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PAYMENT SCHEDULES: MAKE YOUR FIRST SHOT YOUR BEST SHOT

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It is vital to ensure that payment schedules in the construction industry are as detailed and comprehensive as possible.

That is because under section 20(2B) of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (**the Act**), a respondent to a payment claim cannot include in its adjudication response any reasons for withholding payment that were not included in its payment schedule.

In addition, section 22(2)(d) of the Act states that an adjudicator, in determining an adjudication application, must consider, amongst other things, the payment schedule to which the adjudication application relates, together with all submissions (and relevant documents) that have been duly made by the respondent in support of the payment schedule.

SUMMARY OF SECURITY OF PAYMENT

It is important to quickly summarise the Security of Payment procedure contained in the Act and some key terms:

1. A payment claim is a claim for payment for construction work or the supply of related goods and services by a claimant;
2. A payment schedule is a response to a payment claim which sets out the amount intended to be paid, and if the amount is less, the reasons why full payment is not being made by the respondent party;

3. An adjudication application is made if a claimant wishes for the payment claim to be adjudicated and can be made if the:
 - a) amount intended to be paid is less than the amount claimed; or
 - b) respondent fails to make payment pursuant to the payment schedule by the relevant due date.
4. The adjudication application sets out the claimant's case regarding why it should be paid the amount in its payment claim;
5. An adjudication response is made in response to the adjudication application and should elaborate on the reasons included in the payment schedule as to why the respondent has withheld payment regarding the amount subject of the payment claim and;
6. An adjudicator determines an adjudication application.

For the purposes of this article, emphasis is placed on the payment schedule as this is a respondent's most critical document, particularly given the consequences that apply if new reasons for withholding payment are introduced in an adjudication response that were not included in the payment schedule.

WHAT HAVE THE COURTS SAID?

The following is a summary of what the Courts have said regarding the required link between the reasons for withholding payment in a payment schedule and what is subsequently contained in an adjudication response:

1. The payment schedule informs the claimant of the "metes and bounds" of its dispute with the respondent and articulates the respondent's case to be determined by the adjudicator.

- Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 17125.

2. That is necessary so the claimant can know the nature of the respondent's case that it will have to meet in deciding whether to pursue its claim.

- Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 114027.

3. The parties are required to define clearly, expressly and promptly the issues in dispute in the payment claim and the payment schedule. Those issues are the only ones the parties are entitled, subsequently, to agitate in their dispute and the only issues which the adjudicator can determine:

- Pittwater Council v Keystone Projects Groups Pty Ltd [2014] NSWSC 179129.

4. Submissions are permissible in the adjudication response but new reasons are not.

- Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 431.

5. Further evidence in the adjudication response is only permissible if it is “logically probative” of one or more of the reasons in the payment schedule.

- Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering Ltd [2017] NSWSC 166532

KEY TAKEAWAYS

It is therefore important that payment schedules are as detailed, clear and precise as possible when setting out the reasons why a respondent does not intend to pay the full amount in a payment claim. Otherwise, any new reasons can be excluded or not taken into consideration by an adjudicator in any adjudication.

CONTACT US

If you would like assistance or further information regarding your payment claims or payment schedules, please do not hesitate to contact Associate **Anish Wilson** at Kreisson on (02) 82396500 or at excellence@kreisson.com.au.

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