

Beware Hidden Payment Terms

by Quenda Behler Story

Earlier this year, a friend of mine had an interesting conversation with a young man who was subcontracting for a GC. The contractor owed the young man a pile of money and my friend was concerned. But the young man assured him there was nothing to worry about, because the contractor was a pal and would never stiff him. “Besides,” said the young man, “I can always put a lien on the property.”

That is never a wise assumption.

When a sub doesn’t get paid, it’s almost never because the GC set out to cheat him. I can think of only a few times when I’ve seen that. Instead, it’s usually because the contractor is in financial trouble and can’t pay all the subs.

So what can the young sub who confided in my friend do to protect himself? He should take a close look at the contracts he is asked to sign and search for clauses that spell trouble. Two prime deal-breakers are pay-when-paid clauses and a requirement to sign a lien waiver. He should look for these clauses in the contract between the sub and the prime contractor and in the contract between the prime contractor and the property owner.

It might seem odd for a sub to ask to see the contract between the owner and the GC, but the contractor is obligated to show any terms the sub is bound by. And in most states, the fact that the sub did not see the prime contract will have no bearing on whether he is bound by it. In other words, ignorance is not a defense.

Pay When Paid

A pay-when-paid clause says the sub doesn’t get paid until the job is finished and the customer has made his final payment. Under these conditions, the sub can expect to hear something like, “Of course I can’t pay you until after I get my money.” And sometimes that’s true, especially on smaller jobs.

But pay-when-paid clauses can be pretty open-ended. Exactly when will the contractor be paid? How long after that will the sub get paid? Keep in mind that on most projects the contractor collects payments as work proceeds, and — depending on what state he’s in — he may have

collected a big up-front sum. Payments are often tied to fixed dates or contract milestones, like pouring the foundation, completing the drywall, and so forth.

Rather than agree to a pay-when-paid clause, the sub could insist on language that says his pay is tied either to those milestones or to the customer payment due when the sub’s part of the job is finished. Or, if the job is small, the sub could substitute language that says he’s due his payment a certain number of days after final job completion.

Lien Waivers

The second kind of language subs should watch out for has to do with lien waivers. Sometimes these clauses — which say the sub has surrendered his right to put a lien on the customer’s property — are in the contract between the sub and the prime; other times they’re in the contract between the prime contractor and the customer. I have reviewed countless contracts that contained lien-waiver clauses the sub didn’t realize were there — or didn’t realize were binding on him. Without the right to put a lien on the property, there’s almost no way a sub can collect from the property owner if the contractor doesn’t pay.

If a sub finds a lien-waiver clause in the prime contract, what should he do? Before performing any work, he should write up a memo saying he has not given up his right to a lien. Ideally, he should get both the contractor and the property owner to sign the memo. The property owner’s signature is especially important: Since it’s his property that will be lien-ed, only he can sign away his right to a lien waiver.

The young sub mentioned above was way too lax in his attitude. You *can’t* always put a lien on a property. The rules for filing a lien are very specific and vary from state to state. In some cases, certain paperwork must be filed while the job is going on. It’s important to preserve your lien rights, and the best way to do that is by learning the rules and being careful not to sign those rights away.

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