



briefing

construction - autumn 2007

fair payment guidance launched by office of government commerce

Following the work of the Public Sector Construction Clients' Forum (PSCCF) Fair Payment Working Group, the OGC has launched their 'Guide to best Fair Payment practices' for the Construction industry. The Guidance marks the first ever cross-industry agreement on the principles of fair payment best practice.

What is it?

The Working Group, chaired by Sir Christopher Kelly, was set up to agree good practice for fair payment in the construction industry after the Latham and Egan reviews highlighted widespread problems. John Ioannou, OGC's head of market and suppliers, noted that ["the construction industry has experienced more problems with payment than other sectors because it is so fragmented. It has about seven interfaces between a client and a final supplier"](#).

What does it do?

The document, launched in London on 19 September 2007, is a concise ten pages with three Annexes and three Appendixes making up the bulk of the document. At its core is a model Fair Payment Charter which the OGC recommends be signed by the client at the outset and all contractors and suppliers on engagement. The corner-stones of the Charter are:

- greater transparency;
- no unfair withholding of retentions;
- more efficient payment procedures; and
- payment periods not exceeding 30 days.

The OGC has recommended a start date of 1 January 2008 to allow for the appropriate mechanisms to be put in place. The extent of these mechanisms will vary depending on the size, value and complexity of the project. One of the most notable proposals is that of the 'Project Bank Account' which will be utilised to uphold the four principles above. This is a pooled account which acts as a middle man between all payers and payees in respect of all project transaction monies.

A Project Bank Account is defined as a ['fair payment for all system'](#) which ensures that a contractor and his supply chain promptly receive monies rightfully due through certified interim payments. The account is set up in trust for the whole supply chain which ensures that the money remains safe in the event that the contractor goes into receivership. This means that each account will require a Trust Deed to be signed by all parties, a model of which is included as an Appendix to the Guidance.

The process of preparing and certifying monthly valuations or milestones is unaltered by the arrangement and a Project Bank Account will vary from client to client and project to project. Some projects may operate monthly valuations whereas other payments will be triggered by the completion of a milestone event. Similarly, the way the account is opened and administered will vary, therefore some clients may set in place arrangements for their appointed contractors to complete the standard mandates and open the account on their behalf, whilst others may prefer to do so themselves.

An interim payment will be agreed in the normal way, including the review and evaluation of the payments due to each member of the supply chain by the contractor. The payment is then authorised by the client team and transferred directly from the client by BACS into the Project Bank Account. The client and main contractor then jointly authorise the payment transactions to the supply chain. All members of the supply chain will be notified of the date they will receive payment at the time the payment is authorised.

The aim of the suggested improvements is to provide greater certainty on payment and to optimise payment periods to minimise financial charges.

Is it binding?

No, it is guidance only, not legislation! Therefore, you are not forced to comply with it. However, it is likely that in future tenders, contractors willing to buy into the Charter will be more sympathetically evaluated than those who do not. In an attempt to encourage take up of the guidance, OGC has called for compliance with the charter to become a driving factor in the future selection of project terms and incentives or rewards under framework agreements.

Does the guidance apply to all construction contracts?

No, only to those where the ultimate client is a public body. However, there is pressure to extend its remit to all contracts (as well as to enshrine it in binding legislation). The National Specialist Contractor's Council (NSCC) has launched a Fair Payment Campaign to coincide with the launch of the Guidance in an attempt to encourage the private sector to follow suit.

The OGC and PSCCF plan to monitor the progress of implementation and report on the success of the principles in 2010.

Summary

Clearly, even though the Guidance is not binding, it will be an advantage to contractors to be able to demonstrate familiarity and readiness to comply with the Guidance when tendering for public projects.

If you want to know more about building the Guidance into tenders or contract terms, or using Project Bank Accounts please contact Simon McCann on 029 2038 5400 or Paul Millar on 029 2038 5484



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Simon is a commercial/projects partner who specialises in major public/private projects and also advises on public procurement and constitutional/administrative issues. Before joining Morgan Cole, Simon led the health legal team in the National Assembly for Wales. His recent experience includes advising Asterol on a 35-year, £130 million managed equipment services contract for clinical equipment and systems as part of the Peterborough Hospitals PFI scheme, the Designed

for Life: Building for Wales framework for the construction of future Welsh hospitals (expected to deliver an initial investment of £250 million), acting for Philips Medical Systems on a £110 million-plus imaging equipment and IT systems PFI in Belfast, the Department of Health's Independent Sector Treatment Centres PPP scheme. In addition he has advised on PFIs in relation to education and emergency services, and partnering schemes and collaborations.



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Paul is the head of Morgan Cole's construction and engineering group and has specialised for over 15 years in construction and engineering contracts. Paul has significant experience of infrastructure projects, project disputes and development related work projects (across various sector). This includes, advising:

- Severn Power Limited since 2005 in relation to all aspects of a major gas fired power station development (850MW) at Uskmouth near Newport which also encompasses a major electricity substation, gas pipeline and jetty facility;
- the Isle of Man Government in relation to a major sewage treatment plant project and an airport runway extension;
- Total UK Limited in relation to a major extension at the Milford Haven Refinery;
- a Major UK contractor in relation to final account issues arising from a Channel Tunnel Rail Link related contract and more recently a Tubelines contract; and
- a Major UK contractor in relation to the first river Severn crossing.

In the PFI and PPP sector, Paul has advised a major care home provider in relation to a significant nursing home project involving the construction of 12 nursing homes as well advising Cowlin Construction Limited in relation to various student accommodation PFI based projects.

Paul has advised on numerous development projects including recently advising Llanelli Rugby Club in relation to its new stadium. He is active within the Constructing Excellence initiative and is a committee member of the SW Wales Constructing Excellence Steering Group.