

### 青年魯班選舉《建築工藝》組別面試

6月12日 (星期日)

安全、健康及環境委員會成員簡振強營造師及體育及康樂委員會成員胡啟宗營造師擔任由香港魯班廣悅堂主辦之2022青年魯班選舉《建築工藝》組別面試評判。



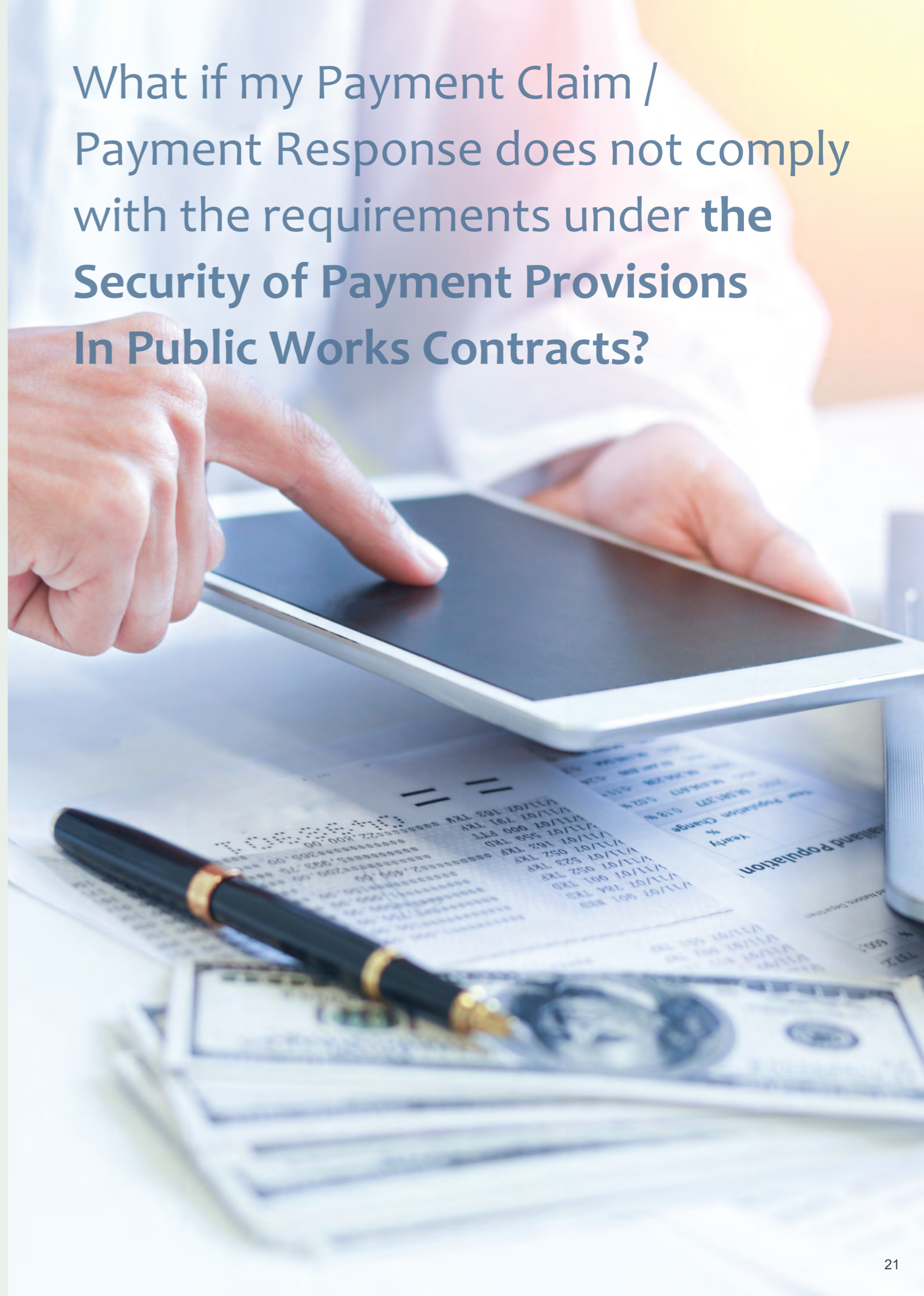
### 青年委員會參與賣旗籌款活動

6月25日 (星期六)

學會致力推廣及倡議專業營造管理，亦心繫社區關懷社群，支持慈善公益活動。一眾青年委員會委員，包括主席陳偉林營造師、秘書黃仲玄營造師、委員林永豪營造師，其他青年會員及其家人精神奕奕，在烈日當空下代表學會支持及參與香港耆康老人福利會賣旗活動。炎炎夏日無阻團隊熱忱，贏得無數市民慷慨解囊，順利完成善舉。



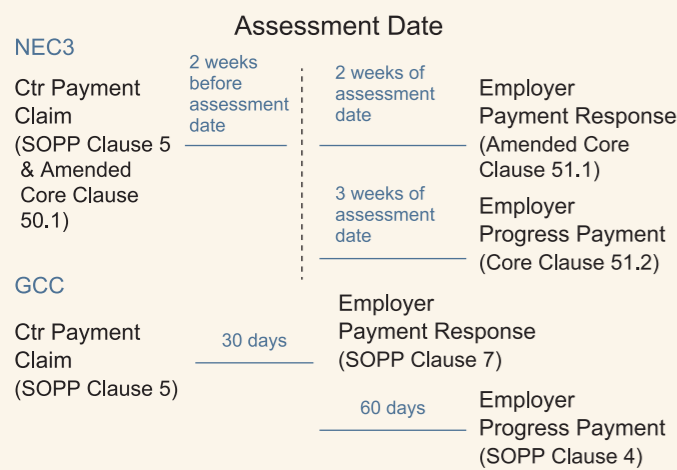
What if my Payment Claim / Payment Response does not comply with the requirements under **the Security of Payment Provisions In Public Works Contracts?**



In the last article, we briefly discussed the framework of the Development Bureau's Technical Circular on Security of Payment Provisions in Public Works Contracts (SOPP) issued in October 2021.

In this second of the series of articles on SOPP, we will discuss compliance with the payment process provisions in the SOPP and how non-compliance with such provisions may affect the parties' rights under the SOPP framework.

The timeframe for a contractor to serve a Payment Claim and the employer to serve a Payment Response can be best illustrated in the flowcharts below:



**SOPP Clause 5 requires a Payment Claim to:**

- be in writing;
- identify the construction work or related goods and services to which the payment relates; and
- state the amount of the progress payment that the contractor claims to be payable.

A payment application that contains the above ingredients is taken as a Payment Claim (SOPP Clause 5(7)).

**SOPP Clause 6 requires a Payment Response to:**

- be in writing;
- identify the Payment Claim to which it relates;
- state the amount (if any) admitted as due under the contract before set off or withholding, and the basis of calculation of that amount;
- state the amount (if any) not admitted as due under the contract before set off or withholding, the grounds for, and the basis of calculation of that amount;
- state the amount, the grounds, and the basis of the calculation of any amount to be set off or withheld; and
- state the net amount to be paid (if any) and the calculation of the amount.

A payment certificate or assessment under the contract in response to a Payment Claim or payment application that contains the above ingredients is to be taken as a Payment

Response (SOPP Clause 6(4)).

Under the SOPP, a contractor may only commence adjudication if a “payment dispute” arises (SOPP Clause 10(1)). SOPP Clause 9 identifies the circumstances in which a “payment dispute” will arise.

In short, a payment dispute arises if the contractor has served a Payment Claim compliant with SOPP Clause 5 on the employer and:

- (1) the employer has served a Payment Response on the contractor under SOPP Clause 6 in which:
    - (a) the Payment Claim is disputed (in part, in its entirety and / or arguments of set off / withholding are raised);
    - (b) a net amount is admitted as due and is to be paid but the employer has failed to pay the net admitted amount in full by the due date; or
  - (2) the employer does not serve a Payment Response under SOPP Clause 6 in reply to the Payment Claim
- The following interesting questions arise. What if the Payment Claim / Payment Response is not served within the requisite timeframe? What if the Payment Claim / Payment Response does not contain all the ingredients as required under SOPP?

Whilst the UK statutory adjudication regime may differ from the SOPP in various aspects, some of the UK decisions (in the Technology and Construction Court) may provide useful insight in answering the above questions. Two of such cases is set out below for illustration.

**Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd (2021)**

**Facts**

The employer engaged the contractor under a construction contract, which provided for monthly payment application. The contractor issued a payment application for £1.9m. Under the UK legislation, Housing Grants, Construction and Regeneration Act 1996 (HGCRA), the employer was required to issue a payment notice to the contractor specifying the sum it considered due at the payment date, and the basis of the valuation. The employer first sent a payment notice 34 identifying the sum due to the contractor as £0.97. Six days later, the employer sent a second payment notice 34a which was out of time and specifying a much larger figure of approximately £657,200 as due. One of the issues raised in the Court in respect of a challenge to the Adjudicator's decision, was the validity of payment notice 34.

**Held**

The employer's payment notice 34 did not set out the amount which the employer actually considered to be due,

rather it had sent the notice to gain time in order to make an assessment of the sum it actually believed to be due (i.e. payment notice 34a). Further, the notice did not set out the basis of the calculation; and that, accordingly, payment notice 34 did not comply with the requirements under HGCRA and was therefore invalid. However, in this case, the Court did not have to decide on the consequences of payment notice 34 being invalid because neither parties in the court proceedings had sought relief for this.

However, based on other UK decisions (such as **S&T (UK) Ltd v Grove Developments Ltd (2018)**), and under HGCRA, where the employer's payment notice / pay less notice is found to be invalid, the employer will have to make payment on the amount of the interim payment application. This can be contrasted with the SOPP which provides that if the employer does not serve a Payment Response, the employer will be regarded as disputing the full amount claimed but will not be able to raise any set-off in any adjudication in relation to the Payment Claim concerned (SOPP Clause 8). Referring to the UK line of authorities (as discussed above), it would seem that if the Payment Response failed to comply with the requirements under SOPP Clause 6 and hence invalid, it would be taken that the employer did not serve a Payment Response and hence triggering SOPP Clause 8. There could be a similar effect with a non-compliant Payment Notice. An invalid Payment Notice could bring into question on the validity of the corresponding adjudication proceedings as arguably, a “payment dispute” has not arisen (see above).

The UK Courts have repeatedly emphasised the importance that an “application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity”.

**Jawaby Property Investment Ltd v Interiors Group Ltd (2016)**

**Facts**

Under the subject contract, the contractor was required to make interim payment applications on the 8th of each month. On 5 January 2016, the employer sent an email to the contractor requesting the contractor to send “[its] valuation tomorrow morning”. On 7 January 2016, the contractor responded by email saying “please see our initial assessment for Valuation 007, this is based upon Progress update and onsite review carried out earlier this week” (contractor's 7 January e-mail). The valuation was in the total gross sum of £2.4 million, as set out in a summary sheet and attached spreadsheets. The Court proceedings

related to various declarations sought by the employer against the contractor. One of the issues that the Court had to determine was whether the contractor's 7 January email was a valid interim payment application under the contract.

**Held**

The 7 January e-mail did not comply with the requirements under the contract. It was merely an initial assessment. The valuation did not state what the contractor considered to be due to it. The Court considered that a reasonable recipient of the 7 January e-mail would not have regarded it as unambiguously informing the recipient that this was an interim payment application for the purposes of the contract.

The Court held that whether the above conclusion would lead to harsh results for the contractor, this was an area where, as the case authorities made clear, there was little scope for latitude. If a contractor wished to have the benefit of an interim payment regime such as that contained in the contract, its application for an interim payment had to be in substance, form and intent an interim payment application stating the sum considered by the contractor as due at the relevant due date, and it had to be free from ambiguity.

Whilst one could say that the decision in **Jawaby** may have been influenced by the fact that under the UK legislation, HGCRA, if an employer does not serve a Payment Notice / Pay Less Notice, the contractor could be entitled to the sums that it had applied for under its payment application. One may say that equally, under the SOPP, if the employer does not serve a Payment Response because it was not apparent that a document which the contractor had served was alleged to be a Payment Claim, there could be significant consequences for the employer under SOPP Clause 8 hence the need for the alleged Payment Claim to be “in substance, form and intent”, a Payment Claim compliant with the SOPP.

To avoid any possible challenges to entitlement to payment in the case of the contractor or to set off / withholding in the case of the employer, it is important that the parties comply strictly with the SOPP provisions on the contents and format of the Payment Claim / Payment Response and also their respective timeframes.



**Mr Joseph Chung**  
Committee Member