

ARTICLE SERIES

# KEY LESSONS EVERY CONTRACTOR MUST KNOW ABOUT PAYMENT APPLICATIONS IN CONSTRUCTION PROJECTS





When contractors are engaged in construction projects, the employer undertakes to make payments to the contractor in instalments and through the mechanisms provided under their contract. One important mechanism for payment in a construction contract is the contractor's payment application.

The payment application is important as it assists the employer in finding out the value of work done and the amount due to the contractor. Typically, the payment application will show the total value of work completed and the contractor's amount. Usually, the contract will require that the contractor submits its payment application every month or after the conclusion of agreed milestones.

Like every construction contract, the FIDIC Suite of Contracts 2017 [1] and the General Conditions of Contract for the Procurement of Works in Nigeria, 2011 (the GCC) have provisions governing the contractor's payment application.

This article will examine two vital lessons crucial to contractors making payment applications.

#### LESSON 1:

The contractor must ensure that the payment application complies with the requirements provided under the contract.

The contractor will need to ensure that its payment application is clear in substance, form and intent, and relates to the due date it was made. Specifically, the contractor must ensure that:

(a) The contractor submits its payment application within the period stated in the contract:

Under the FIDIC suite of contracts 2017, the contractor will need to submit its payment application within the period stated in the contract [2]. Where the contract does not state any period for submission, the contractor will need to submit its application at the end of every month [3].

<sup>[1]</sup> The FIDIC Suite of Contracts is a compilation of several standard contracts for the construction industry. These contracts have been designed for a diversity of construction projects. Contracts included in the FIDIC Suite include the Red, Yellow, Silver, Green and Pink Books 1999 and 2017 editions.

<sup>[2]</sup>See Clause 14.3 of the FIDIC 2017 Red, Yellow, and Silver Books [3] Ibid

#### (b) The contractor's payment application is in the content and form recommended under the contract:

Clause 14.3 (i) – (x) of the FIDIC Suite of Contracts 2017 lists the items the contractor will need to include in its payment application. Under the GCC 2011, the contractor will need to include all the estimated value of the work executed within the period less the cumulative amount certified previously [4].

## (c) The contractor communicates its payment application in the mode prescribed under the contract:

Under the GCC 2011, all communications between the contractor and employer are meant to be in writing and delivered to the address provided in the contract [5].

This means that the contractor's payment application must be in writing. The GCC 2011 defines writing to include any hand-written, type-written, or printed communication including telex, cable, and facsimile transmission [6].

Under the FIDIC suites of contract 2017, payment applications sent via electronic means such as email exchanges are valid in addition to the other forms of communication [7]. The contractor therefore must allow its payment application to conform with the mode approved by the contract.

Where the contractor fails to make its payment application under the contractual requirements, the contractor will not receive any payment. We can see an example of this consequence in the English case of RGB Plastering Ltd v. Tawe Drylining & Plastering Limited [8]

In the RGB case, the sub-contract between the contractor (RGB) and the sub-contractor (Tawe) required payment applications to be submitted every month. Specifically, the subcontract required that Tawe submits all its payment applications by the 28th of every month. The subcontract also provided that Tawe submits its payment applications to a particular email address: 'applications@rgb-group.org'.

Tawe submitted its April 2019 payment application on the 30th of April 2019.

<sup>[4]</sup> The GCC 2011; Clause 62.1

<sup>[5]</sup> See the GCC 2011; Clause 12.1.

<sup>[6]</sup> Ibid; Clause 1 (ak)

 $<sup>\</sup>cite{Model}$  [7] See Clause 1.3 (a) (ii) of the FIDIC 2017 Red, Yellow and Silver Books

<sup>[8] (2020)</sup> EWHC 3028 (TCC)

Although Tawe sent its April 2019 payment application to several email addresses of the contractor's employees, Tawe failed to send the April 2019 payment application to 'applications@rgb-group.org'. RGB argued that having received the payment application after the contractual date and to a different email address, it was impossible to accept there was an application for April, or that Tawe's application covered work done for April 2019.

RGB stated that the only reasonable conclusion will be that the application for April 2019 was late and therefore invalid. The court agreed that Tawe's payment application did not comply with the requirements provided in the subcontract. It was not clear so that the parties could know what to do about it or when.

#### LESSON 2:

The contractor must watch out for contractual provisions that protect employers from being haunted by their past failure to respond to payment applications in the way required by the contract.

It is common for the employer to gloss over its rights and obligations under the contract. Where this is the case, the employer will be estopped from insisting on full compliance with the contractual obligations.

So, take for instance that the contract requires the contractor to submit its payment application on a particular date and to a particular email address. The contractor in submitting its third payment application fails to send within the time stipulated and to the wrong address. If the employer proceeds to pay the contractor despite the non-compliance with the contractual requirement, the employer has waived his right to insist that the payment application requirements be complied with. This means that the contractor can submit subsequent payment applications without complying with the contractual requirements and the employer will be prevented from refusing to pay.

However, the case will be different where the contract contains a non-waiver clause like the GCC 2011 [9].



This clause implies that the employer can validly refuse subsequent payments that do not comply with the contractual requirements notwithstanding that the employer had failed to insist on the contractual requirements in the past. Clause 4.3 (a) of the GCC 2011 states that:

Subject to GCC Sub-Clause 4.3(b), no relaxation, forbearance, delay, or indulgence by either party in enforcing any of the terms and conditions of the Contract or the granting of time by either party to the other shall prejudice, affect, or restrict the rights of that party under the Contract, neither shall any waiver by either party of any breach of Contract operate as waiver of any subsequent or continuing breach of Contract.

In the RGB case, Clause 38 of the subcontract between RGB and Tawe provided as follows:

1. Nothing contained in any approval or consent given by or on behalf of RGB in connection with the Sub-Contract Works shall prejudice or modify or affect or otherwise relieve the Sub-Contractor for any of its obligations under this Sub-Contract.

2. No purported waiver or amendment to these provisions by RGB's management on Site or other project personnel shall be construed as an amendment to these terms and conditions. The Sub-Contractor shall comply with these conditions strictly notwithstanding.

Tawe informed the court that it had in the past submitted payment applications later than 30th April and to a different email address and still received payment. For this reason, Tawe urged the court to prevent RGB from refusing to pay its payment application submitted on 30th April 2019.

Although the court did not consider this point as Tawe submitted this point late, Tawe's argument will still not be valid even if it submitted the point early. This is because Clause 38 shields RGB from being haunted by its past failures to insist that Tawe's payment applications be made in accordance with the contract.



#### **CONCLUSION**

Adherence to the contractual requirements on payment applications is key for the contractor to receive payment for work done. Where the contract contains protective clauses like a non-waiver clause, it is important that the contractor notes that its obligation to submit its payment application in line with the contract remains notwithstanding that the employer failed to insist on the contractual requirements in the past.





#### **AUTHORS**



Osinachi Nwandem

ÆLEX is a full-service commercial and dispute resolution firm. It is one of the largest law firms in West Africa with offices in Lagos, Port Harcourt and Abuja in Nigeria and Accra, Ghana. A profile of our firm can be viewed here. You can also visit our website at www.aelex.com to learn more about our firm and its services.'

COPYRIGHT: All rights reserved. No part of the publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means without the prior permission in writing of ÆLEX or as expressly permitted by law.

DISCLAIMER: This publication is not intended to provide legal advice but to provide information on the matter covered in the publication. No reader should act on the matters covered in this publication without first seeking specific legal advice.

### **CONTACT DETAILS**

#### LAGOS, NIGERIA

4th Floor, Marble House 1, Kingsway Road, Falomo P. O. Box 52901, Ikoyi Lagos, Nigeria

Telephone: (+ 234 1) 2793367; 2793368

4736296, 4617321-3;

Facsimile: (+ 234 1) 2692072; 4617092

E-mail: lagos@aelex.com

#### ABUJA, NIGERIA

4th Floor, Adamawa Plaza 1st Avenue, Off Shehu Shagari Way Central Business Area FCT Abuja, Nigeria

Telephone: (+234 9) 8704187, 6723568,

07098808416

Facsimile: (+234 9) 5230276 E-mail: abuja@aelex.com

#### **PORT HARCOURT, NIGERIA**

2nd Floor, Right Wing UPDC Building 26. Aba Road P.O. Box 12636, Port Harcourt Rivers State, Nigeria

Telephone: (+234 84) 464514, 464515

574628, 574636

Facsimile: (+234 84) 464516, 574628 E-mail: portharcourt@aelex.com

#### **ACCRA, GHANA**

7th Floor, Suite B701 The Octagon Accra Central, Accra P.M.B 72, Cantonment Accra, Ghana

Telephone: (+233-302) 224828, 224845-6

Facsimile: (+233-302) 224824 E-mail: accra@aelex.com