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# TIME

*To Get Paid*

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Are You Mad As Hell  
About Not Getting Paid on Time  
and Don't Want to Take It Any More?  
Then Read On.

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For doing a good job, the very least you should be able to expect is prompt payment for your work. But this reasonable expectation has been historically and continually undermined, not only in this industry but also in construction as a whole.

Nevertheless, there are many current initiatives at work from individuals, associations and legislators designed to remedy this inequity,

First of all, we must note just how widespread this problem is. The AWCI reports that, for the last two years, prompt pay ranks the highest among concerns of its members in the associations annual government affairs survey. In the booklet *A Guide to Passing a Prompt Payment Law In Your State*, the American Subcontractors Association states that “slow pay ranks as the number one concern” among its members during their annual legislative survey. According to their findings, “the vast majority of ASA members find the

delay of payment a serious or very major problem.”

The booklet explains that with the enactment of the federal Prompt Payment Act of 1982 and subsequent amendments in October 1998, the federal government greatly improved the payment criteria for its contracts. Although the federal government has set a precedent for state prompt payment laws, New Hampshire has not enacted the law yet. Some states, including New Hampshire, have laws that do not require payments to pass through to all tiers of a construction project.

Although general contractors often have cause for complaint, they are not as hurt by this situation as the subcontractors. Late payment to subcontractors is as prevalent in the private sector as in the public sector. The majority of states do not have prompt pay laws relating to private work.

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and avoid liens,” according to ASA papers. “Yet some contractors habitually pay subcontractors 60, 90 and 120 days after they receive payment from

the owner. Subcontractors depend on the cash flow generated by payment for work performed to meet their payrolls and loan payments, and to pay suppliers. The increased interest in prompt pay laws by the federal government and the states strengthens the case for private sector reform.”

### Many Steps Toward Payment

Some question the general contractors’ degree of culpability for delayed payments. Gregory Hippert, controller for Pelletier & Sons, Fitchburg, Mass., is willing to assume that the delays don’t come from bad faith. “It is hard to get paid on time,” he says, “But it’s not necessary because contractors don’t want to [get paid on time]. They have

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to request the payment from the owner and get it back on time. And there are so many steps along the line.”

But most subcontractors are less generous in their evaluation of the situation. “Contractors have no guilt about keeping your money,” says Jerry Screws, vice president of Drywall Connection, Avada, Colo., “They expect you to organize the job, get it scheduled, pay out your own money for the materials and carry your own payroll. Then they hold out on paying you. And then if you have a chance to make a little profit, they try to back-charge you. It’s a constant hassle.”

But one thing both Hippert and Screws agree about is that one way to

## TEN STEPS TO GETTING PAID

- Be selective in the contractors you work for.
- Strike objectionable language from the contract.
- Stay on top of all the financial transactions throughout the entire process.
- Have a CPA or other financially trained person be in charge of collectibles.
- Make copies of accounts receivables due to all key personnel.
- Review all receivables on a monthly basis so that you are up-to-date on all charges.
- Get to know the owner, architects, board members or administrators of the project you are working on.
- Reserve the right to stop work.
- After 60 days, file a lien.
- Work with your colleagues and associations long range to pass laws in the state legislature ensuring fair payment.

minimize the problem is to be selective in whom you work for. "We try to work with the best contractors and develop a relationship with them. Let them understand what it's like not to have the money for the weekly payroll," Hippert says. "We try to have somebody we can work with, who we can call up and say, 'We have this problem, let's get it solved.'"

Screws, on the other hand, says, "You have to be careful who you work for because you're putting your money at risk"

### Pick and Choose

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found that being highly selective has virtually eliminated his collection problem. While his company was growing rapidly early on, he got his share of bad contractors and the resulting payment hassles. He decided he didn't need as large a volume of contractors and decided to stay with only those who pay promptly.

"I've found that if you pick contractors who run their jobs well, you do better than going with those who get so strung out they can't manage themselves, much less others," Botens says. "Being satisfied with less volume but staying with good contractors sure beats running around the countryside with lawyers trying to get your money."

For most subcontractors, however, simply choosing good prime contractors doesn't completely solve the problem.

"When you work for people you don't know, you're asking for trouble," said Gary Adams, president of Adams Con-

struction Services, Inc., Atlanta. "You should have a working relationship or a good recommendation."

But he adds that even though he is very selective with whom he works for, it's still very hard to collect on time. "Most contractors take 45 to 90 days to pay us. It's not good for us and kills cash flow. We spend a lot of time on the phone trying to collect money when we should be doing other things."

issue has to do with is "pay when paid" clauses general contractors typically put into contracts.

It's obviously an obtrusive source of leverage, providing the contractor a pretext for delaying payment whether or not he is paid on time by the owner.

This artificial provision has resulted in considerable ambiguity, inconsistency and confusion.

The courts in Seattle do not allow a pay-if-paid clause, according to Morris Mehrer, president of Mehrer Drywall, Inc., Seattle. The courts ruled that the

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## Pay When Paid?

Perhaps the single most controversial

prime contractor has to pay the subcontractor whether or not he is paid by the owner. However, the pay-when-paid clause is acceptable since it assumes that the subcontractor will be paid someday.

"Contract language is a pet peeve of mine," says Bob Maddox Jr., president of Allied Construction Services, Inc., Des Moines, Iowa. Maddox works to delete objectionable phrases such as "pay when paid," as well as clauses having to do with unfair allocation of risk and refusal to pay overhead.

On the other hand, Maddox says there are not as many problems with payments in the Midwest because people

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have a more trustworthy nature than they do in the South or West. He still has his share of delays, though, and acknowledges that there are variations from state to state. "In Nebraska, the

## Principles Of Prompt Payment to Contractors

Timely payment must begin with the state agency and flow through to the last subcontractor or supplier on the project. The first part of an effective prompt pay statute is payment from the state to the general contractor. It should include provisions that state the following:

- The number of days the state has to pay the contractor.
- How many days the government has to return an improperly submitted invoice to the contractor for correction.
- The rate of interest, and the actual starting date of interest accrual.
- The instances in which late payments will not accrue interest. For example, contracts on which good-faith disputes exist, incomplete contracts, etc.
- The reasons for payment to be withheld.
- The amount of retainage, a time frame for the reduction and final payment of retainage and the conditions under which retainage will be subject to late-payment penalties.
- Permission for the court in disputed payment cases to award reasonable attorney fees to the prevailing party.

### Prompt Payment to Subcontractors:

It is important for timely payment to flow through all tiers of a construction project. Contractors should be subject to the same type of payment provisions as the state. These should include provisions with the following:

- The number of days a contractor has to pay a subcontractor. ASA recommends a seven day payment period beginning when the contractor receives payment from the state.
- The number of days a subcontractor has to pay its subcontractors and suppliers, requiring each subcontractor to include a prompt-payment provision in its subcontracts
- A requirement that the contractor pay an interest penalty on late pay and rate of interest. If the state pays the contractor late, the provision should require the subcontractor receive a prorated portion of the state's interest penalty
- The specific amount to be retained pending satisfactory performance of the subcontract. The percentage retained from the subcontractor should not exceed the percentage retained by the state from the prime contractor.
- The contractor is required to provide written notice to both the government and the subcontractors if part or all of the subcontractors' payment is to be withheld. Any funds that a prime contractor withholds from a subcontractor should not be included in the contractor's payment request to the state.

Source: *A Guide to Passing a Prompt Payment Law in Your State*, by the Subcontractors Legislative Resource Center, American Subcontractors Association, Inc., Alexandria, Va.

pay when pay clause is not legal, whereas it is legal in Iowa and Illinois.”

George E. Simpson, president of G. E. Simpson Company, Inc., Birmingham, Ala., reports that Alabama passed a prompt payment act more than a year ago, requiring timely payment or payment with interest. However, it has not appeared to make any considerable difference during the last year.

Maddox always strikes the objectionable languages from the contract. Screws says, “You have to sign those contracts and there’s nothing you can do about it.” Brian Clavette, president, Danbury Drywall Systems LLC, Danbury, Conn., says, “It really doesn’t matter what you put in the contract.

Contractors will generally pay you when they feel they have the money to pay. They decide what their terms are.”

Contracts and state laws imply court action, which also includes extensive attorney fees and prolonged delays. He suggests more immediate legislation might be found in a bill pending in Connecticut that would withhold the certificate of occupancy until all parties were paid.

Adams recommends that while putting in a pay request, confirm that everything is in order and in agreement with the requirements. Follow this step by calling in 30 days. After 45 days, call again. After 60 days, begin calling several times a week “A lot of contractors won’t pay

you until you call,” he says. “It’s unfortunate, but that’s the way it is.”

## Who Is Responsible?

Denis Dieker, Chief Financial Officer of Midwest Drywall Company, Inc., Wichita, Kan., says his difficulties stem from minor disputes over who is responsible for what and the timeliness of change-order approval. He recommends dealing with these issues immediately, along with documenting what was agreed upon and what was done. Many rush through the preliminary stages, causing problems down the road.

“‘Hurry up and do it now and we’ll agree on the price later.’ But you have

to agree to the price in the beginning. If you're put off until tomorrow, hold him to that," Dieker says.

Michael Chambers, president of J & B Acoustical, Inc., Mansfield, Ohio, typically asks for a letter of current condition and

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the date he will be paid if the contractor complains of a cash crunch. He also reviews all receivables every month.

Gregg Travis, secretary-treasurer of Lassiter Plaster Company, Inc., Murray, Ky., provides everybody in management with a copy of accounts receivables. Whenever a past due contractor has a complaint, it's an opportunity to let him know that the company has recorded the complaint.

He also suggests building a relationship with the owner, administrator or board member of the project so that if the contractor has not paid, it is possible to speak with someone with more authority in the company

"The contractor may not appreciate it," he says, "but you can sure get his attention."

## Just Stop the Work

Jim Van Horn, vice president of Fred Shear and Sons, Inc., Tigard, Ore., takes an even stronger position.

"We reserve the right to stop work, at least on all those items that are not part of the contract. Most contracts are now written so that you have to meet the schedule. But you can stop



work there too. It's probably not legal, but what's he going to do? It's like a poker game."


The strongest weapon the subcontractor has is one that has been around for a long time, the lien. Many subcontractors don't evoke the lien for fear of alienating their contractors.

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Gregory Zavaglia, president of Interior Construction Services, St. Louis, MO., has a CPA address any payments past 30 days, and file a lien on anything over 60 days.

“Some people are lax in collections,” Zavaglia says. “We probably did three or four last year. Once owners and contractors know our policy about collections, they'll generally fall in line. Our average for receivables is 42 days, which, in our industry, is really good.” 

#### About the Author

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### Guidelines on Prompt Payment

#### Day of Calendar

##### Month

##### Event

20th

Sub-subcontractors request payment from subcontractors.

25th

Subcontractors request payment from contractor, incorporating the subcontractor's request in the billing.

1st

Contractor submits an itemized application to the owner's representative for payment with the necessary supporting data, covering the monthly progress of the entire contract being performed

5th

The owner's representative issues the certificate for payment to the owner for the amount requested.

10th or sooner

The owner makes payment to the contractor for the amount certified by the owner's representative.

No more than 7  
Days After Receipt

The contractor pays each subcontractor the amount received from the owner on its account promptly but not later than seven days after receipt.

No More Than 10  
Days After Receipt

Each subcontractor pays each sub-subcontractor the amount received from the contractor on its account promptly.

The schedule should be adjusted by making appropriate billings and payments on the last working day prior to any listed Saturday, Sunday or holiday.

Source: *Guidelines For A Successful Construction Project*, published by the Associated General Contractors of America, Washington, D.C.; American Subcontractors Association, Inc., Alexandria, Va.; and Associated Specialty Contractors, Bethesda, Md.