

10 TIPS FOR MAKING A PAYMENT CLAIM

The following tips can be utilised to assist you in making a payment claim in respect for works performed under a construction contract:

1. Identify the Key Contract Provisions

In order to determine your contractual rights and obligations, it is important that you review your contract and identify the key contract provisions. Key contract provisions in relation to payment claims could include, but are not limited to, submitting payment claims, timing of payment claims and dispute resolution clauses.

Additionally, identify the principal obligations of the other party and establish whether they have properly performed all their obligations, express or implied.

2. Identify Any Collateral Agreements

Just like with your main contract, you will need to review any collateral agreements to check for the relevant obligations, provisions and whether performance of those obligations justify making a claim, for example, perhaps the other party has agreed to provide access, materials, or design information and has done so too slowly or in a way which changed the nature of the work required.

3. What Happens If There Is No Written Contract?

A construction contract can be in writing or oral, or it can be a combination of both. If you are performing work with no written contract or the contract does not contain all the necessary provisions about your rights to claim payment for work performed under the contract, those rights might have been agreed in conversation and if so the conversations should be carefully recorded in the claim.

4. Determine the Type of Payment Claim

It is important to determine the type of the claim and support with documents the type of payment claim correctly. Under a construction contract, progress payments usually must be supported with documents relating to insurance, payment of subcontractors and suppliers, updated programs and a variety of other documents required by the principal. Care should be taken to submit all appropriate documents with the

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necessary qualifications and explanations to ensure that they are comprehensive and accurate.

5. Making a Payment Claim

You must make a payment claim in accordance with provisions in the contract. However, if there is no written contract or the contract does not contain provisions in relation to making a payment claim, a payment claim must:

- Be in writing and properly organised and presented for best effect;
- Be addressed to the party to which the claim is made (being careful to identify the correct contracting party);
- Include the date of the claim, the name of the project and contract reference numbers;
- Show the amount claimed and how it has been calculated (including any provisional estimates which may be necessary if information is not presently available);
- Include sufficient detail of the claim for it to be considered, (dates, times, instructions, when the work was carried out or the expense incurred, how the work was additional to any previously agreed fixed price);
- Be signed by the claimant (being careful to identify the correct contracting party);
- Given to the party to which the claim is made; and
- Be endorsed as required by any relevant legislation.

6. Adhere to Any Required Timeframes

When presenting a claim for payment, you must ensure you strictly follow the contract provisions that relate to claims. In many cases a delay to notify the claims can be severely detrimental to their success and some contracts expressly bar claims. This leads to expensive legal debate as to whether the claim survives. Best to claim early and claim often than claim late.

In the event the payment claim is not made within time, you should seek agreement from the other side that the claim will be considered on its merits and if that is not forthcoming seek prompt advice on the best way to pursue the claim. A payment dispute arises when the amount claimed; or the amount retained; or the security held by a party to the contract becomes due and is not paid in full or is paid in part.

The security of payment legislation in each state and territory provides a mechanism for resolving payment disputes. You should also seek prompt advice if a payment dispute arises due to the strict timelines in respect of claims under the security of payment legislation.

7. Prepare a Contract Reconciliation

It is important that you accurately record the status of the contract when making a claim in order that clarity as to the context of the claim is available to both parties. This should list all claims and payments and whether previous claims have been approved and paid.

Keeping accurate records and sharing those with the other party allows you to work towards identifying and resolving any discrepancies in relation to payment claims as well as establishing critical dates as to when payment claims are due.

8. Prepare an Accurate Chronology

If you prepare a chronology and regularly update the chronology of events relevant to the works performed under the contract in respect of the claims made, you will be in a position to promptly provide further information to the other party if requested to do so. The chronology should be cross referenced to documents or statements.

Being prepared and across the facts of the matter at issue often allows you to rebut a criticism and convince the other party to propose a more attractive compromise.

9. Program

Each claim should be supported by an updated program with one copy of that program demonstrating the delay caused by the event around which the claim is based.

Time is money and a failure to reflect the time impact of say a variation or a change of sequence of the work or a partial suspension of the work can often mean that the claim is severely undervalued or simply unpersuasive as to the extent of the costs.

Depending on the nature of the claim often a simple bar chart will demonstrate the time related effects and allow the calculations to be properly correlated to the calculations of the loss. If the program shows work or delay on dates not claimed for in the claim (or the opposite) it should be reviewed closely.

10. Contractual Provisions

It is important to identify the correct contract provisions under which the claim is made so the liability and quantum of the claim can be easily understood by the other party.

Usually, the primary clause is explained, and the requirements of that clause shown to be satisfied by the claim. However, where there are alternative bases for the claim the alternatives should be sketched out so that if the primary claim is seen to fall short an alternative basis might be accepted leading to a successful result.