



Pay-if-Paid Clauses *Is it the “Cure-all” for Primes?*

A valid pay-if-paid clause in a contract allows a “prime” to withhold payment from a “sub” unless and until the owner/client first pays the “prime.” This clause, when written correctly shifts the risk of the owner/client’s failure to pay from the “prime” onto the “sub.” If not written correctly, courts have interpreted conditioned payment provisions as “timing provisions.” In other words, the “prime” can only withhold payment for a reasonable period of time. Ultimately, if the clause is not written correctly, the “prime” still carries the risk of the owner/client’s failure to pay when the clause is not properly written.¹

Assuming a properly drafted pay-if-paid clause exists, what further duties does the “prime” have except to wait for payment from the owner/client? The “sub” does not have the ability to enforce contract terms between the owner/client and prime (barring unusual circumstances). So does the pay-if-paid clause improperly reward the “nefarious” owner/client and the “uncaring” prime (because it is not the “prime’s” money)? If the “sub” is going to accept the risk, but be reliant on the “prime” to chase the owner/client, does the law recognize some obligations still owed by the “prime” to the “sub?”

The Texas legislature has codified two additional duties on a “prime” seeking to enforce a pay-if-paid clause.² One, the “prime” must demonstrate a reasonable investigation into the owner/client’s ability to make payments **before** entering into a subcontract containing a pay-if-paid clause. What constitutes a “reasonable investigation” is uncertain. Moreover, given the status of Florida law, there seems to be no indication that this requirement would come to fruition. Two, the “prime” must make reasonable efforts to collect payment from the owner/client. A “prime’s” failure to “chase” an owner/client will invalidate the effect of a pay-if-paid clause. While Florida has yet to adopt the obligation of a “prime” to “chase,” Florida does recognize obligations of “trust and confidence.” Thus, it would not appear to be a far stretch for a Florida court to adopt such a requirement; particularly given the courts’ reticence to enforce such rigid contract provisions as a matter of public policy.

1. In later articles, we will address what is “reasonable” in terms of obligations of the “prime” to pay. We will also address the stress between a pay-if-paid provision and statutory lien and bond rights..

2. Tex. Bus & Com. Code Ann § 56.054.

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What This Means For You

For a “prime,” don’t be overconfident. If the owner/client owes the money, take affirmative steps to secure payment. For “subs,” enter with caution pay-if-paid contracts. While the courts generally favor those actually doing the work getting paid, the courts also recognize the freedom of contract. *If you signed it, you bought it.*

SIDE BAR:

2015 NEF Block Kids Building Block Competition — Imaginations Ran Wild

The National Association of Women in Construction, Greater Orlando Chapter 73 (“NAWIC”) hosted its annual NEF Block Kids Building Block Competition on January 31st at Cypress Springs Elementary. We sponsored and judged this 25 year nation-wide tradition in which 102 children locally participated. Attendees created construction related projects and local winners advance to Regional Competition. We look forward to continuing to support programs like this one as a means to bring awareness of construction careers to kids across America.

“The road to success is always under construction.” – Lily Tomlin



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