

NEC Secondary Option X14 Advanced Payment to the Contractor / Subcontractor / Supplier

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About Us




GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

Our NEC capability has principally been acquired through practical application and experience within 'live' project environments assisting both contractors and subcontractors.


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2




What is a Payment?

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3



Definition

'The transfer of an item of value, usually in the form of currency, from one party to another'.

A 'payment' may be made as;

- Consideration in exchange for goods or services,
- The fulfilment of a legal or contractual obligation,
- A voluntary action where no obligation or liability exists.

The party making the payment is usually referred to as the Payer.

The party receiving the payment is usually referred to as the Payee.

Within the construction industry, payments are regulated by;

- The Housing Grants, Construction and Regeneration Act 1996,
- The Local Democracy, Economic Development and Construction Act 2009.

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4



Advanced Payment

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Definition

'A payment made in association with work or services before they are actually carried out'.

An advanced payment may also be referred to as;

- A down payment,
- A mobilisation fee,
- An upfront payment,
- A loan payment.

In the report 'Constructing the Team' by Sir Michael Latham (Jul 1994) one of the 13 recommended requirements of an effective form of contract was making provision for *'advance mobilisation payments'*.

Many of the standard forms of contract are structured to facilitate an advanced payment, usually made at the initial stage of a project.

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Purpose



There are numerous reasons why an advanced payment may be made, including the following;

- Assisting with cashflow,
- Mobilisation,
- Procurement of critical resources,
- To provide commitment to a project,
- To assist an 'emerging' contractor,
- To provide greater financial certainty.

The purpose of an advanced payment may be determined by the manner in which the contract provision is drafted.

Notwithstanding the above, however, contracts generally do not regulate how an advanced payment is actually used.

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7

Repayment



Once an advanced payment has been made, the 'repayment' is usually deducted from the progressive value of work done under the contract.

Information relating to repayment is set out within the contract terms and should include the following information;

- When any repayment actually commences,
- The method for calculating the value of any repayment amounts.

Whatever the repayment terms, they need to ensure that repayment is achieved before Completion.

The parties could also provide for the repayment to be subject to interest, for the following reasons;

- The payer is compensated for the 'upfront' payment,
- This provides a deterrent to 'late' repayment.

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8



Advanced Payment Bond

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9



Background

A common requirement associated with an advanced payment is the reciprocal provision of an advanced payment bond by the payee.

The advanced payment bond represents an undertaking by a bondsman, or surety, to make a payment in the event of default.

Reminder: there are essentially 3 'types' of bond as follows;

- Conditional, or default, bond,
- On-demand bond,
- Hybrid bond.

An advanced payment bond typically costs around 3% of the advanced payment amount.

The value of an advanced payment bond should be 'amortised' in line with repayments to reflect the decreasing financial liability.

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10

Content



An advanced payment bond should provide details of the following;

- Maximum liability,
- When and by how much the bond amount reduces,
- Modification or change to the primary contract,
- Assignment or transfer,
- Changes 'within' the contract,
- Reasons why the Guarantor / Surety is discharged from their obligations,
- Obligations on the Payee in relation to the advanced payment,
- Form of notices and/or demands.

The bond terms should align with the intention and operation of the advanced payment.



NEC Suite

NEC Suite



Secondary option X14 can be found in the following NEC forms of contract:

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Supply Contract (SC),
- Design, Build and Operate (DBO).

There are variances between the forms due to the different names of the respective parties and roles.

The DBO form also differs from the other forms in that it states in Contract Data the 'earliest date' after which the advanced payment is included in an assessment.



NEC4 ECC X14

ECC X14.1 - Payment



The advanced payment amount is stated in Contract Data, as follows;

The amount of the advanced payment is

The advanced payment is made at either;

- The first assessment date, or
- The next assessment date following receipt of an advanced payment bond.

For the DBO form the first assessment date is 'qualified' to state;

'... after the date stated in the Contract Data ...'

The earliest date after which the advanced payment is included in an assessment is

Under NEC3 the period of time was stated as four weeks from either;

- The Contract Date, or
- When an advanced payment bond is received.

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15

ECC X14.2 - Bond



The requirement to provide a bond is stated in Contract Data,

An advanced payment bond **is/is not** required. (Delete as applicable)

The 'bond' is issued by a bank or insurer which has been accepted,

- Note that there are no timescales associated with this.

A reason for not accepting the bond provider is that their commercial position is not strong enough to carry the bond,

- This would presumably relate to the bond provider's credit rating score.

The bond is for the amount of the advanced payment not repaid,

- This reflects the 'amortised' value.

The bond is in the form set out in the Scope.

- This would determine both the type of bond and the terms.

Clause X14.2 further states that delay in making the advance payment, in accordance with the contract, is a Compensation Event.

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16

ECC X14.3 - Repayment



This refers to the information in Contract Data in relation to;

1. The amount of repayments

The instalments are

(either an amount or a percentage of the payment otherwise due)

- Consider the effect of 'retention' on repayments.

2. When repayments are to be made

The period after the Contract Date from which the

Contractor repays the instalments in assessments is

- Consideration of when the Contract Date actually occurs.
- Time periods not specifically aligned.



Things to Consider ...

Things to Consider ...



What if more than one advanced payment is to be made?

Is interest to be charged?

The required advanced payment bond and type.

Can the advanced payment bond 'type' be changed?

Include the X14 procedure and associated timescales on a programme submitted for acceptance.

Does the Scope actually state the required credit rating score of the bond provider?

Compile a cash flow forecast to assess what repayments are due and when the advanced payment is likely to be repaid.

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19

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20