

The Ten Commandments of Post Contract

What You Must Do After Signing a Contract.....



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Who Should Read This...

This White Paper should be read by all UK and Internationally based Funders, Developers, Clients, Design Teams, Contractors and Specialist Sub-Contractors who want to minimise risk, have better commercial relationships and have a real desire to conduct their business **without** unnecessary conflict and the waste it produces.

It is also useful for parties interested in advising or supplying certain services to construction and those studying in the field of construction or building.

About the Author

Yosof Ewing¹ is the author of the internationally acclaimed White Paper series **The 10 Commandments**². He is the Managing Director of CPUK, a private practice of Professional Alternative Dispute Practitioners, Dispute Resolvers, Expert Witnesses, Quantity Surveyors and Project Managers based in the UK with global reach. He is a qualified Mediator, Licensed NLP Practitioner and acts as Expert Witness, as well as advising on disputes, contracts and procurement in construction, property and energy.

Yosof is a Fellow of the Institute of Commercial Management, Fellow of the Chartered Management Institute, Member of the Association of Project Management, Member of the Chartered Institute of Civil Engineering Surveyors, Member of the Chartered Institute of Arbitration, Practicing Associate of the Academy of Experts, Member of the Association of Project Safety, Member of the Institute of Engineering and Technology, Member of the Society of Construction Law and is a listed Party Representative by the Association of Independent Construction Adjudicators.

Failure to notify sums due or that you intend to pay less is a dangerous game and I would advise that you stick rigidly to the dates in the contract.

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Introduction

The following list are 10 things you **must** do after you sign up to a construction contract and maintain for the duration of the works.

As well as helping you out of a dispute situation it is a good way to improve upon your processes and will provide you with the data to carry out a thorough Post Contract Analysis. I hope that this will be with a reasonable profit or at the very least what you expected at tender stage.

Either way it will help you get better and in these tough times goodness knows it could make the difference between surviving or becoming a sad statistic.

The 10 Commandments of Post-Contract

1. Agree Valuation Dates...

And stick to them!!

Once your contract and order are in place, agree the dates that valuations should be submitted. The latest date for queries and the latest dates for payment.

With the changes in the new legislation which came into force in 2011 in UK you must make sure that you are on the ball with your payment notices. Failure to notify sums due or that you intend to pay less is a dangerous game and I would advise that you stick rigidly to the dates in the contract.

Cash flow is KING. Always has been and always will be in any business. In construction it is as important to the success of your project as your design team, the contractors and sub-contractors. Without cash flow these guys cannot deliver a project. Its that simple.

From funders and clients point of view, I know that there is little insight into what goes on in their supply chains. Some would argue (and blindly do) that ignorance is bliss. Sorry but this is really not the case and never has been. If those that fund projects turn a blind eye to what goes on in their supply chain, then things will never change. Its no longer okay for them to sit back and consider that their risk is covered by the Main Contractor.

Make sure you have good reporting systems so that you can pull together your claims in a clear and concise manner.

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2. Check you have all the up to date information...

As soon as you have been appointed, i.e. a written contract is in place you must verify all of the contract information, drawings, specifications, scope and so forth.

You must compare it to what you tendered on and any changes that will impact the project timeline or the budget should be notified in writing to the employer.

Any notification should clearly state the cost/time impact and the recourse you seek. For example an extension of time or an increase to the contract sum.

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3. Follow the contract programme...

In these days of electronic project control software and schedules that are constantly updated in line with realtime, on-site, multiple sub-contractor and supply chain issues, it is hyper-critical that you keep an eye on where you slot in, so-to-speak.

Keep in touch with the project management teams and up-to-date with any communications. If there are any issues put them in writing explaining the impact on time as well as any cost implications. Do not wait until after the event.

Delay analysis in Dispute Resolution is becoming something of a science. If you have no records of what took place at the time, or any form of correspondence between you and the employer in respect of variations to the cost/time line, you could be out on a limb and find yourself exposed to damages.

If there are any issues put them in writing explaining the impact on time as well as any cost implications. Do not wait until after the event.

Make sure you and your staff are keeping accurate site records, diaries and so forth. They will prove invaluable in the event of a dispute.

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4. Put everything in writing...

Everything **and I do mean** everything that you say or do and likewise the employing party say or do must be recorded in writing. Every discussion, query, letter, email, drawing, specification, reference, site diary and so on must be documented.

Keep a project specific correspondence file. This time line will prove invaluable if things turn sour.

How can you resolve a Dispute if you cannot prove it?

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5. Agree variations as you go...

You need to ensure that you have a robust and workable system for monitoring site activity. Most contractors focus on making sure the work gets done and that delays are kept to an absolute minimum. Whilst this is admirable, who pays for the cost of this?

Don't bury your head in the sand. Variations should **always, always, always** be agreed in writing **before you start the work**. This includes the cost of the variation and any impact on the programme. I cannot emphasise this point enough.

A variation isn't just an extra claim for payment as most contractors think. A variation could be a delay caused by another party that could at a later stage cost you money in damages.

Okay but the Main Contractor insists that work proceed with all due haste or else.

Your response - or else what? Check the contract!! I would wager that there will be a clause in their contract that states that **all variations must be agreed in writing before they are started**.

In other words they are in breach of their own contract terms. Why should you put yourself at risk of non-payment by accepting this breach? Don't do it.

What was that? You don't want to upset the relationship. Well fair enough but I did warn you.

As a practical man and ex-contractor and if you really insist, then I suggest you could adopt this policy. Go ahead and do the work, record it, get them to sign the record of what took place and then submit your claim. If it doesn't get paid then don't do it again.

Seriously though I would much prefer you just enforced your employers contract and refused to begin until agreement has been reached.

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6. Make sure your payment claims are clear...

If your employer cannot follow your claim then it could lead to disagreements and delays to payment.

Claims for payment should be as clear as possible and include as much supporting documentation as you have available.

You must separate them into three clear sections:

- A. Works in relation to the original contract.
- B. Works out with the scope of the original contract (variations).
- C. Materials on site (contract dependent).

Claims must always be cumulative and take account of payments made so that you do not "lose" claims.

Consider investing in a straight forward pre and post contract process software. This expense will pay for itself over and over in the years to come.

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7. Do not over claim...

Relationships matter, its that simple.

If you expect to be treated fairly and reasonably then you must also act fairly and reasonably.

As an ex-contractor I understand the temptation to pad out a claim in the hope that either the PQS won't notice or that by the time some cuts are made you will be nearer what you are actually entitled to. Don't do it!!

It undermines your relationship, credibility and destroys any trust between parties.

Think of it this way. If you know 100% that you are entitled to what you have claimed then this will be evident to those around you, including potentially an Adjudicator. On the flip side if you are at the fiddle then you can lose credibility and it could seriously affect the outcome of any resolution, not to mention future works.

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8. Do not accept payment on account...

You have probably heard of an Interim Payment?

This is a payment made on a monthly basis in relation to works carried out by you. What can and often does happen is you will get a rounded down sum in relation to your claim (e.g. you claim £321,987.00 and they paid you £300k).

Most contractors wouldn't bother about this, after all you're getting paid right? Wrong!!

You are being paid on an interim basis. In other words on a provisional basis. This means that right up, until the Final Account is fully agreed, your account can be revisited and varied.

"I'm okay" you say, "I got the full £321,987.00. I'm safe as houses me". Wrong!!

In both sets of circumstances it is important to ensure that you get your account **fully agreed** on a month to month basis. After you receive payment and the amount is correct you should follow this up with a thank you, stating something like "Payment received in full for works carried out as instructed and without dispute".

My rule of thumb is never let a disputed account go over two months.

Another very valid reason is, what if a member of staff leaves?

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9. Follow up any non payment...

If your employer has withheld a single penny from you for any reason without explaining why then you need to ask why.

Under the current legislation you have **statutory rights** that entitle you to receive an explanation as to why you are having sums due withheld.

Do not accept non-payment, late payment, payment to account or "we can sort that out next month". Before you know it you're at Final Account stages and suddenly all bets are off.

As stated in Commandment 4, put everything in writing and keep copies. Record calls, emails, letters or any other method of communication.

If you do end up in dispute this audit trail will prove invaluable and will stand you in good stead.

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10. Monitor your Employers Credit Rating...

With contractors going out of business at an alarming rate it has never been more critical to have credit control procedures.

Ratings change make sure you keep up to date and ensure that you are not unnecessarily exposed.

When you registered your company with Companies House, HMRC and the other myriad agencies did you say you were a company or did you say you were a charity?

Thought so!!

If your employer is abusing your rights and not playing fair then you need to take immediate action.

Your suppliers and creditors cannot survive on handouts and you cannot sustain continual non-payment or late payment.

As a business owner you have a duty of care to ensure the survival of your company and therefore sometimes that means you will need to get tough on the companies who are no longer classed as clients but now come under the heading of "liabilities".

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So to Summarise...

Disputes are avoidable or can be easily resolved with the right preparation and attitude. When you consider their cost and then add it to the costs involved in obtaining work, building relationships, PQQ's, procurement, legal costs.....the list goes on. Surely it is common sense to seek to avoid any discord that will affect you, your business, your profits, your project, your asset and leave you right back where you started. Ready to do it all again. Don't you think that enough is enough?

Definition of Insanity: doing the same thing over and over again and expecting different results.
(Albert Einstein)

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