



Payment Clauses – Timing Provisions *Reasonableness is in the Eye of the Beholder*

Everyone wants to be paid timely for the work they perform; yet, no one wants to advance funds before they have been paid. In Florida^[1], a valid pay-if-paid clause in a contract allows a “Prime” to withhold payment from a “Sub” unless and until the owner first pays the “Prime”^[2]. However if a pay-if-paid provision is not drafted correctly courts will view it as “timing provisions” resulting in the “Prime” only being able to withhold payment for a *reasonable period of time*, i.e., the court interprets the provision as a “pay-when-paid” clause.

What is considered a reasonable period of time depends upon who you ask. A Florida appeals court determined that a Sub was entitled to payment after 90 days of completing the work for which payment was earned even though the Prime had yet to be paid. The Sub argued and established what it believed was a reasonable amount of time and the Court agreed.^[3]

Courts outside of Florida have held that a “reasonable time” includes the time during which the Prime is **actively** pursuing collection **and** while there remains a reasonable likelihood that the Prime will actually collect payment due from the owner.^[4] Reasonable timing does not necessarily mean that a Sub is going to get paid in a time which the Sub considers reasonable. Reasonableness depends on the judge you are before.

In other jurisdictions Subs have had to wait while the owner and the Prime litigated the balance due on the contract. In one particular matter, after several postponements and a period of two years from the completion of the work, the court determined that more than a reasonable time had transpired and ordered the payment as due.^[5] The same jurisdiction in a different case held that three years from completion was more than a reasonable time.

Thus reasonableness is up for interpretation by the judge. Depending on where you are located and which Court you are in front of, your results will vary.

1. In some states, “pay-if-paid” provisions are void as against public policy. Additionally, even where “pay-if-paid” provisions are allowed, some states do not extend that benefit to the Prime’s surety on a payment bond
2. *Pay-if-Paid Clauses: Is it the “Cure-all” for Primes?* Gregory S. Martin & Associates, March 30, 2015
3. *Bentley Const. Dev. & Eng., Inc. v. All Phase Elec. & Main., Inc.*, 562 So. 2d 800 (Fla. 2d DCA 1990).
4. *Avon Brothers, Inc. v. Tom Martin Const. Co., Inc.*, 2000 WL 34241102 (N.J. Super A.D. 2000).
5. *Moore v. Continental Cas. Co.*, 366 F. Supp. 954 (W.D. Okla. 1973).

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What This Means For You

All parties must ensure payment terms are clearly defined. For a Prime - be proactive, take effective steps to seek amounts due from the owner. Do not simply rely on loose contract language as a reason to not pay a Sub for work performed. For Subs – do not leave “reasonableness” to the discretion of the Courts. Consider establishing a deadline (set forth in the contract) by which the Prime is to pay even if the owner has not.

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Season’s Greetings

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