

PAYMENT PROBLEMS?

issues to consider on any construction project

by/// MARK J. STEPLER

Mark Stempler, Esq. is an attorney in Becker & Poliakoff, P.A.'s Construction Law and Commercial Litigation groups. Mr. Stempler has substantial experience representing contractors and subcontractors in contract disputes and litigation. Mr. Stempler can be contacted at (561) 655-5444 or MStempler@Becker-Poliakoff.com. If you would like to suggest a topic for a future article written by a Becker & Poliakoff attorney, please contact Susan Greene at (954) 985-4124 or SGreene@Becker-Poliakoff.com.



In any economy, good or bad, payment issues are at the forefront of construction projects. As a result, contractual clauses pertaining to payment are typically the most important features of a contract. Further, the parties must be aware of the consequences of making and accepting different methods of payments, some of which will be discussed in this article.

- The time and manner of payments should be specified in the contract. If they are not, Florida courts have generally held that a provision will be implied that payment must be made within a reasonable time after the work is performed.
- Some contracts contain contingent payment clauses which condition payment upon a certain event or events. For example, "pay when paid" clauses are commonplace which excuse a contractor from making payments to a subcontractor until the contractor receives payment from the owner for that subcontractor's scope of work. Therefore, even if the owner pays the contractor for other work, the contractor may still withhold payment from the subcontractor. However, pay when paid clauses may only be enforced if the contractor seeks payment from the owner in good faith and with due diligence.
- Contractors must also be aware of the procedures governing change order work, typically specified in the contract. If written change orders are required in the contract, verbal change orders should not be accepted because payment claims for such changes might not be enforceable. However, in that situation, contractors might still be able to pursue the payment claiming that the recipient of the contractor's labor and materials would be unjustly enriched if the recipient is not required to make the payment.
- Contractors should also carefully consider the potential consequences of accepting a partial payment when there is an ongoing payment dis-

pute. For example, under the doctrine of "accord and satisfaction," a contractor might waive its claim for the amount it believes is due if the contractor accepts a partial payment from an owner who indicates the partial payment is intended to be payment in full for the contractor's work. Therefore, contractors should be leery of checks or agreements for partial payments which state "final payment," or claim to be "payment in full." While the contractor might be able to preserve its claim by saying it was not clear the owner intended the partial payment to be payment in full, the owner will have a strong argument that the contractor waived its claim for the balance by accepting the payment.

- When partial or percentage payments are made pursuant to a contract, retainage is often withheld until all of the work is satisfactorily completed. This gives the party performing the work an incentive to complete the project. To avoid disputes, the contract should specify the retainage percentage to be withheld, and the terms for its release to the contractor. Then, if an owner or upstream contractor fails to pay according to the contract's terms, a contractor might have the right to suspend or terminate its work until the payments due have been made.

In summary, payment terms and conditions are the foundation of any solid contract. Even though a contractor's primary concern might be the total price when negotiating a contract, contractors should also give the proper amount of attention to a contract's payment terms and conditions to avoid disputes and costly litigation. Further, throughout the project, contractors must consider the terms' impact on payment disputes and the risks associated with the contractors' decisions during those disputes. Indifference to such matters could cause immeasurable damage and cost much more than the original contract price.

save the date UPCOMING EVENTS

OCTOBER 1 - **Gallery Night**

OCTOBER 29 - **October Luncheon**

OCTOBER 30 - **Masquerade Bash**

NOVEMBER 3 - **Projecto Appreciation Cocktail**

NOVEMBER 12 - **14th Annual Golf Classic**

DECEMBER 3 - **December Luncheon**

DECEMBER 9 - **Legislative Breakfast**

DECEMBER 16 - **Legislative Cocktail**

DECEMBER 18 - **Bike Drive**

For more information, contact Mercy T. Navarro, LBA Director of Operations, at mnavarro@lbaorg.com, or 305-446-5989 x7.