

Wisconsin Chapter, N.E.C.A. E-Newsletter

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“PAY IF PAID” AND “PAY WHEN PAID” CLAUSES

By Attorney Randall J. Andersen

Construction contracts with subcontractors frequently include provisions limiting the responsibility of the prime contractor to pay the subcontractor, if the prime contractor has not been paid by the owner.

There are two types of contingent payment clauses. Those which link the timing of the subcontractor’s payment to the time that the prime contractor receives payment are referred to as “pay when paid” clauses. Those that specify that the prime

contractor must receive payment from the owner in order for the subcontractor to ever be eligible to receive payment are referred to as “pay if paid” clauses.

“Pay when paid” clauses contain language allowing the prime contractor to delay payment until the prime contractor receives payment from the owner. However, they do not relieve the prime contractor of responsibility for paying the subcontractor if the prime contractor never receives payment from the owner. In most states, if the contract includes a “pay when paid” provision, the prime contractor must still pay the subcontractor within a reasonable period of time, regardless of whether the prime contractor receives payment from the owner.

“Pay if paid” clauses are different than “pay when paid” clauses. A “pay if paid” clause provides that the prime contractor is responsible for paying the subcontractor only if the prime contractor receives payment from the owner. The Wisconsin Statutes contain a provision rendering some “pay if paid” clauses void. Wis. Stats. sec. 779.135(3) provides that provisions making payment to a prime contractor from any person who does not have a contractual agreement with the subcontractor, supplier or service provider a condition precedent to a prime contractor’s payment to a subcontractor, supplier or service provider, are void.

Section 779.135 renders void a “pay if paid” clause in some (but not all) construction contracts for the improvement of real estate in Wisconsin. There are a number of limitations:

- * The statute only applies to construction contracts for the improvement of land in Wisconsin.
- * The statute only applies to “pay if paid” clauses in a contract between a prime contractor and a subcontractor, supplier or service provider.
- * The statute does not prohibit the use of a “pay when paid” clause.

The statute, on its face, does **not** apply to a “pay if paid” clause in a contract between a first-tier subcontractor and a second-tier subcontractor, or a contract between a subcontractor and a material supplier. Commentators have also suggested that the statute may not help subcontractors on certain design build projects, where the owner contracts with a design builder, and the design builder enters into a separate contract with a general contractor. Since the general contractor is not a “prime contractor,” sec. 779.135 may not apply to a “pay if paid” clause contained in a contract between the general contractor and a subcontractor. It is an open issue as to whether “pay if paid” clauses in those types of contracts would be enforceable in Wisconsin.

2018 Upcoming Seminars

- ◆ 02/27/18 - Eight Habits of High Performing Foremen - Eau Claire, Wisconsin - Dr Awad Hanna
- ◆ 03/07/18 - Foreman’s Field Guide to Developing your Workforce - Appleton, Wisconsin - Nic Bittle

Save The Date

Basic Estimating

Crowne Plaza, Madison

April 2-5, 2018

December 21, 2017—winter solstice

Let us love winter, for it is the spring of genius—Pietro Aretino

