



# Debunking the Top 10 Payment Myths

by Donald Gregory, Esq.

**P**ayment is the lifeblood of any subcontractor or supplier. Yet many myths adversely affect the ability to timely secure payment. Here are my personal top 10.

**1** "Don't worry about it, we can always lien."

While lien rights are important, they are not a substitute for good credit practices. Lien rights attach only to the equity in the property, which can often be a problem on a troubled project. In addition, legal fees must be paid to foreclose or otherwise turn the lien into cash, and frequently are not recoverable.

**2** "We don't care about anyone on the project other than the customer."

Big mistake, particularly if your customer needs cash flow on the job to pay your bill. Even if you negotiate good contract language with an honest and solid customer, you still may not be timely paid if your customer is not paid by others further up the "construction food chain" on the project. Consider the project's financing and the reputation of others who control cash flow.

**3** "We'll worry about payment terms after we get the job."

Wrong. Once your company is awarded the job, you lose leverage to walk away from unfair payment terms, particularly if the contractor has relied upon your bid in securing the job. It is much better to condition your bid upon acceptable contract language so you maintain leverage to secure fair payment terms, or if that fails, to walk away to a safer job.

**4** "Don't rock the boat until the job is done."

Many in the construction industry fear disrupting relationships on the job and the flow of payment so much that they consciously avoid any notice of, or

discussion of, problems until after the job is virtually finished. This inevitably leads to shouts of protest that "we should have known sooner" and bad blood that often results in litigation that could have been avoided if the problem had been addressed timely.

**5** "It's a bonded job, so no worries."

While the security provided by a bond can be advantageous, a bond claim does not automatically equate with timely payment. Bonding companies are notorious for inaction and often require legal prodding to satisfy their obligations, which requires time and expense — and erodes the bottom line.

**6** "Don't offend the customer by asking for a personal guarantee."

While no customer wants to be asked for a personal guarantee, suppliers that insist upon guarantees from owners of marginally capitalized companies are much more likely to be paid even if the company buying the materials encounters financial difficulty.

**7** "There is no real difference between 'pay-when-paid' and 'pay-if-paid,' is there?"

There sure is. "Pay-when-paid" in many jurisdictions means that while timing of payment may be delayed, there still is an obligation to pay within a reasonable period of time. In contrast, "pay-if-paid" (using words like "if" and "condition precedent") means that not only timing but also entitlement to payment can be derailed if payment is not received by the contractor from the owner. This difference can be the difference between eventually receiving payment or nothing at all.

**8** "Waiving lien rights without consideration is unenforceable, right?"

Wrong, at least in many states. Contrary

to well-accepted construction folklore, lien rights can be waived up-front in a contract without additional consideration in many jurisdictions. So don't do it. If someone wants you to waive lien rights before you even step on the job, there is probably a reason for it.

**9** "A bad contract is better than no contract at all."

If you provide labor or material, you have a contract with your customer, either oral or written. While a written contract eliminates many uncertainties about the terms, many written contracts shift risk to those downstream and take away legal rights. Therefore often a handshake deal or a simple purchase order is better than a one-sided written subcontract.

**10** "Let's wait as long as possible before we have to incur legal fees."

No subcontractor wants to incur legal fees, particularly if not absolutely necessary. As a result, many wait longer than is prudent to get legal advice or take legal action. This approach often is "penny wise and pound foolish" in that the earlier a legal problem is addressed and solved, the fewer resources are expended, and often with more productive results. Typically in payment disputes, "the squeaky wheel gets the grease" and "the early bird gets the worm" of payment before others. Once a payment problem develops, it typically gets only worse over time.

Subcontractors and suppliers that do not fall prey to these payment myths will be more profitable as collection rates increase as part of a solid credit strategy. ■

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