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Payment tools every contractor should have

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Every construction company is in the business of collecting payments for goods and services provided. But what legal tools are available to make sure your company is actually paid for its work?

Imagine that your company is about half finished with a project, but the company you contracted with is four months behind on payments. They've fallen behind before, but it's a lucrative contract (when you are paid) and you would like to finish your work. Additionally, it's a high-profile project that you would like to use to showcase your company's abilities, but these late payments are creating all kinds of cash-flow problems.

Do you keep working and hope payment comes sooner rather than later, or do you pull your crew from the site? If you pull your crew, are you inviting litigation for walking off the job?

The Texas Prompt Payment to Contractors and Subcontractors Act provides some guidance for this scenario. If an owner receives a written payment request for an amount that is allowed under a contract, it must make payment within 35 days. Unpaid amounts accrue interest at 1 1/2 percent per month.

Even more notable about the statute, however, is that it gives contractors the ability to suspend performance if an owner fails to timely pay an undisputed amount. This can be done 10 days after the contractor gives the owner (and possibly the owner's lender) written notice that (1) payment has not been received,

and (2) it intends to suspend performance for nonpayment.

A contractor who suspends performance under this provision is not required to supply further labor, services, or materials until it is paid the amounts due (over which performance was suspended), plus costs for demobilization and remobilization.

Another extremely effective tool to help contractors obtain payments is the lien. A person has a lien if (1) they specially fabricate materials or furnish labor or materials for construction or repair of a house, building or improvement, and (2) they specially fabricate the material or furnish the labor or materials under a contract with the owner, contractor or subcontractor. In short, if you've built or improved a structure, there's a good chance you can protect your interests with a lien – if it is properly perfected.

To perfect a lien, a "lien affidavit" must be filed in the county of the to-be-liened property by the 15th day of the fourth month after the indebtedness accrued. The lien affidavit is fairly simple, but a few things must be included, such as a general description of the work or materials furnished (if the claimant did not contract with the owner, the lien affidavit must identify each month the work or materials was furnished), a description of the property to be liened, the name and address of the owner, and a statement of when and how notice of the claim was sent to the owner.

The rules are slightly different for subcontractors. They still must file the lien affidavit, but they must also give the original contractor written notice of the unpaid balance by the 15th day of the second month following each month in which labor or materials was provided. The owner must be given this notice by the 15th day of the third month.

For subcontractors, the best practice is to send out notices every month to both the general contractor and owner after payment is late. Too often, the subcontractor simply waits and waits for payment. By the time they realize payment isn't coming, it's too late to file a lien. A lien cannot be filed if the timing requirements are not satisfied, and the penalties for wrongfully filing a lien can be up to \$10,000.

There are many factors to consider when trying to collect payment on projects, including the relationship between the parties, potential for future business and the amount at stake. However, the Prompt Payment Act and the lien are two tools that can help you obtain the payments you have earned.

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