

JCT Sub-Contract Final Payment Notice: no choice but to adjudicate

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Introduction

The standard conditions of the JCT Design & Build Sub-Contract 2016 (similar provisions are included in the other JCT Sub-Contract forms and in the 2011 editions) set out that, upon issuance of the Final Payment Notice by the Contractor, unless the Sub-Contractor commences dispute resolution proceedings within 10 days of receipt, the notice constitutes conclusive evidence of (among other things) final settlement of all Sub-Contractor's claims.

This timeframe, which translates to 8 working days¹, seems extremely tight for the Sub-Contractor to review, assess, summarise and refer the dispute to adjudication or to the tribunal (either arbitration to litigation).

It looks like the reference to adjudication is the quickest (and less costly) action to be taken by the Sub-Contractor as a first step. Therefore, the Sub-Contractor has to act quickly and give notice of adjudication to the Contractor within 10 days of receipt of the Final Payment Notice, in order to avoid losing its rights with regards to any disputed matter contained therein.

It should be noted that, as explained below, if the Contractor fails to issue a Final Payment Notice, the Sub-Contractor's Payment Application as set out in clause 4.22.3 produces the same results. However, this article focuses on the Sub-Contractor's position which seems to be more disadvantaged, as the Employer and the Contractor have an additional opportunity to commence proceedings (in relation to the Sub-Contract Works or any part of) following issuance of the Final Statement under the Main Contract, arguably much later down the line.

It goes without saying that the Sub-Contractor should be mindful of any Sub-Contract amendments (as well as the Main Contract provisions) which could vary the timeframes and obligations / rights of either Party or the Employer.

The effect of the Final Payment Notice and the relevant clauses are explained below.

Clause 4.7.2

Clause 4.7.2 refers to the Contractor's obligation to give a Payment Notice no later than 5 days after the due date with regards to interim payments or the Final Payment Notice with regards to the final payment.

The due date for the final payment as set out in clause 4.22.1 is the later of:

- the Retention Release Date or any later due date under clause 4.12.2.3 (balance of the Retention relating to making good of apparent defects notified); and
- the date of submission of the calculation of the Final Sub-Contract Sum by the Contractor to the Sub-Contractor or the last day that this should have been submitted (i.e. 8 months after receipt of the Sub-Contractor's documents necessary for calculating the Final Sub-Contract Sum which need to be submitted no later than 2 months following practical completion; pursuant to clauses 4.21.2 and 4.21.1 respectively).

In accordance with clause 4.22.2, the final payment shown in the Final Payment Notice is the difference between the Final Sub-Contract Sum and the total amount of the interim payments previously made.

Clause 4.22.3

This clause allows the Sub-Contractor to make a Payment Application for the final payment no later than 4 days before the due date as set out above or in the event that the Contractor fails to issue the Final Payment Notice, at any time after the 5 day period stated in clause 4.7.2 (provided that the Sub-Contractor has not made any application for the final payment previously).

Effect of Final Payment Notice

Clause 1.8.1 states that the Final Payment Notice (which is issued by the Contractor in accordance with clause 4.7.2 or is construed as reference to the Sub-Contractor's application under clause 4.22.3 if the former fails to issue it) shall become conclusive evidence in any future proceedings that:

- the quality of materials or goods and the standards of workmanship as expressly set out in the Sub-Contract (or as instructed by the Employer under the Main Contract) are to the reasonable satisfaction of the Employer (but not any other items);
- the Final Sub-Contract Sum has been calculated, taking into account all amounts required by the Sub-Contract (save for accidental inclusion or exclusion of work or arithmetical error); and
- all due extensions of time have been given and the reimbursement of direct loss and/or expense (including loss and/or expense due to the Contractor by the Sub-Contractor) included is in full and final settlement of all claims between the Contractor and the Sub-Contractor.

In accordance with sub-clause 1.8.2, the above effect shall be suspended until conclusion of any proceedings in relation to any disputed matter in the notice, as long as these proceedings are commenced (by either the Contractor or the Sub-Contractor) within 10 days after the date of receipt of the Final Payment Notice.

The clause also provides that if the Employer commences proceedings under the Main Contract (within 28 days of the Main Contract's Final Statement) these also suspend the effects of the Final Payment Notice, provided that the Sub-Contractor is part to those proceedings or is notified of them within 14 days of commencement; that leaves a further window for the Contractor (28 days from commencement of the Employer's proceedings) to commence proceedings with regards to a matter included in the Final Payment Notice.

Clause 1.8.3 states that if the proceedings consist of a reference to adjudication, the suspension extends to the conclusion of any subsequent legal or arbitration proceedings which commence within 28 days of the adjudicator's decision but not otherwise. Finally, clause 1.8.4 provides that if the Final Payment Notice is not issued by the Contractor in accordance with clause 4.7.2, the Sub-Contractor's Payment Application in accordance with clause 4.22.3 shall have the same effects.

Conduct up to the issuance of the Final Payment Notice

Normally, any differences in the account would be already known (and discussed) long before the issuance of the Sub-Contract Final Payment Notice; as explained, the notice would have to be issued up to 5 days after the later of the final retention release due date and the formal submission of the Final Sub-Contract Sum calculation by the Contractor (8 months from practical completion).

It would therefore be reasonable to assume that the Contractor and the Sub-Contractor would have already been through contractual exchanges regarding outstanding EOTs, claims etc. thus any disputed matters in the Final Payment Notice would be no surprise to either.

Ideally, the Contractor would have sent a draft of the "final account" to the Sub-Contractor and the Parties will have the opportunity to discuss the account before the formal issuance of the Final Payment

Notice, acknowledging that any dispute arising under the latter, would trigger the commencing of proceedings within 10 days.

In the event that the Sub-Contractor is unaware of this provision, and no proceedings are commenced within the required timeframe, it would be in a perilous contractual position thereafter with regards to any outstanding claims, as the Final Payment Notice will constitute (in any proceedings to follow) conclusive evidence that all claims and/or EOT are settled.

Conclusion

Upon issuance of the Final Payment Notice by the Contractor, if the Sub-Contractor disputes it (or any matter contained therein), it needs to react quickly and within the timeframes explained; otherwise (the notice) will constitute conclusive evidence in any future proceedings the Sub-Contractor decides to instigate with regards to the dispute(s).

The quickest and most economical solution is the Sub-Contractor to issue a valid notice of adjudication within 10 days of the Final Payment Notice. This action will suspend its effects (with regards to the disputed matter) until final determination; that could be the Adjudicator's decision, if further proceedings (arbitration or litigations) are not commenced by either Party or the Employer with 28 days of the decision.

For assistance, you can contact us at info@pronea.co.uk

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[1]: Under clause 1.5 (and Section 116 of the HGCR 1996 as amended), only bank holidays are excluded when reckoning periods of time.