



COMMUNIQUÉ

*Newsletter of the New Zealand Architects Cooperative Society Ltd
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Christmas Greetings to you all!

Barry Dacombe writes:

Progress Payments and the Construction Contracts Act 2002



Are you complying with the procedures set out in the Construction Contracts Act 2002 (CCA)?

It is our belief that few practitioners are and consequently are putting themselves and their clients at some risk.

The purpose of this article is to attempt to clarify a number of issues arising from the CCA and to provide guidance and supporting documents that will assist members to manage the risks, comply with the law and perhaps endear themselves to their clients.

But first of all it is necessary to point out that the current NZIA documents (SCC1 in particular) precede the CCA and are accordingly out of date with regard to the format and procedures required under the Act. It is also worth pointing out that an Auckland court decision recently publicised, pointed to procedural errors in the valuing of progress payments by a firm of quantity surveyors which could have had quite serious consequences and claims for damages arising. So it is important to get it right.

The administering of progress payments has developed into a difficult subject and NZIA in their rewrite of SCC1 (due to be published early next year) even with the benefit of much legal advice, has had some difficulty establishing and agreeing with Master Builders clear compliant procedures.

The fundamental requirements of the Act from a procedural point of view are simply :-

1. The builder makes a claim for a progress payment – now called a Payment Claim which has to be in a specified form.
2. The client or Principal – now referred to as the Payer under the Act is required, within a specified time to issue a Payment Schedule which advises the amount that is to be paid.
3. Payment is then to be made within a specified period.

If for some reason the Payment Schedule is for a different amount to the Payment Claim, the Payer is to advise the Contractor the reasons why and provide this reassessment in writing.

If no Payment Schedule is provided by the Payer either within the specified period or at all, the amount claimed by the Contractor in its Payment Claim becomes due and payable in full.

There are a number of issues arising here but in the interests of simplicity I will keep to the fundamentals –

Under Architect administered contracts the Architect, prior to the CCA, would receive the contractors claim on behalf of the client, check its veracity and where it differed from the claim usually discuss these differences with the Contractor before issuing a progress Payment Certificate advising the client and the Contractor of the amount to be paid. In contracts where a Quantity Surveyor is engaged to administer this process the progress claim would normally result in an agreed valuation being provided to the Architect for certifying – all within the time laid down in the contract.



The CCA does not recognise these quite sensible processes but does allow contracting parties to agree different times for the processing and payment of Contractor Claims to the default times specified in the Act.

Under the new NZIA SCC1 2005 (which tends to follow the New Zealand Standard NZS 3910) a procedure has been introduced to recognise the role of the Architect (or Engineer under NZS 3910) in the administration of progress payments on behalf of the Principal.

Again in simple terms these procedures are :-

1. The Contractor issues a Payment Claim to the Architect with a copy to the Principal.
2. The Architect assesses the Payment Claim and after making appropriate deductions allowed under the Contract, issues a provisional Payment Schedule to the Contractor and the Principal.
3. The Principal is entitled to notify the Architect of any amendments or deductions that the Principal requires with reasons.
4. The Architect must then issue a Payment Schedule incorporating such amendments that the Principal requires acting as agent of the Principal.
5. If no amendments are notified by the Principal the earlier provisional Payment Schedule is deemed under the contract to be a Payment Schedule in terms of the Act.
6. The Contractor is then paid the amount certified by the Architect.

In addition to the above the Architect is required under the contract to issue the Payment Schedule in such a form as is required to constitute a payer generated GST invoice.

The times required for these various processes are both tight and strict and must be adhered to.

(Please note that under NZS 3910 these procedures vary slightly so it is again important that the Contractual Conditions be adhered to the letter).

The NZIA SCC1 document (as does NZS 3910) include provisions for the dealing with final accounts and securities for off-site materials and these specific provisions need to be carefully read to understand their procedures.

If you're finding this hard going – think about your poor client who is the other party to the Contract and the person/entity who looks to you for guidance!

How can you assist?

How do you ensure you are discharging your obligations under the contract correctly?

NZIA SCC1 2005

The first step is to obtain an interim copy of the Payments provisions of SCC1. These are available by contacting Chris Mason of NZIA [cmason@nzia.co.nz]. (He has kindly agreed to provide this information).

The next step is to incorporate these provisions into any new contracts as a Special Condition of Contract and to make sure that any existing Contracts that have not incorporated complying provisions with respect to the CCA are varied by a Variation to the Contract to make them compliant with the law. You will need, of course, to delete the current SCC1 Payments clauses.

The next step is to advise your client (if it is not already aware) of the procedures associated with the CCA and the new Condition of Contract. A simple letter – along the lines of this proforma letter below – is offered to assist members in achieving good client relations.

But above all else be certain that you comply with the law and adopt the procedures and timing incorporated in the SCC1 or NZS 3910 provisions.

Barry Dacombe
Director
NZACS



PROFORMA LETTER

Dear Client

XYZ/ABC Building Contract – Progress Payments

This letter and enclosure advises you on the first of a number of payments you will be required to make under your Building Contract. It sets out to advise you of the procedures contained in your contract and required by legislation.

Under the terms of your building contract your Contractor is entitled to monthly progress payments.

The Construction Contracts Act 2002 (the Act) provides specific procedures and time scales that must be adhered to in the assessment and payment of progress payments under your building contract.

As a consequence we advise you that we have received a copy of the Contractor's Payment Claim, also issued to you, for a progress payment under the terms of the contract and have assessed its value and validity and now provide you with our assessment of it.

*This is in the form of a provisional Payment Schedule. If you are in agreement with this assessment you are required to make payment for the amount certified within **17 days of the date of the Contractors Payment Claim.***

Should you not agree with our assessment you must advise us within 3 working days so that an amended (if required) Payment Schedule can be issued by us on your behalf.

The provisional Payment Schedule and any subsequent payment schedule are in the form of a payee generated GST invoice.

You are required to pay the Contactor within 17 working days of receipt of the Contractors Payment Claim.

It is essential that you comply with the strict provisions of the Act particularly with respect to the amount and timing of your payment.

Your failure to comply with the procedures and timing required by this legislation can have consequences which may be detrimental and we urge your co-operation and compliance.

Yours faithfully

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We welcome contributions from readers, on how they manage risk

