as being unpaid.

### **Procedures when a complaint of non-payment is received from an employee, subcontractor or supplier**

Receiving a complaint is not by itself a cause to withhold payment to the Contractor. If a complaint is received, the following procedures should be followed:

- Direct any employee who complains to contact the Office of Industrial Relations, which will contact the Contractor to determine whether the Contractor is in breach of any statute or award.
- Advise a subcontractor or supplier to seek redress under the *Building and Construction Industry Security of Payment Act 1999* (NSW).
- In all instances, advise the Contractor of the complaint. If the complaint has been received in writing, send a copy to the Contractor under a covering letter from the Principal's Representative. In most cases, this action will have the desired effect.
- Frequently the issue is about the quality or quantity of work performed and is a matter for the complainant to resolve with the Contractor. In this situation the Principal's Representative should take no further part in the matter.
- If the issue is not resolved, request the complainant to provide a Statutory Declaration detailing the nature and extent of the complaint. See Reply to a payment complaint by an employee, subcontractor or supplier: [Sample letter 13G](#) (Minor Works) and [Sample letter 63C](#) (GC21). This establishes the bona fides of the complaint. Advise the complainant of the possible repercussions if a false Statutory Declaration is made. If no Statutory Declaration is received, no further action is required.
- Send a copy of the complainant's Statutory Declaration to the Contractor with a letter requesting the Contractor to supply a Statutory Declaration with respect to the Payments and Retention clause of the Contract and advising the repercussions of submitting a false Statutory Declaration. See Notice of a payment complaint: [Sample letter 13H](#) (Minor Works) and [Sample letter 63D](#) (GC21).
- If the Contractor submits a Statutory Declaration, which is in conflict with the complainant's Statutory Declaration, the Principal's Representative should refer the matter to the Principal's Agent and if necessary the client agency for further action. Such further action may commence with providing each party with a copy of the other party's statutory declaration and requesting reasons why the matter should not be referred to the appropriate authorities. See [Conflicting](#)

statutory declarations (Sample letters to the Contractor and complainant):  
*Sample letter 13J* (Minor Works) and *Sample letter 63E* (GC21).