

B. Christopher Lee, Esq.
Legal View
How to Avoid Working for Free

One of the goals of all contractors is to perform work of good quality. However, the main objective is to get paid for the quality work performed. Achievement of this goal is not something that should be thought about for the first time at the end of the job or when the owner or general contractor starts questioning invoices. Instead, the goal of payment should be kept in mind throughout the construction process: while negotiating the contract; during the contract; during performance; and at the end of the job. Actions which you take during the whole process significantly affect the enforceability of legal rights if you must contact a lawyer to collect for your work. It is your responsibility to educate yourself and your employees about the steps which you can take to protect your legal right to receive full payment. While space does not permit a detailed explanation, the following is an overview of the most significant steps you can take.

Your collection effort starts before the contract. It is imperative that you investigate the creditworthiness of your customer. There are some contractors and owners who will intentionally try to avoid paying. Others may be a financial risk, either because of their cash position or because they are undertaking more complicated work than they have done before. If you are uncomfortable with the financial status of your potential customer, find out whether there is a payment bond. If so, obtain a copy as soon as possible, since there may be time deadlines stated within the bond. The time to obtain a copy of the bond is not at the end of a job when you have not been paid. At that point, the claim may not be good because notice was not given or because the statute of limitations has run out and your claim is timebarred. If there is no bond available, request a guaranty from the owner or construction lender. At the very least, request a joint-check agreement. The sooner you request such an arrangement, the more likely you are to obtain it.

The next opportunity to increase your chance of getting paid is during the contract-negotiation phase. Often you will be presented with a "form" contract which is usually intended to protect the party proposing its use. Do not be afraid to object to certain terms in the form contract. If there are terms in the form that are harmful, it cannot hurt to ask to have the terms deleted or modified. In particular, you should watch out for "pay-when-paid" clauses which, although not always legally enforceable, will be used against you. Most certainly, you do not want to be put in a position of having to file suit to find out whether the clauses are enforceable. Cross the language out. You should also be wary of contracts which waive Mechanic's Lien rights. While most Pennsylvania projects have lien waivers filed on the entire job, some do not. A general waiver is not enforceable in New Jersey. Another area to review are your rights with respect to extras. Some contracts, particularly public contracts, seek to make your claims for extras or change orders dependent upon your customer's claims against the owner or general.

If so, your claim may be lost amid many other claims against the owner and may not receive the attention it deserves.

The third and most important stage during which you should watch out for payment problems is during performance of the contract. Don't hesitate to insist upon prompt payment. Slow payment in the beginning can be a warning of the problems to come. If you experience slow payment, it may provide another opportunity to request a joint-check agreement or guaranty. Likewise, if there are lien rights available on the project, there may be steps that you must take to preserve your claim, particularly in the case of alteration or repair on a Pennsylvania project where notice must be given to the owner before the completion of your work. This is also the time when you must make sure that all contractual requirements are followed with respect to claims for change orders or extras. In addition to following the contractual requirements, confirm oral promises of extra payment by sending a confirming letter. The more documentation you have, the better chance you will have of recovery.

Another area which is often overlooked during construction is protection of potential claims against the owner and lender based upon language in their contracts. Most contracts provide that in order to receive progress payments, the general contractor must certify that all materialmen and subcontractors have been paid. Likewise, many contracts include clauses which permit the owner or lender to hold back amounts which they know have not been paid. While these contracts often disclaim that these clauses are for the benefit of subcontractors, many courts will accept the argument that subcontractors have a right to recover as a third-party beneficiary of these contractual protections. This is especially true if the owner has held back money and there is still additional money owed on the principal contract. However, you must put the owner or lender on notice during performance that you have not been paid according to your contract. This should be done by certified mail, return receipt requested.

At the completion of performance, you should be sensitive to time deadlines in perfecting Mechanics' Liens and payment-bond rights. Although Pennsylvania lien rights are often unavailable, there are circumstances where the waiver may be invalid because of legal technicalities. If your claim warrants it, you should have your attorney check to determine if the waiver was properly filed. You may be pleasantly surprised. Another argument that can be asserted to defeat a lien waiver is the identity of the owner and general contractor. If their interests are so intertwined that they are really the same entity, the waiver may be held to be a ruse to eliminate lien rights for subcontractors and suppliers.

These are a few of the most important steps you can take to increase your chances for payment. If you follow them, you will either get paid promptly or you will provide your lawyer with a basis to resolve your claim successfully and economically.