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**“HOW TO GET PAID”**

Getting paid for one's work – an economic necessity of construction or any other business. Unfortunately, it is an objective more readily discussed than accomplished. However, attention to four specific issues enhance the contractor or trade supplier's ability to be paid. These are:

1. The contractor asking itself key critical questions *prior* to signing any contract.
2. The contractor's understanding of key contract clauses.
3. The construction flow chart identifying the parties and those with whom they have contracted.
4. Remedies available to unpaid contractor or supplier.

Please note: Each of these issues must be addressed based upon the specific facts of each contract and case. The within materials thus constitute a general overview but do not in any way constitute legal advice. The reader should consult his/her legal counsel for any advice.

## I. KEY QUESTIONS TO ASK

1. What do I know about the project, the parties who provide the source of funding, and the reputation of the party with whom I have contracted? No contract provision or attorney can safeguard a client from dealing with a disreputable party or in performing work on a financially troubled project.
2. Have I read the contract, and what are my duties and rights? All rights of a contractor, including the right to file a lien or assert a payment bond claim, are controlled in substantial part by its contract with the party with whom it is dealing. The contract may limit rights, limit remedies, and critically impose notice requirements upon the contractor. A thorough understanding and working implementation of these provisions is critical in order to protect such rights.
3. Am I prepared to deal with issues immediately when they arise, and how will I do so? Issues left unattended only become larger, and the parties' positions most often further apart. They may readily lead to a claim which is unpaid. The passage of time can encourage the hiring of consultants, attorneys, etc., by the party on the other side, thus making your position, however correct, more difficult and more expensive to enforce.
4. Documentation – What records do I keep and, in the case of a dispute, what have I decided upon as my course of action to document my position? Photographs, diaries, and the prompt sending and responding to communication. Timely communications allow a contractor to create, at the very time of the dispute, the ammunition which will be necessary to resolve it favorably, whether in negotiations or in litigation.
5. What remedies are available to me and under what terms (e.g., lien rights, payment bond rights, and trust fund rights)? See attached.

## II. KEY CONTRACT CLAUSES TO UNDERSTAND

These define and may limit your rights and must be understood from Day 1 in order to protect your right to payment.

- A. Identity of Parties – Corporate, Partnership, Other. Defines party from whom you may seek recourse.
- B. Location of Contracting Party – In State; Out-of-State. Contracting with an out-of-state contracting party may significantly impede collection efforts.
- C. Payment Terms – “Pay when Paid” Clause; Timing of payment vs. condition of payment. Condition of payment clauses no longer enforceable in New York (at least as to non-federal projects), see Westfair Electric Contractors v. Aetna Casualty & Surety Co., 87 N.Y.2d 148, 638 N.Y.S.2d 394 (1995).
- D. Incorporation of General Contractor – “Flow Down” Clauses. These can bind, e.g., a subcontractor to certain provisions of the general contract.
- E. Site Inspection Clauses – Imposing duty on contractor to be familiar with the proposed site.
- F. Extra Work – Changed conditions; unforeseen conditions; duty to inspect project site. Critical clauses – define rights to additional payment and notice requirements.
- G. Time – Completion dates, milestone dates, extensions of time, “no damage for delay” clauses. Critical clauses – define rights to time extensions and often exclude monetary recovery for delay.
- H. Notice Clause – Critical clause – establishes procedural requirements for obtaining more money and/or time.
- I. Liquidated Damages – May make contractor liable for each day of delay.
- J. Warranties – May create a warranty period for curing of defective work.
- K. Indemnification – May create additional liabilities for contractor based upon liabilities incurred by party for whom it is working.

- L. Termination – Defines rights of parties to terminate and effect of termination. May allow termination for convenience.
- M. Dispute Resolution – Arbitration – may require arbitration and/or mediation and preclude court litigation.
- N. Venue: Choice of Law – May require litigation in a certain state or county; may provide which state law applies.
- O. Final Payment Clause – May create waiver of further claims by contractor and/or owner.
- P. Waiver of Claims – Contract may provide that certain types of claims, such as consequential damages, are raised.
- Q. No Damage for Delay – A common clause made subject to four exceptions by New York case law.

### III. CONSTRUCTION FLOW CHART

Defines the remedies you have in enforcing payment (see Part IV).

#### Example of Typical Construction Project Flow Chart



#### IMPROVEMENTS SUBJECT TO STATUTE

- A. Includes both Improvement of Real Property (L.L. §2(8)) and Public Improvements (L.L. § (7))
- B. New York Statute limited to improvements within New York State
- C. Does not include Federal projects

#### IV. REMEDIES AND QUESTIONS TO ASK YOURSELF

1. Contract  
Identity of parties; contract; party making payment.  
Is this a public improvement or improvement of real property (private improvement)?
2. Mechanic's Lien  
Is project lienable?  
May subcontractor file lien?  
Is there a lien "fund"?  
What is the real value of lien/lien fund?  
What are the procedural and time requirements for filing lien?
3. Payment Bond  
Is there a payment bond?  
May subcontractor make a claim on payment bond?  
What are procedure and time requirements for making claim on bond?  
Must I give prompt notice of my claim and to whom?
4. Trust Fund  
Is this a trust fund project?  
What is the value of a trust claim?  
What are the procedural and time requirements for bringing a trust claim?
5. Other  
E.g., repossession (Lien Law §39-c)
6. Remedies  
What must I do and when to protect my rights?

By looking at the Construction Flow Chart you can help identify your rights.

- I. Federal Projects
  - A. Liens  
- No right to file mechanic's lien.
  - B. Payment Bonds  
- Persons contracting with general contractor or with first tier subcontractor protected.  
  
- Materialman to general contractor or first tier subcontractor protected.  
  
- Materialman to a materialman not protected.

- Critical notice requirement if no contract with general contractor; notice requirement may exist if private project – even if subcontractor has contract directly with general contractor.

- May be other bonds on project giving additional rights.

## II. Non-Federal Projects in New York State

### A. Mechanic's Lien

- May be filed on private project by general contractor and first, second, or third tier subcontractors, or materialman to general contractor or first or second tier subcontractor.

- May not be filed by a materialman to a materialman.

- On public project, may be filed by first or second tier subcontractor; may not be filed by general contractor, third tier subcontractor, materialman to a materialman, or materialman to a second tier subcontractor.

- Private lien must be filed within 8 months of last of lienor's labor or materials unless a single family residence, in which case time period is 4 months.

- Public lien must be filed.

- Service and filing requirements must be strictly complied with and are different for public and private projects.

### B. Payment Bonds

- Required on government projects per State Finance Law §137.

- May be given on non-government projects.

- Critical notice requirements if claimant not in privity with bonded contractor.

- Ordinarily must have contract with bonded principal or a first tier subcontractor.

- Ordinarily not applicable to a materialman to a materialman.

### C. Trust Funds

#### Lein Law Article 3-A

- Applicable to improvements which are 1) made in New York State and 2) are non-federal projects.

- One year statute of limitations from completion of project, except if claimant is a subcontractor or materialman, the trust action may also be commenced within one year from the time the last payment is due such beneficiary.

- Protects persons supplying labor or materials to a contractor or subcontractor on any tier.

- May allow claim against a transferee of trust assets under certain circumstances.