GETTING PAID

If You Aren’t Getting Paid On Time, You’re Putting Yourself Out of Business.

Of all the problems a subcontractor has to face, the one that is most common and creates the most difficulty is not being paid on time. And the one that creates the most havoc is not being paid at all.

The maintenance of cash flow is of such critical importance that many subs hit with a serious or continuing collection problem are simply forced out of business.

From the number of claims being made by subcontractors to collect what they believe is due them it is evident that there are no magic formulas that guarantee payment. Perversely, there seems to be no end of magic formulas put to use to delay or prevent them from getting their money. Actually, they aren’t magic—it’s just that so many of them seem to appear out of nowhere.

Given that there are no hard, fast rules one can follow to guarantee being paid for all the work they do, the next best thing is to take some precautions to avoid becoming a casualty of what many contractors customarily rely upon to get paid when they take a job: blind faith and unbridled optimism.

The following suggestions are not meant to fault anyone’s faith and optimism. They are meant to give your faith some vision and to put reins on your optimism. That way, maybe you can steer around some of the pitfalls that are prevalent in the wall and ceiling industry. Precautions that can help you determine whether your chances of getting paid are good or bad fall into five general areas:

1) Funding 2) Documents 3) Rights 4) Records 5) Facts

How is the Job Funded?

Where you do not have a relationship with or implicit trust in any of the parties to a contract that you’re interested in getting, a good precaution to start with is to find out if all the money needed for the project actually exists. This applies to both public* and private work. The number of alleged or broken bank loan or mortgage commitments and the resultant financial disasters amongst contractors attest to the value or knowing that money to be paid out to contractors is available to be paid out when it is due.

Whether banks or mortgage companies are involved or not, the financial capability and reputation of the owner, general contractor, or construction manager; whoever has the authority and obligation to sign your check, should be looked at as if you were a lender of last resort. Remember, you are, in fact, extending credit. Thus you should, in fact, know how much risk you take by doing so.

Once you are satisfied that the money is there—or will be there when needed—the next precaution is to assess the spirit of cooperation you can expect from those that will approve and process your draw requests. Usually there are contractors of whom you can inquire who have had experience with whomever you intend to do business and upon whose judgment of their good or ill-will you can rely.

If, after an objective inquiry and evaluation of the information you’ve gotten, you feel confident that getting paid will not be any more difficult than—as one Alaskan contractor put it—“going ice climbing carrying a spud wrench and wearing tap shoes,” you can go on to the next precaution.

The importance of reviewing and appraising the contract documents of any job you propose to do cannot be

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*At times public agencies do not have funds to cover predictable overruns. At other times their payment machinery works only spasmodically in alternate months.

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overstated. A contractor’s knowledge of what constitutes an adequate set of documents is essential to his understanding of what his and others’ responsibilities are. Yet, few contractors get this knowledge from studying the documents. More often than not their education results from a dispute that sends them running—for the first time—to find out what and how the provisions of the contract deal with the particular problem he’s having.

It makes no difference whether the documents are a sheet of paper with scrawls accompanied by a sketch on a dirty scrap of drywall or a thick roll of bedsheets-size drawings and a small library of general conditions and specifications. The documents must clearly state two fundamental elements:

1) How what is to be done, when and,
2) The terms, conditions, times, and amounts of payments.

All other provisions of the documents will bear to one degree or another on these two elements.

A contractor’s failure to take into account the conditions imposed upon him by the other provisions of the contract and how they affect what he is to do—BEFORE he signs the contract—is a principal cause for the dissatisfaction amongst the parties and often the reason (excuse) given for the delay or refusal to make payment.

The contract provisions are meant to set out explicit details of the conditions under which the contractor is to work. At times the details are unintelligible. Occasionally they are contradictory. Where they are a re-hash of old boilerplate they can be depended upon to be either ambiguous or missing. Only by reading them can the existence or absence of critical information be determined.

Having read them and finding language too fuzzy to understand, it behooves the contractor to either allow for the potential cost that is likely to result from a later “interpretation” of the provisions or to have the conditions clarified, amended, or deleted BEFORE he signs up.

Your Rights . . .

The contract provisions also set out certain legal rights that the contractor is supposed to enjoy. In addition to these rights, in most, if not all contracts involving private property, a contractor has lien rights. In most public contracts, subcontractors and suppliers have payment bond rights.

Knowing what these rights are and the precise procedures for putting them into effect is an absolute must. The rules governing the filing of liens and bond claims are generally very rigid. Failing to meet time and proof requirements can turn a collection that should have been a lead pipe cinch into a protracted court battle over your contract rights.

In the opinion of some attorneys a payment bond is an unequivocal promise to pay a timely, properly documented claim. No ifs, ands, or butts. Although the claims are sometimes fiercely contested by the sureties, a subcontractor who delays filing his claim or misses the boat for technical reasons is ignoring his best potential source of relief.
Property liens, although much more cumbersome and expensive to pursue, are at least an opportunity to affect some security that may produce your money for you somewhere down the road.

**Documentation . . .**

Change orders, extras, time extensions, liquidated damages, interruptions, delays, demobilization, remobilization, extended overhead—all of these and other factors are treated in one way or another by the contract or "the unwritten understanding" between the parties. Because "the unwritten understanding" can too easily become "the unwritten misunderstanding" it is imperative that the contractor have a system of record keeping that not only complies with whatever the contract calls for but, more importantly, puts him in the position to support any claim for additional money he may have.

In theory, all contractors keep records. Not only to satisfy Uncle Sam
and his growing army of nieces and nephews, but also to give him a means of comparing what he did with what he thought he was going to do-along with who did it, how long it took, and so forth.

In practice some contractors offer up as records their recollection of the notes and sketches they made on a wall that has since been painted and daily job reports whose only decipherable elements are large, colorful coffee stains. They’re records all right. But they don’t go very far in proving you’re entitled to any money!

Keeping track of what goes on on a job that is not a part of the original deal or appreciably changes it is the only sure method a contractor has to protect his right to be paid his additional costs.

A system that accurately records what, where, when, who, and why in the simplest, most direct language is best. If it is readable and to the point it will be sufficient for any arbiter of a dispute to come to a rational decision in respect to whatever a contractor’s claim might be.

Notices and responses; letters that alert and apprise whoever you are looking to to be paid, should likewise be written in appropriate manner, at effective times, and in language that is simple and direct—language that leaves no opportunity for misinterpretation.

Know the Facts . . .

All parties to a construction contract, especially the contractors, should at all times be able to state what they know. Unsupported opinions can be the reason for arguments; facts are the tools with which the arguments are settled.

If you are intent upon avoiding jobs where getting paid may be a problem, and still more intent on getting paid on jobs that you do take—gather the facts. Use them. Record them. Let them work for you.

There are benefits and satisfactions to being in the contracting business. Virtually all of them that a contractor can enjoy are, alas, dependent upon being paid for all the work he has done.

Often a contractor will do a fantastic job in record time. In a burst of uncommon magnanimity the owner, the architect, and the GC (after congratulating themselves on being so smart as to have hired such a great contractor) will extend their heartfelt thanks and appreciation for a job well done.

Basking in the reflected glow of all the praise, the contractor sends the bill for his services—including (which everyone has admitted they are aware) the overtime, additions, and changes to the job.

In the succeeding telephoned-filled months it is discovered (determined) that the contractor didn’t do such a hotsy-totsy job after all. Besides, he’s not really entitled to anywhere near the amount of money in his bill; that is, if he’s entitled to any at all.

This process produces ascending emotional responses and plans of action by the contractor in the following sequence: inconvenience; annoyance; irritation; worry; debilitation; crisis; panic; outrage; mayhem; assault; homicide; suicide.

By taking some of the precautions that have been outlined above, you should be able to easily knock off the last six.