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**From:** Mark Bourke  
**Sent:** 21 September 2006 19:36  
**To:** Horsley, Chris  
**Subject:** RE: Withholding payment - Housing Grants, Construction & Regeneration Act 1996 & SDS Agreement

Thankyou

-----Original Message-----

**From:** "Horsley, Chris" <Chris.Horsley@dlapiper.com>  
**To:** "mark.bourke@tie.ltd.uk" <mark.bourke@tie.ltd.uk>  
**Cc:** "Fitchie, Andrew" <Andrew.Fitchie@dlapiper.com>  
**Sent:** 21/09/06 19:23  
**Subject:** Withholding payment - Housing Grants, Construction & Regeneration Act 1996 & SDS Agreement

Mark,

I couldn't spot any particularly pertinent DLA Piper notes on the Act on our system, but a specific answer to your query about their withholding payment where the SDS Provider are not complying with all their obligations under the Agreement is set out below.

Basically, tie are entitled to withhold payment from the SDS Provider if they serve effective notice of their intention to do so, at least 3 days in advance of the date on which payment is due. If the grounds for doing so are unjustified, interest on the payment is incurred.

The 1996 Act

Section 111 of the 1996 Act provides that a party to a construction contract may not withhold payment unless he has given an effective notice of intention to withhold payment. The notice must specify the amount to be withheld and the ground for withholding payment and it must be given not later than the "prescribed period" before the final date for payment. The parties are free to agree what the "prescribed period" will be (failing which, the prescribed period will be 7 days, as provided for in the Scheme for Construction Contracts Regulations 1998).

If it is later decided that the amount withheld should in fact be paid (whether by agreement between the parties, or by the adjudication procedure) that party must pay the sum, either seven days from the date of the decision, or by the final date for payment (whichever is later).

The SDS Agreement

The SDS Agreement is drafted in compliance with the Act.

Clause 13.2 - the Client (tie) must give the SDS Provider notice of their intention to withhold payment, at least three days prior to the final date for payment. They must set out the sum they are intending to withhold and give a detailed reason or detailed reasons for doing so.

Clause 13.3 - the SDS Provider would be entitled to claim interest if the withheld payment is subsequently determined to be payable (whether by agreement between the parties or as a result of the Dispute Resolution Procedure). Interest will be payable on the period between the date on which the sum should have been paid and the date on which it is ultimately paid.

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(Usual definitions of "notice" and "interest" will apply i.e. written notice etc, interest at 2% above the base rate of RBS)

If tie withhold payment without giving effective notice, SDS would be entitled to suspend performance of their contractual obligations until payment is made. However, they must give at least 60 days' notice of their intention to do so (clause 21.5).

I hope that this answers your question Mark. In a nutshell, withholding payment is fine provided that notice is given in time and detailed reasons are provided. tie will have to pay interest on the payment if the grounds given are later proved unjustified. Suspension of performance is also a risk.

Please give me a shout if you wish me to clarify any of this, or if you need any further information.

Kind regards

Chris

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