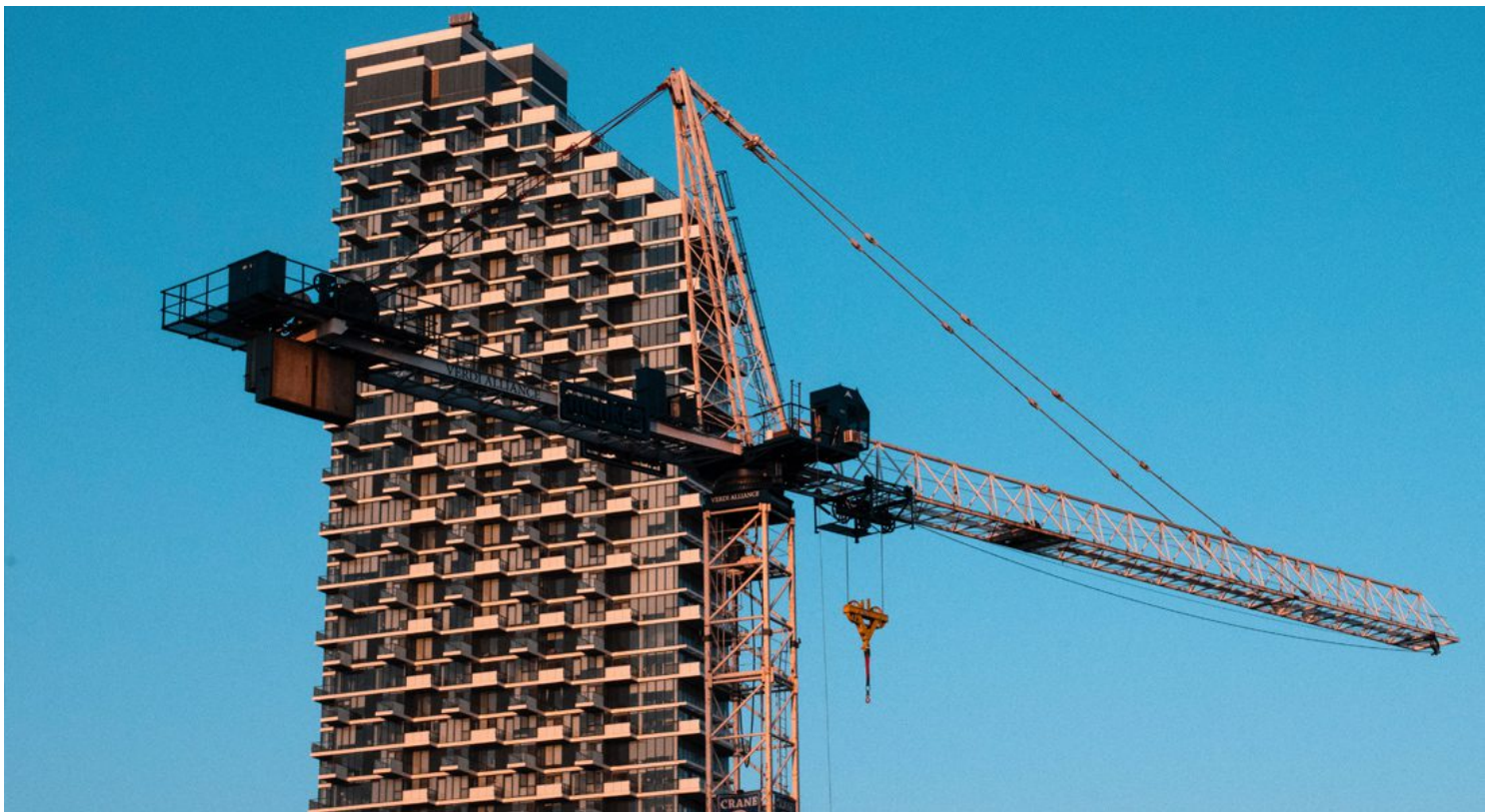


NEWS & INSIGHTS

Does more money really cause more problems? A breakdown of “pay-when-paid” and “pay-if-paid” clauses

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Picture this: You were hired by a general contractor to serve as a subcontractor on a private construction project. You performed all of your work in a good and workmanlike manner. The project’s owner accepted your work and the materials you used. Despite these facts, your final invoice to the general contractor remains outstanding because the project’s owner is withholding money from the general contractor. When you ask for payment, the general contractor informs you it does not need to pay you because your subcontract contains a “pay-when-paid” or “pay-if-

paid clause.” Sound familiar?

“When” or “if” shifts the risk

Although the phrases “pay-when-paid” and “pay-if-paid” are (at times) used interchangeably in conversation, the implications of these clauses to your bottom line differ significantly. “Pay-when-paid” clauses change the *timing* of payment while “pay-if-paid” clauses change the *requirement* for payment.

“Pay-when-paid” clauses typically state that a subcontractor (or supplier) will be paid within a certain number of days after a general contractor is paid by the project owner. The quirk about this type of clause is that the general contractor cannot avoid payment to its subcontractors or suppliers if a project owner fails to pay the general contractor. In other words, if the owner does not pay the general contractor, *the general contractor still must pay its subcontractors or suppliers*. So, “pay-when-paid” clauses determine when payment will occur, not if payment will occur.

On the other hand, “pay-if-paid” clauses require an upstream payment to occur *in order for a lower tiered party to get paid*. Under these clauses, a general contractor (theoretically) does not need to pay a subcontractor or supplier *unless the general contractor is paid by the project owner for the work*. Therefore, “pay-if-paid” clauses put the risk of non-payment by a higher-tiered contractor or project owner squarely on the shoulders of a subcontractor or supplier.

Seek legal counsel

So, what happens if your subcontract has a “pay-if-paid” clause, all of your work has been performed diligently and accepted by the owner, but you still have not been paid because of the project owner’s withholding? Are you out of luck until the larger dispute between the project owner and general contractor is resolved? Perhaps not. Some Pennsylvania courts have concluded recovery is available for the subcontractor in these situations despite, outstanding payments due to the general contractor. It depends on several circumstances, such as why the owner has refused to pay the general contractor and the documentation supporting any given dispute.

Some subcontractors merely give up when these situations occur. However, consulting with an experienced construction counsel may result in several different options to get you paid, including filing a mechanics’ lien or, perhaps, making a legal argument to defeat the “pay-if-paid” clause. If you find yourself in this situation, Saxton & Stump attorneys [Matt Chabal](#), and [Ron Pollock](#) are available to discuss your options. Our [Construction Law team](#) can review and/or negotiate your contracts before you begin work so that you can evaluate the potential risk you are taking on and the implications.

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