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## Contingent Payment Clauses in the 50 States

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**DISCLAIMER:** *This publication does not contain legal advice. Individual circumstances vary widely, so readers should consult legal counsel before acting on the information provided herein.*

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## **About ASA and FASA**

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# Preface

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A **contingent payment clause** is a contractual provision that makes payment contingent upon the happening of some event. In construction subcontracts, the typical contingent payment clause makes the subcontractor's payment contingent upon the payment of the contractor by the owner.

Contingent payment clauses take on one of two forms in subcontract agreements. Some clauses link the *timing* of the subcontractor's payment to the time when payment is made by the owner. These are called "pay-when-paid" clauses. Other clauses specify that the owner must pay the contractor *in order* for the subcontractor to *ever* receive payment. These provisions that shift entitlement to payment are called "pay-if-paid" clauses. Even though most states distinguish between the two types of clauses, a few jurisdictions find that the provisions have the same exact legal effect.

For over thirty years, most state courts have held that contractors cannot indefinitely withhold payment from subcontractors based upon a "pay-when-paid" clause. Instead, "pay-when-paid" clauses require a contractor to pay its subcontractors within a "reasonable time" of the completion of satisfactory work.

In contrast, "pay-if-paid" clauses often allow contractors to permanently withhold payment from their subcontractors where the owner has failed to pay the contractor. Because of the harshness of such a provision, most states only enforce "pay-if-paid" clauses if the contract unambiguously expresses that the parties intended for the subcontractor to only be paid if the contractor is paid.

As states have moved toward protecting the rights of subcontractors, some state courts have decided not to enforce "pay-if-paid"

provisions. Additionally, a growing number of states have enacted legislation that declares such contractual provisions void and against public policy.

This article attempts to summarize the basic stance of each of the fifty states with respect to these two types of contingent payment clauses. The following information is displayed for all states that have applicable law on this issue:

- Whether a "pay-if-paid" clause will be enforced in that state if it is unambiguously drafted.
- Whether the state distinguishes between "pay-if-paid" and "pay-when-paid" provisions.
- Whether "pay-when-paid" clauses allow a contractor in the state to only delay payment to its subcontractors for a reasonable time.
- Key statutes and cases that describe the states' positions on contingent payment clauses.

This publication is designed as a summary of the basic principles of state law, but is not a comprehensive legal treatment of the law in the states. *This publication does not contain legal advice.* Because individual circumstances may vary widely, and because state laws are constantly changing, readers should consult their local attorneys for specific advice.

# Table of Contents

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Acknowledgments .....	ii
Preface .....	iii
States ( <i>and Washington, D.C.</i> )	
Alabama .....	1
Alaska .....	1
Arizona .....	1
Arkansas .....	1
California .....	1
Colorado .....	2
Connecticut .....	2
Delaware .....	2
District of Columbia .....	2
Florida .....	3
Georgia .....	3
Hawaii .....	3
Idaho .....	4
Illinois .....	4
Indiana .....	4
Iowa .....	4
Kansas .....	4
Kentucky .....	5
Louisiana .....	5
Maine .....	5
Maryland .....	5
Massachusetts .....	5
Michigan .....	5
Minnesota .....	6
Mississippi .....	6
Missouri .....	6
Montana .....	6
Nebraska .....	7
Nevada .....	7
New Hampshire .....	7
New Jersey .....	7
New Mexico .....	7
New York .....	8
North Carolina .....	8
North Dakota .....	8
Ohio .....	8
Oklahoma .....	9
Oregon .....	9
Pennsylvania .....	9

**CONTINGENT PAYMENT CLAUSES IN THE 50 STATES**

Rhode Island ..... 9  
South Carolina ..... 9  
South Dakota ..... 9  
Tennessee ..... 10  
Texas ..... 10  
Utah ..... 10  
Vermont ..... 10  
Virgin Islands ..... 10  
Virginia ..... 11  
Washington ..... 11  
West Virginia ..... 11  
Wisconsin ..... 12  
Wyoming ..... 12

**CONTINGENT PAYMENT CLAUSES IN THE 50 STATES**

State	"PAY IF PAID" Enforced If Explicit	"PAY WHEN PAID" And "PAY IF PAID" Treated Same	"PAY WHEN PAID" Suggests Time for Payment	STATUTORY PROVISIONS	CASE LAW
Alabama	X		X	Ala. Code 8-29-2: All contracts between parties must specify a date of payment.	Pay-when-paid clause in the subcontract did not create a condition precedent to payment, but that it was merely a timing mechanism for payment. The parties did not "clearly indicat[e]" that the subcontractor assumed the risk of nonpayment." <i>Fed. Ins. Co. v. I. Kruger, Inc.</i> , 829 So. 2d 732, 741 (Ala. 2002)
Alaska	X	X			The pay-when-paid clause is enforced as creating a valid condition precedent to payment for the subcontract. <i>Industrial Indem. Co. v. Wick Constr. Co.</i> , 680 P.2d 1100 (Alaska 1984).
Arizona	X		X		"In order to create a condition precedent [to the subcontractor's payment], there must be contractual language demonstrating the parties' unequivocal intent" that the subcontractor will only be paid if the contractor is paid. <i>L. Harvey Concrete v. Agro Constr. &amp; Supply Co.</i> , 189 Ariz. 178, 181 (Ariz. Ct. App. 1997)
Arkansas	X	X		Ark. Code Ann. § 22-9-205: Recognizes the enforceability of a "pay-when-paid" provision in a public contract. It does not address whether a "pay-when-paid" clause would create a condition precedent to the subcontractor's payment.	A condition that sets out events to happen before payment may be construed to link the existence of the debt to fulfillment of the conditions. <i>Brown v. Maryland Casualty Co.</i> , 246 Ark. 1074, 1082 (Ark. 1969).  Clause that required payment "immediately on the completion of the work" established a valid condition precedent to payment. <i>Manuel v. Campbell</i> , 3 Ark. 324 (1841).
California			X	Cal Civ Code § 3262: Statute preventing a waiver of lien rights has been interpreted to also prohibit "pay-if-paid" provisions for the indirect effect on lien rights.	California courts will not enforce "pay-if-paid" clauses as they unlawfully inhibit subcontractor's mechanic's lien rights. <i>William R. Clark Corp. v. Safeco Ins. Co.</i> , 938 P.2d 372 (Cal. 1997).

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Colorado	X		X		Pay-if-paid provisions must unequivocally express the party's intent to establish a condition precedent to payment in order to be enforceable. "[A] pay-when-paid clause . . . is an unconditional promise by the general contractor to pay its subcontractor even if the owner becomes insolvent." <i>Main Elec., Ltd. v. Printz Servs. Corp.</i> , 980 P.2d 522 (Colo. 1999).
Connecticut	X	X		Conn. Gen. Stat. 158 (j): Contractor cannot withhold payment from a subcontractor because of a dispute with another contractor, subcontractor, or vendor.	Contract language that specifies payment shall be made to the subcontractor at the time it is made to the contractor effectively establishes a valid condition precedent to payment. <i>Star Contracting Corp. v. Manway Constr. Co.</i> , 337 A.2d 669 (Conn. 1973).
Delaware			X	Del. Code. Ann. tit. 6 § 3507 (e): Makes void any clause in a Subcontract that makes payment by the owner a condition precedent to the subcontractor's payment. This statute does not apply to public contracts.	No cases have yet to interpret the bounds of the statutory prohibition of "pay-if-paid" clauses. The statute was passed in 2002.
D.C.	X	X			"Pay-when-paid" provision established a valid condition precedent. Subcontractor still prevailed in claim for damages as the court imposed a duty on contractor to attempt to recover payment, and contractor had settled with owner without accounting for the subcontractor's entitlement. <i>Urban Masonry Corp. v. N&amp;N Contractors, Inc.</i> , 676 A.2d 26 (D.C. 1996).

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Florida	X		X		"Risk-shifting provisions are susceptible to only two possible interpretations. If a provision is clear and unambiguous, it is interpreted as setting a condition precedent to the general contractor's obligation to pay. If a provision is ambiguous, it is interpreted as fixing a reasonable time for the general contractor to pay. In purported risk-shifting provisions between a contractor and subcontractor, the burden of clear expression is on the general contractor." <i>DEC Electric, Inc. v. Raphael Constr. Corp.</i> , 558 So. 2d 427, 429 (Fla. 1990).
Georgia	X	X			A clause that says the subcontractor only receives money when the contractor is itself paid will bar recovery by the subcontractor until the contractor is paid. <i>United States ex rel. McKenney's, Inc. v. Gov't Tech. Servs., LLC</i> , 531 F. Supp. 2d 1375, 1378 (N.D. Ga. 2008) (citing <i>St. Paul Fire &amp; Marine Ins. Co. v. Ga. Interstate Elec. Co.</i> , 187 Ga. App. 579 (Ga. Ct. App. 1988)).
Hawaii	X			HRS § 444-25: If payment is contingent upon receipt of funds, the contractor shall clearly state this fact in the contractor's solicitation of bids.	There are no cases from courts regarding this statute, but the language of the statute appears to contemplate the enforcement of a contingent payment clause.
Idaho	X	X			Contract terms setting the timing of payment of subcontractor after the payment of the prime contractor creates a valid condition precedent. <i>Hoff Cos. v. Danner</i> , 822 P.2d 558 (Idaho 1991).



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Illinois	X	X		770 Ill.Comp. Stat. 60/21: "Any provision in a contract, agreement, or understanding, when payment from a contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party including a private or public owner, shall not be a defense by the party responsible for payment to a claim" if that party is other than the contractor.	Pay-when-paid language may establish a condition precedent to payment if the intent of the parties was to create such a condition. <i>Premier Elec. Constr. Co. v. American Nat'l Bank of Chicago</i> , 656 N.E. 2d 157 (Ill. Ap. Ct. 1995).
Indiana	X		X	Burns Ind. Code Ann. § 32-28-3-18: An obligor's receipt of payment from a third person may not: (1) be a condition precedent to; (2) limit; or (3) be a defense to; the provider's right to record or foreclose a lien against the real estate that was improved by the provider's labor, material, or equipment.	Clause setting the time to pay subcontractor after the last payment received by the contractor merely established a reasonable time for payment and did not create a condition precedent to payment. <i>Midland Eng. Co. v. John A. Hall Constr. Co.</i> , 398 F. Supp. 981 (N.D. Ind. 1975)
Iowa	X		X		Clause setting a time for payment after payment by the owner establishes a reasonable time for payment by the contractor to the subcontractor. <i>Grady v. S.E. Gustafson Constr. Co.</i> , 103 N.W.2d 737 (Iowa 1960)
Kansas	X		X		Clause setting a time for payment after payment by the owner establishes a reasonable time for payment by the contractor to the subcontractor. <i>Shelley Electric, Inc. v. United States Fidelity &amp; Guaranty Co.</i> , 1992 U.S. Dist. LEXIS 16978 (D. Kan. Oct. 16, 1992).
Kentucky	X		X		Clause setting a time for payment after payment by the owner establishes a reasonable time for payment by the contractor to the subcontractor. <i>A. L. Pickens Co. v. Youngstown Sheet &amp; Tube Co.</i> , 650 F.2d 118, 120 (6th Cir. 1981)

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Louisiana	X		X		<p>Pay when paid clause sets a reasonable time for payment and does not set a condition precedent to payment of a subcontractor. <i>Southern States Masonry, Inc v. J.A. Jones Constr. Co.</i>, 507 So. 2d 198 (La. 1987).</p> <p>Properly worded "pay-if-paid" clause will create a condition precedent to the subcontractor's payment. <i>Imagine Constr., Inc. v. Centex Landis Constr. Co., Inc.</i>, 707 So. 2d 500 (La. App. 1998).</p>
Maine					No cases or statutes concerning contingent payment clauses.
Maryland	X		X	Md. REAL PROPERTY Code Ann. § 9-113: Contingent Payment clauses will not prevent collection from other sources such as a property owner or a contractor's bond.	In order to shift the risk of owner non-payment to the subcontractor, the subcontract must have an express unambiguous provision shifting that risk. <i>Gilbane Bldg. Co. v. Brisk Waterproofing Co.</i> , 585 A.2d 248 (Md. 1991).
Massachusetts	X		X		Pay when paid clause does not create a condition precedent for payment to subcontractor but establishes reasonable time for payment. Pay-if-paid clause would create a condition precedent if the language were sufficiently clear. <i>A.J. Wolfe Co. v. Baltimore Contractors, Inc.</i> , 244 N.E.2d 717 (Mass. 1969)
Michigan	X		X		Language specifying that "receipt of payments...being a condition precedent to payments of the subcontractor" enforced as a valid "pay-if-paid" clause. <i>Berkel &amp; Co. Contractors v. Christman Co.</i> , 210 Mich App. 416 (1995).

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Minnesota	X		X	Minn. Stat. § 337.10 (3): Provisions contained in, or executed in connection with, a building and construction contract requiring a contractor, subcontractor, or material supplier to waive the right to a mechanics lien or to a claim against a payment bond before the person has been paid for the labor or materials or both that the person furnished are void and unenforceable.	Conditions precedent are not favored in the law and a contract that does not explicitly create a condition precedent will be construed to merely establish a reasonable time for payment. <i>Mrozik Constr., Inc. v. Lovering Assoc., Inc.</i> , 461 N.W.2d 49 (Minn. Ct. App. 1990).
Mississippi	X		X		Conflicting payment language in a contract will not allow contractor to delay payment for more than a reasonable time following the completion of subcontractor's work. <i>Nicholas Acoustics &amp; Specialty Co. v. H.M. Constr. Co., Inc.</i> , 695 F.2d 839 (5th Cir. 1983) (applying Mississippi law).
Missouri	X		X	Mo. Rev. Stat. § 429.005: "Pay if paid" clauses will not provide protection to land owners, as pre-payment waivers of lien rights are void as against public policy.	Even where the "pay if paid" clause is itself unambiguous, other seemingly contradictory clauses in a contract can cause the "pay if paid" clause to merely establish a reasonable time for payment. <i>Meco Sys., Inc. v. Dancing Bear Entertainment</i> , 42 S.W.3d 794, 808 (Mo. Ct. App. 2001).
Montana				Mont. Code Ann. § 28-2-2103 (2) (a): Within 7 days after a contractor receives payment from an owner, the contractor shall pay the subcontractor.  Mont. Code Ann. § 28-2-723: "A construction contract may not contain provisions requiring a [party] to waive the right to a construction lien or ... payment bond before the [party] has been paid."	Montana courts have yet to address this issue, but the strongly written statutory language is similar to that in states, such as California, that have found "pay-if-paid" clauses unenforceable.

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Nebraska	X		X		Clause that does not unambiguously create a condition precedent for payment merely establishes a reasonable time for the contractor to pay the subcontractor. <i>D. K. Meyer Corp. v. Bevco, Inc.</i> , 292 N.W.2d 773 (Neb. 1980).
Nevada			X	The Nevada Supreme Court interprets Nev. Rev. Stat. Ann. §§ 624.624-624.626 as making void any contractual provision that conditions payment to a subcontractor upon the receipt of payment by the prime contractor.	Lien waiver and pay-if-paid provisions are unenforceable based upon Nevada's public policy favoring the statutory right to a mechanic's lien. <i>Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.</i> , 2008 Nev. LEXIS 46 (Nev. 2008)
New Hampshire	X		X		<p>Courts require specific language such as "if" or "on the condition that" to find that a contract contains a condition precedent. <i>Holden Eng. and Surveying Inc. v. Pembroke Rd. Realty Trust</i>, 137 N.H. 393 (1993).</p> <p>Contractor cannot withhold payment from subcontractor where contractor fails to seek approval of subcontractor's work from architect. <i>D.M. Holden, Inc. v. Contractors' Crane Service, Inc.</i> 121 N.H. 831 (1981).</p>
New Jersey	X		X		Clause setting time for payment to subcontractor after the contractor received payment merely establishes a reasonable time for payment from the contractor to the subcontractor. <i>Seal Title Corp. v. Ehret, Inc.</i> , 589 F. Supp. 701 (D. N.J. 1984).
New Mexico					No court in New Mexico has yet to address the issue of contingent payment clauses.

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New York			X	NY Lien Law § 34: Any contractual provision waiving a subcontractor's right to a lien against a property is void. The Court of Appeals has interpreted these provisions to void all "pay if paid" clauses in subcontracts.	Two sophisticated commercial entities can overcome New York's public policy against "pay if paid" clauses by including a choice of law clause that favors the law of a jurisdiction that permits such contingent payment clauses. (If the contract was entered into before the Prompt Payment Act's prohibition of choice of law clauses went into effect in 2003). <i>Welsbach Elec. Corp. v. MasTec N. Am., Inc.</i> , 2006 NY Slip Op 8632, 1 (N.Y. 2006).
North Carolina		X		N.C. Gen. Stat. § 22C-2: "Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor...and an agreement to the contrary is unenforceable."  N.C. Gen. Stat. § 22C-3: "The contractor shall pay to his subcontractor...within seven days of receipt by the contractor...of each periodic or final payment."	"Pay-when-paid" clauses, like "pay-if-paid" clauses, are unenforceable. <i>Am. Nat'l Elec. Corp. v. Poythress Commer. Contrs., Inc.</i> , 167 N.C. App. 97, 101 (N.C. Ct. App. 2004).
North Dakota					North Dakota courts have yet to address contingent payment clauses.
Ohio	X		X	Ohio Rev. Code § 4113.62(E): "Pay if paid" contract provisions will not prevent the subcontractor from filing a mechanic's lien.	"Pay when paid" clause of a contract establishes a reasonable time for payment but does not set a condition precedent for payment to a subcontractor. <i>Chapman Excavating Co. v. Fortney &amp; Weygandt, Inc.</i> , 2004 Ohio 3867 (2004) (following the rationale from <i>Thos. J. Dyer Co. v. Bishop International Engineering Co.</i> , 303 F.2d 655 (6 <sup>th</sup> Cir. 1962)).

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Oklahoma	X		X	Okla. Stat. tit. 61 § 224: "If a subcontractor ... has performed ... the prime contractor shall make payment to the subcontractor ... no later than ten (10) calendar days after the prime contractor receives its corresponding payment for the work performed."	Clause setting the time for payment of a subcontractor after the contractor has received payment does not create a condition precedent to payment. It merely establishes a reasonable time for payment from the contractor to the subcontractor. <i>Byler v. Great American Ins. Co.</i> 395 F.2d 273 (10 <sup>th</sup> Cir. 1968) (applying Oklahoma law).
Oregon	X		X	Or. Rev. Stat. § 701.630: "The original contractor shall pay to the subcontractor ... the full amount received for such subcontractor's work and for materials and products supplied based on the subcontract or purchase order terms and conditions within seven days of receipt by the original contractor."	Any intention to shift the risk of a construction project from the contractor to the subcontractor must be evidenced by unambiguous language. Language that appears only to set a time for payment will not be construed to establish a condition precedent for payment. <i>Mignot v. Park Hill</i> , 391 P.2d 755 (Oregon 1964).
Pennsylvania	X		X	62 Pa. Cons. Stat. § 3933 (c): The subcontractor shall be paid "the full or proportional amount received for each subcontractor's work and material... 14 days after receipt of a progress payment."	If the intent of the parties is unambiguous, a "pay-if-paid" clause will establish a condition precedent to payment. <i>C.M. Eichenlaub Co. v. Fid. &amp; Deposit Co.</i> , 437 A.2d 965 (Pa. Super. Ct. 1981).
Rhode Island	X				When there is clear evidence that the parties intended to establish a condition precedent, no payment must be made until that condition has been satisfied. <i>Rotelli v. Catanzaro</i> , 686 A. 2d 91 (R.I. 1996).
South Carolina			X	S.C. Code Ann. § 29-6-230: Owner payment to the contractor cannot be a condition precedent to the subcontractor's payment.	Clause setting the time for payment of a subcontractor after the contractor has received payment merely establishes a reasonable time for payment from the contractor to the subcontractor. <i>Elk &amp; Jacobs Drywall v. Town Contractors, Inc.</i> , 229 S.E.2d 260 (1976).
South Dakota					South Dakota courts have yet to address contingent payment clauses.

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Tennessee	X		X		Clause setting the time for payment of a subcontractor after the contractor has received payment does not create a condition precedent to payment. It merely establishes a reasonable time for payment from the contractor to the subcontractor. <i>Koch v. Construction Tech.</i> , 924 S.W.2d 68 (Tenn. 1996).
Texas	X		X		Clause reading "contractor will pay [for work for which] payment has been made by the owner] does not establish a condition precedent to payment. <i>Sheldon L. Pollack Corp. v. Falcon Industries, Inc.</i> , 794 S.W.2d 380, 383 (Tex. App. Corpus Christi 1990).
Utah	X		X	Utah Code Ann. § 13-8-4 (3)(a): The existence of a contingent payment contract is not a defense to a claim to enforce a mechanics' lien filed under Title 38, Chapter 1, Mechanics' Liens.	"Pay when paid" provisions do not create conditions precedent to the payment of subcontractors. <i>Zions First Nat'l Bank v. Christiansen Bros., Inc.</i> , 66 F.3d 1560 (10 <sup>th</sup> Cir. 1995).
Vermont			X	Vt. Stat. tit. 9 § 4003: "Notwithstanding any contrary agreement, when a subcontractor has performed in accordance with the provisions of its contract, a contractor shall pay to the subcontractor...the full or proportional amount...seven days after receipt of each progress or final payment or seven days after receipt of the subcontractor's invoice, whichever is later."	Vermont courts have not yet interpreted the prompt payment statute. It is unclear whether a "pay-if-paid" clause would be enforced in the state.
Virgin Islands				V.I. CODE ANN. tit. 28, §§ 251 - 270: Courts in the Virgin Islands have interpreted the construction lien law in that district to preclude any contractual defense in actions to recover payment for completed work.	When a subcontract includes a clause that makes payment to the subcontractor contingent upon payment by the owner to the contractor, that clause is void and against the public policy enumerated in Construction Lien Law. <i>Shearman &amp; Assocs. v. Continental Cas. Co.</i> , 901 F. Supp. 199.

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Virginia	X		X		In the absence of evidence of contrary intent, a "pay when paid" provision will be treated to only establish a reasonable time for payment from the contractor to the subcontractor, and not to create a condition precedent to payment. <i>James River Iron, Inc. v. Turner Constr. Co.</i> , 2004 Va. Cir. LEXIS 230 (Va. Cir. Ct. Sept. 30, 2004).
Washington	X		X		Contract specifying that the subcontractor would receive payment only "to the extent that the Contractor has received payment" did not create a condition precedent to the subcontractor's payment. It simply established a reasonable time in which the subcontractor could be paid. <i>Amelco Elec. v. Donald M. Drake Co.</i> , 20 Wn. App. 899 (Wash. Ct. App. 1978).
West Virginia	X				"Pay if paid" provisions in a subcontract will not only insulate the contractor from liability to the subcontractor if the contractor is not paid, but the provision will also protect the contractor's surety. <i>Wellington Power Corp. v. CNA Sur. Corp.</i> , 217 W. Va. 33, 41 (W. Va. 2005).



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Wisconsin			X	<p>Wis. Stat. § 779.135: "The following provisions in contracts for the improvement of land in this state are void:</p> <p>(1) Provisions requiring any person entitled to a construction lien to waive his or her right to a construction lien...before he or she has been paid for the labor.</p> <p>(2) Provisions making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state.</p> <p>(3) Provisions making a payment to a prime contractor...a condition precedent to a prime contractors payment to a subcontractor. This subsection does not prohibit contract provisions that may delay a payment to a subcontractor until the prime contractor receives payment."</p>	<p>A "pay when paid" provision will not provide a defense to a contractor in a suit with a subcontractor once the contractor has been paid, at least in part. <i>Marino Constr. Co. v. Renner Architects</i>, 214 Wis. 2d 589 (Wis. Ct. App. 1997).</p>
Wyoming				<p>Wyo. Stat. § 16-6-602: For a public contract, contractors must be paid within 45 days of the receipt of the invoice.</p>	<p>Wyoming courts have not addressed whether contingent payment clauses are enforceable.</p>