

'SO SUE ME'

Three simple words that could haunt you in the world of construction

All too often on the jobsite, tensions flare over open payment claims. Whether it is the result of an owner or general contractor's cash flow issues, or a concern over workmanship or staffing, payment issues are a common occurrence on large and small construction projects. The majority of these disputes are hammered out between the contract parties themselves, and the underlying projects continue to move ahead toward completion. It's the nature of the business.

Occasionally, though, parties to a construction contract cannot reach agreement on a payment or series of payments. Few contractors, subcontractors or suppliers can afford to let open payment issues linger for too long, and patience eventually runs short. Whether the non-payment is due to issues totally under the paying party's control or not, if payment can't be worked out, the all-to-familiar response "So sue me" eventually is injected into the conversation.

Admittedly, it is rare that the party seeking payment in a construction dispute is absolutely free of problems with its own performance, but by drawing the "So sue me" line in the sand I often wonder whether the party responsible for making payment truly appreciates the impact of the litigation it is inviting to be filed.

Pennsylvania and other states have recognized that once a party to a construction contract has supplied, installed or completed its work, the entity looking for payment is at an automatic disadvantage in that it must now rely on the party responsible for

making payment to abide by its own obligations under the contract. It is for this reason that Prompt Payment Acts have been passed to provide a level of protection to parties who supply labor or materials to a job in anticipation of future payment.

These Payment Acts state, among other things, that if a contractor, sub or supplier is forced to file a lawsuit in order to collect payment otherwise due and owing, and the entity seeking payment is eventually held to be the substantially prevailing party, that claimant may also be entitled to recover its attorneys' fees and litigation costs, as well as interest and penalties on wrongfully withheld balances.

The right to recover attorneys' fees and litigation costs on construction claims is unique under these Payment Act statutes, because ordinarily under the American system of justice, the parties to a litigation dispute each must bear their own litigation costs. On privately-owned projects in PA of a commercial nature or residential work with 7 or more homes, the attorneys' fees, interest and penalties are a mandatory part of any judge or arbitrator's decision in favor of the party making the claim, provided that party is found to be substantially prevailing.

On most publicly-owned projects, the measuring stick is whether the withholding was done in bad faith; and while the award of fees and penalties isn't mandatory as it is for private work, the risk for the party wrongfully withholding payment on a public job should not be overlooked.

Another important aspect of the Prompt Payment Acts is that if there is a deficiency in the entity seeking payment's work, the paying party may not withhold more than is necessarily

related to the dispute at hand. Furthermore, the party withholding payment must give timely notice of the basis for any payments withheld. A failure to give timely notice may result in an automatic violation of the applicable statute.

While the "So sue me" response may be a natural reaction of any owner or contractor being pushed into a corner on payment issues, the potential for stiff additional penalties which can come along with the other side's decision to take someone up on that threat should never be overlooked.

Unlike in many other commercial settings, once payment on a construction project has been found to be wrongfully withheld, it can be too late to take back those three simple words, even though they seemed to be such an obvious and basic knee-jerk reaction to a pushy contractor, sub or supplier's demands for payment months earlier.



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