Not If or When – Pay Me What I Am Owed NOW!

American Subcontractors Association
Sub-Excel - March 8, 2024

Objectives of Presentation

➢ **Understand distinction between a "pay when paid" subcontract provision and a "pay if paid" provision.**

➢ **Review subcontract provisions shifting risk of nonpayment to subcontractors.**

➢ **Review relevant state laws.**

➢ **Provide contract negotiating tips.**

➢ **Provide tips for getting paid despite adverse subcontract provisions.**

Train Your Brain

What is a "Pay-when-paid" provision?

Contract provision which requires the GC to pay within a certain number of days after receipt of payment from the owner.

What is a "Pay-if-paid" provision?

Risk shifting provision which says that no payment is due from the GC until GC receives payment from the owner.

Typical "Pay When Paid" Provision

"The Contractor shall pay the Subcontractor each progress payment **within ten working days after** the Contractor receives payment from the Owner."

Typical "Pay If Paid" Provision

"Payments shall not become due to Subcontractor unless and until Contractor receives payment for such Work from Owner and the amount due shall not exceed the amount actually received by Contractor as applicable to Subcontractor's Work; otherwise the time when such payments shall be due Subcontractor shall be postponed until Contractor has received same from Owner. Such receipt of payment by Contractor is intended as a ***condition precedent*** to Contractor's duty to pay Subcontractor and ***Subcontractor accepts such risk.***"

Even GCs are Confused!

"The Contractor shall pay the Subcontractor each progress payment within ten working days after the Contractor receives payment from the Owner. Subcontractor acknowledges and agrees Contractor's payments to Subcontractor are solely a direct result of payments made to the Contractor by the Owner. ***Therefore, payment terms are specifically "pay when and if paid."***

When Paid under "Pay When Paid"?

If not paid by owner, GC must pay within a ***"reasonable time."***

What is considered a ***"reasonable time"*** varies from state to state and court to court.

Example: Havens Steel Co. v. Randolph Engineering Co. ("reasonable time" is 3 months)

When Paid Under "Pay If Paid"

If the provision is considered enforceable under the governing law of the subcontract, may never be paid!

Courts generally require the "pay if paid" risk-shifting provision to be **clear and unambiguous.**

*"The Contractor shall pay the Subcontractor each progress payment within ten working days after the Contractor receives payment from the Owner. Subcontractor acknowledges and agrees Contractor's payments to Subcontractor are solely a direct result of payments made to the Contractor by the Owner. **Therefore, payment terms are specifically "pay when and if paid."***

Group 1

"Pay if Paid" is enforced if explicitly called out. Normally requires the provision to say that receipt of payment from the owner is a ***"condition precedent"*** to GC's payment to the Subcontractor.

"Pay when paid" is nothing more than a timing mechanism and suggests time for payment.

The Lay of the Land

Group 1

Alabama, Alaska, Arizona, California, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia

Group 2

"Pay if Paid" and "Pay When Paid" are treated the same.

If receipt of payment from the owner is required before GC has any obligation, magic "condition precedent" language is not required.

The Lay of the Land

Group 2
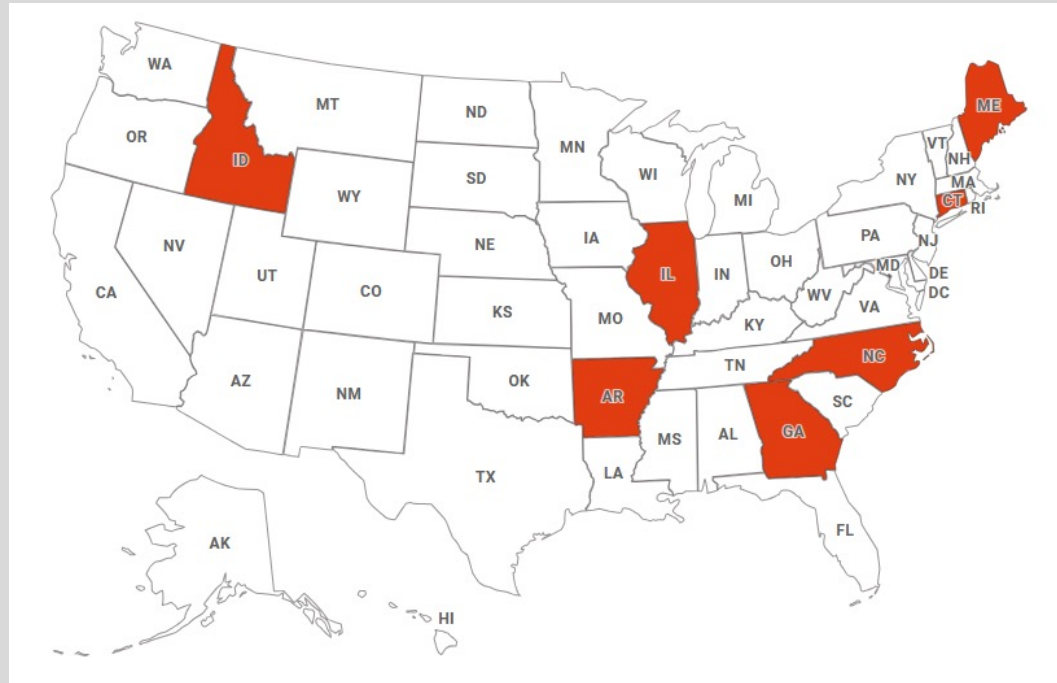
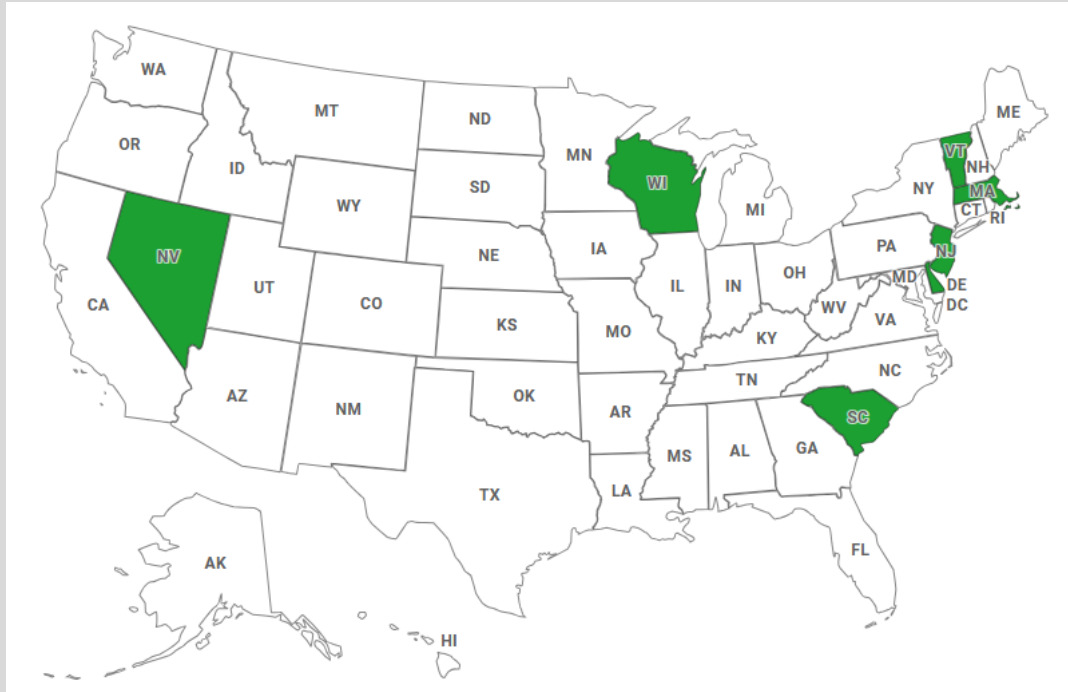**Arkansas, Connecticut, District of Columbia, Georgia, Idaho, Illinois, Maine, North Carolina**

Group 3

"Pay if Paid" is unenforceable and considered void as against public policy.

"Pay When Paid" is nothing more than a timing mechanism and suggests time for payment.
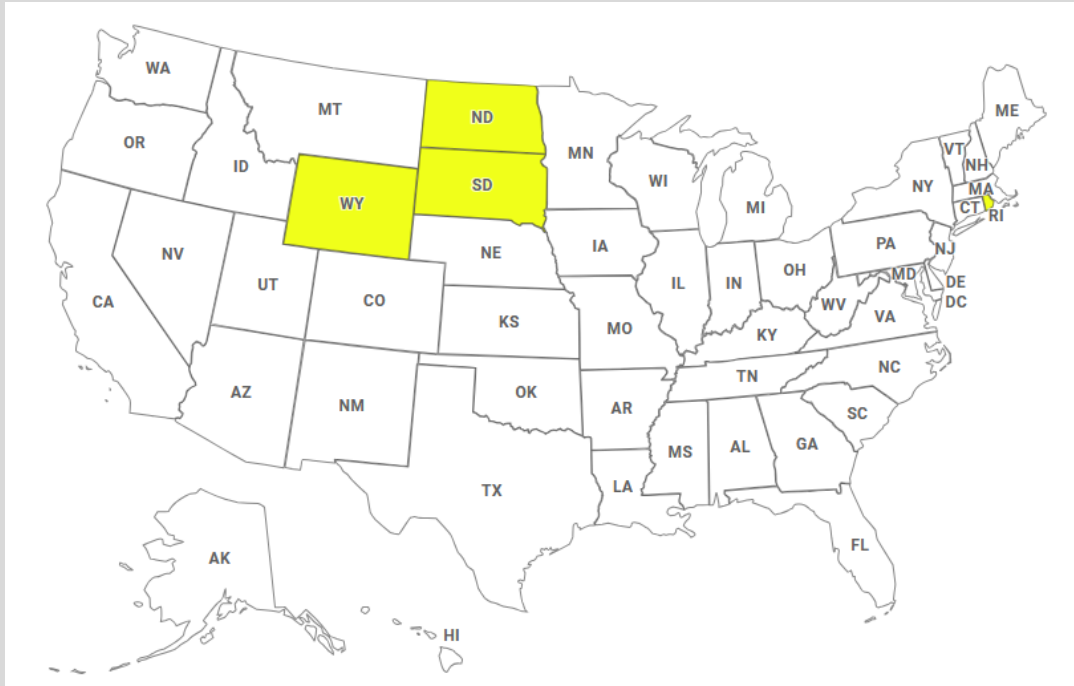
The Lay of the Land

Group 3

Delaware, Massachusetts, Nevada, New York, South Carolina, Vermont, Wisconsin

Group 4

Neither the courts nor the legislature have provided any guidance on enforcement of either a "Pay if Paid" or "Pay When Paid" subcontract clause.

The Lay of the Land

Group 4

North Dakota, Rhode Island, South Dakota, and Wyoming.

Subcontractor Tips

When a Contractor Says: "The subcontractor should share in the risk of owner insolvency."

A Sub Can Say: "My credit risk is with you. There's no justification for me to also extend credit to the owner. I don't have a contractual relationship with the owner. You did the credit check on the owner and your decision to go forward is strictly your responsibility."

Negotiating Your Subcontract

Subcontractor Tips

When a Contractor Says: "A subcontractor's lien rights and the job's payment bond will offer payment protection."

A Sub Can Say: "Bonding companies routinely deny claims on pay-if-paid terms, reasoning that no money is owed when an owner fails to pay. Liens also are often challenged using the same logic."

Negotiating Your Subcontract

Subcontractor Tips

When a Contractor Says: "You should always be willing to wait for your money until I'm paid."

A Sub Can Say: "I can't wait until you pay me to issue checks to my jobsite workers, office staff, utility companies and suppliers. If I'm supposed to finance you, I've become a banker, not a builder.

Subcontractor Tips

When a Contractor Says: "Pay-if-paid is a valid concept."

A Sub Can Say: "Contingent payment terms are void in some states as being against the public interest and fair contracting practice. Even widely endorsed model documents, such as ConsensusDocs and AIA, do not include a pay-if-paid clause. I would have to be a pretty lousy business person to agree to such a questionable concept as pay-if-paid."
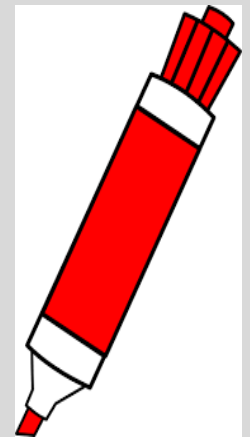
How to Reduce Financial Impact of Contingent Payment Provisions

Revising Your Subcontract

The "Brad Miller Revision" Method

With a Red Sharpie, strike through "Pay if Paid" provision… with impunity.

Or, for the more technologically savvy,

Delete, delete, delete…

Tips for Subcontractors

The "Compromise Revision"

Payments shall not become due to Subcontractor unless and until Contractor receives payment for such Work from Owner and the amount due shall not exceed the amount actually received by Contractor as applicable to Subcontractor's Work; otherwise the time when such payments shall be due Subcontractor shall be postponed until Contractor has received same from Owner. Such receipt of payment by Contractor is intended as a condition precedent to Contractor's duty to pay Subcontractor and Subcontractor accepts such risk; *provided, however, Contractor shall be obligated to pay Subcontractor to the extent the failure of receipt of payment from Owner is caused by acts or omissions of Contractor, another Subcontractor, or a third person over whom Subcontractor has no control.*

The Prevention Doctrine

The Contractor has an implied duty to ***not prevent*** the fulfillment of the condition precedent – the payment from the Owner.

Tips for Subcontractors

Connelly Construction Corp v. Travelers and Walsh Health Joint Venture *-* Court held that,

- whether a Contractor's failure to perform precluding payment from the Owner was inadvertent or deliberate doesn't matter.

- Contractor has a ***"duty of good faith and fair dealing"*** requiring its cooperation to satisfy condition precedent of payment.

Tips for Subcontractors

Preserve Lien and Bond Rights
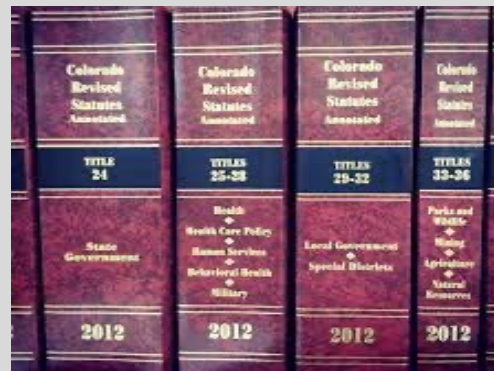
Never agree to waive lien or bond rights!!!!

If the Owner isn't paying, filing a mechanic's lien or bond claim is the *Subcontractor's best recourse.*

Tips for Subcontractors

Preserve Lien and Bond Rights

Many states have statutes that forbid *contractual* lien waivers and state that "Pay if Paid" or "Pay When Paid" provisions do not invalidate the right to file a lien or a bond claim.

Do not waive lien or bond rights in lien waivers!

Tips for Subcontractors

Contractual Lien Waiver

Unconditional Lien Waiver

Time-Based Lien Waiver

Lien Plus Waiver

Preserve Right to Suspend Work

Insert a provision in your Subcontract that allows you to **suspend work** if payment is not timely.

If you don't insert the right to suspend work, you may find yourself in *Subcontractor Purgatory* where you are forced to **work without pay**.

Some states have statutes allowing a Subcontractor to suspend work! Follow the requirements and exercise your rights!

Questions?