

Interim payment

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Charles Blamire-Brown looks at the interim payment process, which has potentially serious consequences if it is not followed to the letter

My contractor has issued a breakdown of its 'initial assessment' of the value of works by email and is now contending that this constitutes its interim payment application. However, I do not consider this is a valid payment application, given that it has been issued by email and refers to the wrong valuation date. What should I do?

The interim payment process can be a veritable minefield for the unwary, with potentially serious consequences if it is not followed to the letter. It is therefore important to be clear as to the requirements of this process.

The [Housing Grants, Construction and Regeneration Act 1996](#), as amended by the [Local Democracy, Economic Development and Construction Act 2009](#), sets out a statutory regime for payment, with which contracts agreed after 1 October 2011, or 1 November 2011 in Scotland, must comply. The process is usually as follows.

- The contract may provide for a payee to make a payment application before the payment due date; let's assume that in your case it does.
- Within 5 days of the due date, the payer or specified person must serve a payment notice setting out the sum they consider due at that date and the basis on which it is calculated.
- If a payment notice is not issued in this time frame then the payee can issue a notice of default. If they have issued a valid payment application this becomes the de facto notice of default, and there is no need to issue a separate notice.
- The payer may still serve a notice of its intention to pay less within the prescribed period before the final date for payment. This must set out the sum the payer considers to be due at the due date, and the basis on which that sum is calculated. If it fails to do so, it will have to pay the amount sought in the payment application or notice of default, as appropriate.

The key issue is whether the breakdown issued by the contractor constitutes a valid payment application. Unless the contract expressly provides otherwise, the fact that it is issued via email does not render it invalid.

However, the breakdown must be clear that it is a payment application and comply with any requirements in the contract as to its form and content. Arguably, the fact it is described as an 'initial assessment' suggests that it might not be intended to be a formal application. The reference to the wrong valuation date may also render it an invalid application; indeed, this was held to be the case in the recent decision in [Jawaby Property Investment v Interiors Group \[2016\] EWHC 557 \(TCC\)](#).

The first step in your case will be to reply to the contractor setting out the reasons why you consider the application invalid. In any event, whether or not it is a valid application, it will be

important to ensure that a payment notice is issued in time or, failing this, that a valid 'pay less' notice is issued within the prescribed period before the final date for payment.

If one of these is not issued, then there is a risk that the contractor will commence an adjudication for the amount sought in its application on the basis of a lack of a valid payment or 'pay less' notice. If the adjudicator determines that the application is valid, the contractor will be entitled to the amount sought, even if the valuation is disputed.

Such 'smash and grab' adjudications have become common in recent years, particularly after [ISG Construction Ltd v Seevic College \[2014\] EWHC 4007 \(TCC\)](#) . In this case, the court confirmed that the employer as payer could not commence a successive adjudication challenging the valuation of the works at the time of the contractor's application because another adjudicator had found the contractor was entitled to payment on the basis of a lack of valid payment or 'pay less' notice.

No matter whether or not there are grounds for challenging a payment application, it is important to follow the process and issue the requisite payment notice or, failing that, a 'pay less' notice

The situation may well be different, however, if this is a final account application. The court confirmed in [Harding v Paice \[2015\] EWCA Civ 1231](#) that the absence of a payment or pay less' notice does not preclude a party from challenging the value of a final account in an adjudication. However, the payer must pay the sum applied for and cannot withhold payment pending the adjudicator's decision on the proper valuation; in other words, it must pay first and argue later.

No matter whether or not there are grounds for challenging a payment application, it is important to follow the process and issue the requisite payment notice or, failing that, a 'pay less' notice. This will avoid the risk of the application later being found to be valid when the contractor commences a 'smash and grab' adjudication and thus being entitled ? absent a payment or 'pay less' notice ? to the amount sought.

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