

Quantity Surveyors Guide to the Construction Contracts Act

SCSI Information Paper



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Contents

	Page
Introduction	6
Application	6
Main contract payments	7
Sub-contract payment	7
The Schedule	7
Payment procedure	9
Suspension	12
Disputes	12

Foreword & Acknowledgements

The SCSi welcomed the introduction of the Construction Contracts Act which was designed to speed up the process to resolve payment related disputes without jeopardising the delivery of construction projects or unnecessarily delaying payments due to subcontractors.

The legislation now provides for an adequate framework for all parties to work within.

The legislation promotes the use of early dispute resolution and the SCSi has also set up its own Adjudication Panel for parties with smaller payments disputes (less than €75,000) to be resolved via a dispute resolution process that allows both parties sight of the total dispute resolution fee.

The SCSi has been very active engaging with government during the drafting of the legislation. SCSi has arranged a number of CPD's nationwide for members to attend so that they are up skilled on the requirements under the Act.

This Information Paper was prepared so that members have a succinct guide to refer to and to act as a signpost for retrieving additional information in areas that are not fully clear. I would also like to thank the following members for their assistance with the development of this paper.

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We hope you find this information paper useful.

Michéal Mahon FSCSI FRICS
QS Professional Group Chairperson

SCSI Information Paper

This is an information paper (IP). Information papers are intended to provide information and explanation to SCSI members on specific topics of relevance to the profession. The function of this paper is not to recommend or advise on professional procedure to be followed by members.

It is, however, relevant to professional competence to the extent that members should be up to date and have knowledge of information papers within a reasonable time of their coming into effect.

Members should note that when an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of any relevant information papers published by SCSI in deciding whether or not the member has acted with reasonable competence.

Document status defined

SCSI produces a range of standards products. These have been defined in the table below. This document is a guidance note.

Document status defined		
Type of document	Definition	Status
SCSI practice statement	Document that provides members with mandatory requirements	Mandatory
SCSI code of practice	dorsed by another professional body that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
SCSI guidance note	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
SCSI information paper	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

Introduction

The Construction Contracts Act 2013 commenced by Ministerial Order on the 25th July 2016. This information paper will briefly outline the main contents of the Act and the relevant Code of Practice and their practical application to the administration of payment under relevant construction contracts and the imposition of statutory adjudication as an option to resolve payment disputes.

The purpose of this legislation is to regulate payments in the construction industry by removing paid when paid terms, accelerating the payment of payments when due and giving certainty to the contractual payment terms, particularly that of subcontracts. The Act provides for a speedy resolution of payment disputes by allowing for statutory adjudication with a temporarily binding enforceable decision.

This information paper is not a legal interpretation, but is intended to be a practical guide to the provisions of the Act. If in doubt you should refer to the Act or seek expert advice.

For the present in the absence of any relevant and specific Irish case law on the subject the Courts may be asked to rely on the significant case law developed for similar statutory payment/ adjudication systems in the UK and other common law jurisdictions eg Australia, New Zealand etc and which might be persuasive on the manner that this Act will be interpreted in this jurisdiction. It is however important to note that legal advice should always be sought where matters of interpretation are unclear as there are significant differences between the Irish statutory adjudication system and the Irish legal system / Irish Constitution and those other jurisdictions

This information paper is for general application for the majority of routine building contracts, but for any marginal issues the wording of the Act must be considered. The SCSI has endeavoured to use familiar terminology used in the Act to guide members through the main points.

Application

The Act applies to almost all construction contracts carried out in Ireland with the following exceptions: -

- Domestic dwellings less than 200m² for an owner occupier
- Building contracts not more than €10,000 in value.
- Contracts of employment (defined)
- PPP Contracts (only the contract between State Authority and its partner in the PPP contract)
- Contracts for the supply and delivery to site of construction materials

All construction contracts within this definition are *construction contracts* for the purposes of this Act.

The parties to a *construction contract* cannot contract out of the provisions of the Act.

The Act distinguishes between *construction contract* involving a main contract between the employer and a main contractor and a *construction contract* between a contractor (or sub-contractor) and sub-contractor(s). Those involving subcontractors are subject to specific time limitations under the Act which are binding on the parties irrespective of the written or oral terms agreed.

Main contract payments

The parties can agree any payment terms, a means to calculate the amounts due and periods for interim and final payment under a *construction contract* provided same are agreed. The current Standard Forms of Contract broadly comply with these requirements, however some minor modifications are being considered to both the Public Works Contracts and the Private forms to avoid any conflict between the requirements of the Standard forms and the Act.

In the absence of any agreement, or in as far as a requirement is absent, the *Schedule* in the Act shall apply.

The requirements in the agreement shall include: -

Amounts to be paid:

- The amount of each interim payment,
- The amount of the final payment
- OR
- A mechanism for determining such amount

Timing of payment:

- The *payment claim date* or a mechanism for determining such a date
- The period between the *payment claim date* and the date on which an amount is due.
- The commencement of the contract should be agreed to allow for determination of the commencement of the first payment claim date.
- Identification of a date when interim payments no longer apply (e.g. RIAI Practical Completion or PWC Substantial Completion) and the final payment date should be defined (e.g. RIAI Final Certificate, PWC Final Payment Certificate).

Sub-contract payment

The default payment mechanism for a *construction contract* is the *schedule* notwithstanding any agreement to the contrary. However, the parties are free to agree differing terms provided they are no less favourable to the sub-contractor.

The Schedule

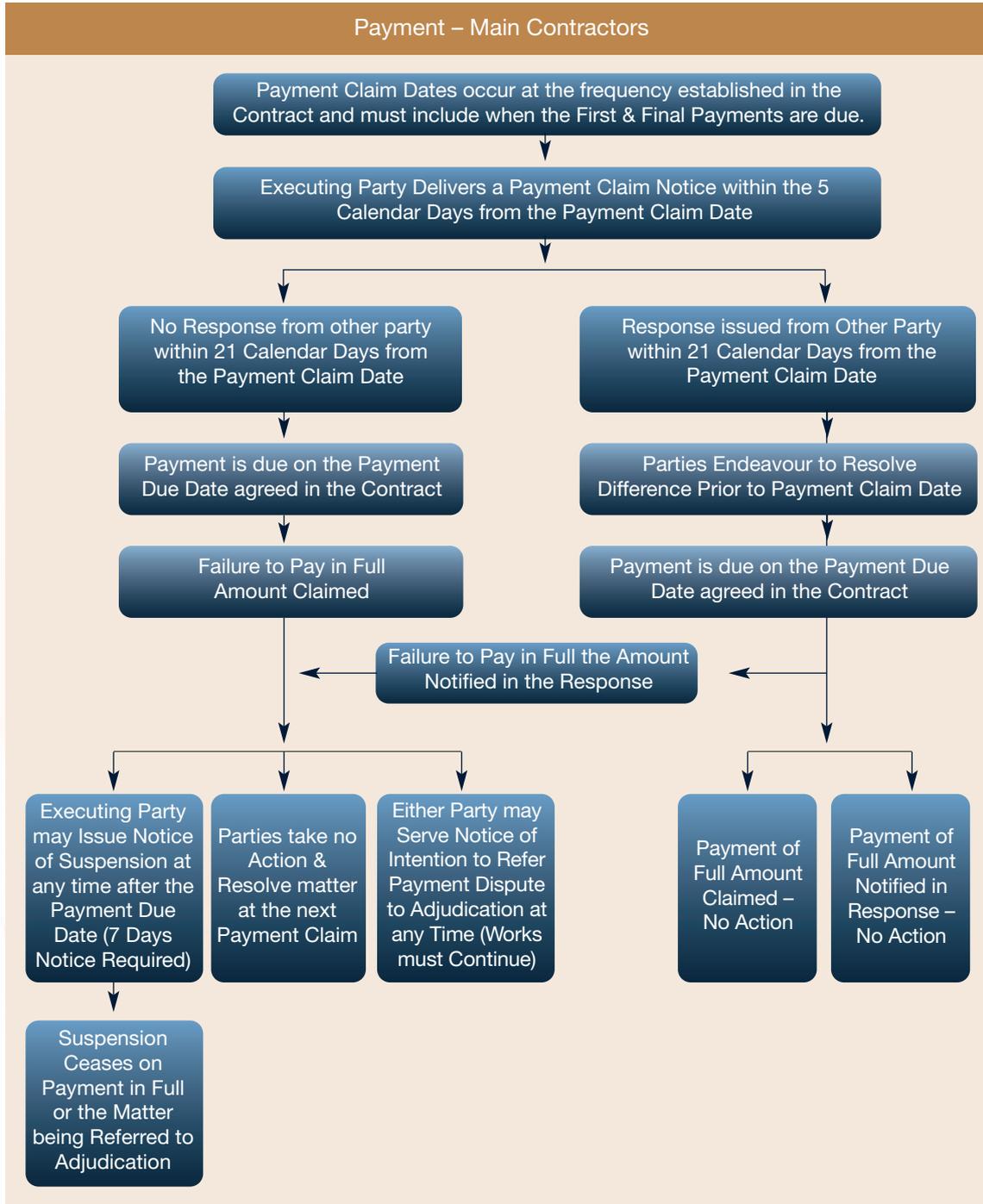
The first payment claim date is 30 days after the *commencement of the contract* and parties should assure alignment of payment days for subcontractors to the Main Contract to avoid difficulties arising from the paid when paid prohibition. It is essential that the contract terms clearly establish the commencement date for the contract so as to avoid serious conflict and confusion as to when the Payment Claim Date arises.

Payment claim dates for interim payments are fixed to every 30 days thereafter up to *date of substantial completion* and there is a final payment 30 days after the date of final completion. The Schedule does not define either substantial completion or *Final Completion* date and this should be defined in the Sub-contract and a method for establishing both dates established.

Typically under Nominated Subcontracts under the RIAI contracts or Named Specialists under the PWC version 2.0 contracts the substantial completion date could normally be aligned to the Main Contract issue of Practical Completion/ Substantial Completion certification and the Final Completion to the issue of Final / Final Payment Certification.

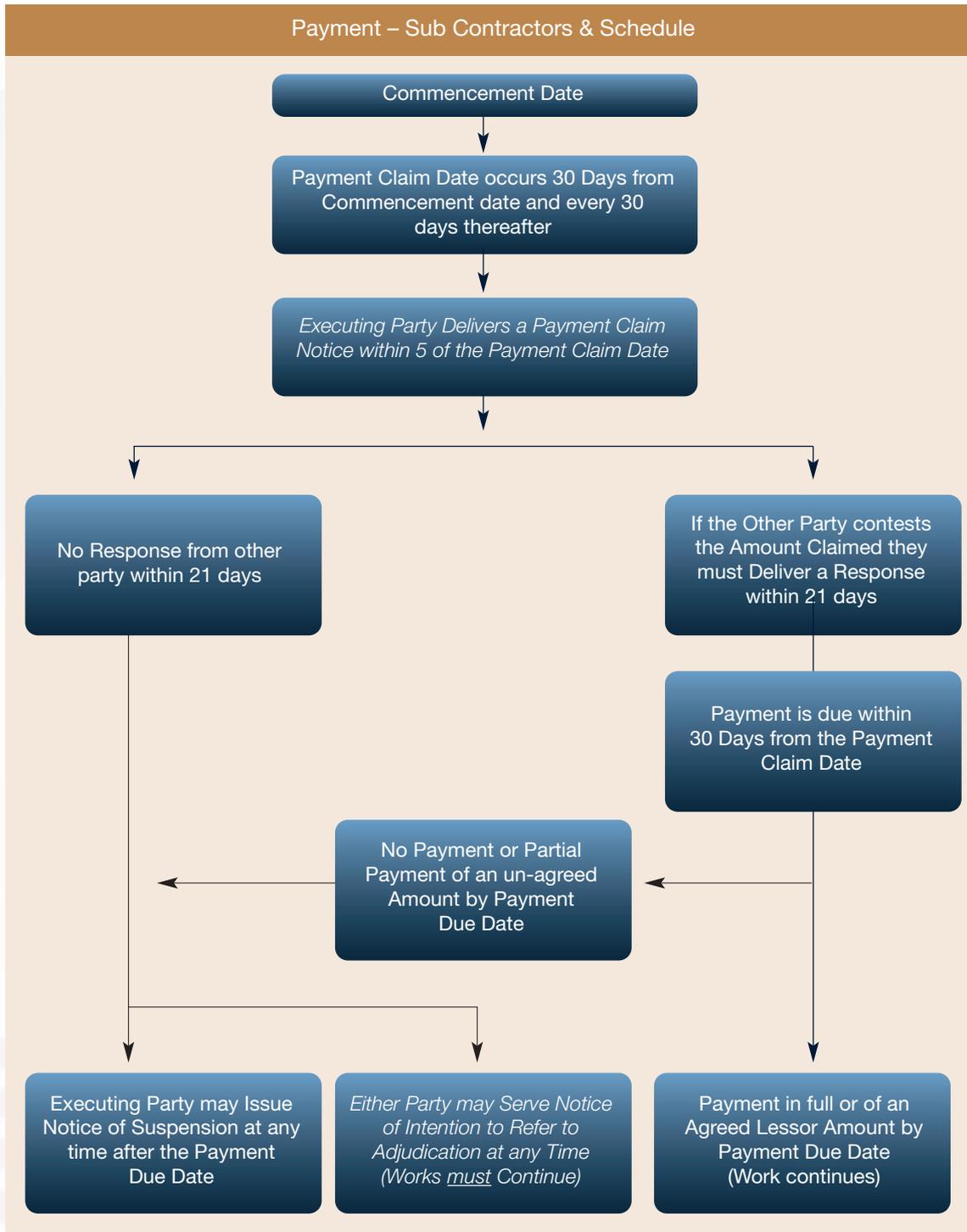
In short duration contracts, that is under 45 days, there is an exception that the *payment claim date* shall be 14 days after the completion of the works. Payment becomes due within 30 days of the relevant payment *claim date*.

Payment procedure (whether under the schedule or not)



Notes

1. A Payment Claim Notice may be described as an Invoice, Interim Application or similar term depending on the form of contract in use but must contain all the information required under the Act.
2. The Payment Claim Date and the Payment Claim Notice Date may fall on the same date if agreed in the Contract.
3. Clients are free to agree Payment Terms with Main Contractors and Principal Consultants that are longer than those stipulated in the Schedule once it is agreed to in a Written Contract..



Notes

1. Following the Schedule strictly the first payment will be made 60 days after the commencement date and every 30 days thereafter.
2. The Commencement Date if not specified in the Contract is the date on which the works start, a different date may be specified once it is 30 days before the first payment claim date. 2. Payment durations listed are the maximum durations permitted for sub-contractors and sub-consultants but more favourable terms may be agreed
3. A Payment Claim Notice may be described as an Invoice, Interim Application or similar term depending on the form of contract in use but must contain all the information required under the Act.

The Act refers to the “Payment Claim Date” as the date when a “Payment Claim” for an amount due is required to be made. For example under the Schedule the first Payment Claim date is 30 days after the commencement of the Contract so the first Payment Claim Notice under Section 4 can only issue on or after that date and the first payment becomes due 30 days at the next Payment Claim date.

A Payment Claim Notice under Section 4 is required to be made not later than 5 days after the Payment Claim date.

The Act allows the paying party to specify another person (Architect/Engineer/Surveyor) to receive the Payment Claim Notice. The parties may agree in contract the manner of delivery but in the absence of agreement post or other effective means is acceptable under the Act.

The payment *claim notice* must state:

- The amount claimed
- The period, stage of work or activity

The subject matter

The basis of the calculation

If the amount is contested, a response to the payment claim notice must be made:

Within 21 days of the *payment claim date* (note not the date the claim is received, this could be 16 days after receipt of the claim if the *notice* is received 5 days after the *payment claim date*) a response and this must state:

- The amount proposed to be paid and the basis of calculation
- The reason for the difference (including details of any claims for loss or damage if applicable)

If the matter is not settled between the parties by the date the payment is due, the amount in the *Response* shall be paid on the relevant Payment Claim Date.

If the Responding party fails to issue a response to a valid Payment Claim Notice in time or at all, the Act is silent as to the consequences. This is different to UK legislation in this regard but there is a view that the amount due under the contract must be paid.

However, the Act does expressly spell out a consequence for a failure to pay.

Suspension

Suspension may only occur when an amount due under the contract is not paid. If the paying party fails to pay either the amount notified in the *Response* or in the absence of a valid *Response*, the amount due under the contract, the Contractor/Sub-Contractor (*the executing party*) may suspend works by giving notice no earlier than the day after the amount is due and in writing specifying the grounds for suspension and give at least 7 days’ notice before the proposed suspension can begin.

Suspension must cease if the sums owing are paid (Sec 5 (3) (a) or if the matter is referred by either party to statutory adjudication under section 6 of the Act (Sec 5 (3) (b)).

Disputes

Should the matter of the payment dispute not be resolved, either party has the right to refer the dispute to the Construction Contracts Adjudication Services at www.djei.ie/en/Construction-Contracts-Adjudication-Service/, by serving a notice of intention to refer the payment dispute to adjudication in accordance with Sec.6 (2) on the other party.

The parties may agree an adjudicator or agree to have an adjudicator nominated by a third Party (e.g. SCSI President). However, if within 5 days the parties have not agreed to appoint an agreed Adjudicator of their own choice, either party may then apply for an Adjudicator to be appointed by the chair of the panel selected by Junior Minister Pat Breen, Minister of State for Employment and Small Business.

The Society of Chartered Surveyors Ireland has established an Adjudication Panel of experienced dispute resolvers to deal with construction contract payment disputes. Parties to a payment dispute can agree to apply to the Society for a nominated adjudicator from the panel or can agree to select an adjudicator from the Society's panel. The Society's panel of adjudicators is available in the Dispute Resolution Section of the Society's website and pro-forma application forms are available at info@scsi.ie.

Adjudication is not covered by this information sheet (refer to the Government publication).

It is a formal and quick process requiring a decision within 28 days, which may be extended by 14 by agreement. The process requires strict adherence to procedure.

The decision of the Adjudicator is binding and the parties must comply with the decision. Either party may appeal the decision to Arbitration or the Courts, however, payment must be made pending such appeal.

Dating back to 1895, the Society of Chartered Surveyors www.scsi.ie Ireland is the independent professional body for Chartered Surveyors working and practicing in Ireland.

Working in partnership with RICS, the pre-eminent Chartered professional body for the construction, land and property sectors around the world, the Society and RICS act in the public interest: setting and maintaining the highest standards of competence and integrity among the profession; and providing impartial, authoritative advice on key issues for business, society and governments worldwide.

Advancing standards in construction, land and property, the Chartered Surveyor professional qualification is the world's leading qualification when it comes to professional standards. In a world where more and more people, governments, banks and commercial organisations demand greater certainty of professional standards and ethics, attaining the Chartered Surveyor qualification is the recognised mark of property professionalism.

Members of the profession are typically employed in the construction, land and property markets through private practice, in central and local government, in state agencies, in academic institutions, in business organisations and in non-governmental organisations.

Members' services are diverse and can include offering strategic advice on the economics, valuation, law, technology, finance and management in all aspects of the construction, land and property industry.

All aspects of the profession, from education through to qualification and the continuing maintenance of the highest professional standards are regulated and overseen through the partnership of the Society of Chartered Surveyors Ireland and RICS, in the public interest.

This valuable partnership with RICS enables access to a worldwide network of research, experience and advice.

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