

Overcoming the Waiting Game for Final Payment

by Larry Logsdon, Esq.

Disputes about final payment can make or break a project. To ensure the project leans toward the former, it is important to give the financial aspect the attention it deserves — before the work begins.

Define the Type: Progress vs. Final

Payment for construction projects consists of two main categories, progress and final. The first, progress payments, are made during construction and in contemplation of further work. The second type, “final payment,” involves, as the name suggests, the payment of the remaining amounts owed at the end of a contractor’s or subcontractor’s work. A survey conducted by the American Subcontractors Association (ASA) revealed that issues regarding “slow final payment” rank as subcontractors’ most serious concern impacting the success of their businesses. There is good reason for that concern. The timing as to when and how much of final payment is made can mean the difference between whether a project is profitable and successful or unprofitable and not worthwhile.

Review the Subcontract Language

Like many other issues faced in a construction project, the framework establishing when final payment is made begins with the language of the subcontract. It allows the parties to quantify their expectations and literally shows the subcontractor and contractor where they are headed. As explained by the notable contractor (or perhaps it was Yankees’ catcher?) Yogi Berra, “You have to be very careful if you don’t know



where you are going because you might not get there.” Because the subcontract language is so important, a subcontractor should closely review its terms and negotiate equitable provisions addressing final payment to try to head off disputes early that may cause the all-important final check to be late.

Needless to say, the higher the percentage of retainage, the more important “final payment” issues become. During contract negotiation, subcontractors may argue that retainage should be reduced as the project moves closer to completion since the premise behind holding retainage — security for completion of work — has largely been met. Less retainage will reduce the potential for disputes over final payment. The parties may also agree on a provision allowing for retainage to be held in an interest-bearing account. The Associated General Contractors of America (AGC)/ASA/Associated

Specialty Contractors (ASC) joint “Guideline on Retainage” states: “Where retainage is used, retained amounts should be deposited in an escrow account accruing interest to the contractor and the subcontractor in their respective shares.”¹ The rationale behind such a provision is that, once earned, the retainage should benefit the party that earned it.

The parties should be sure to set out objective standards and finite provisions in the subcontract as to what needs to be accomplished for final payment. Contractual provisions that clearly address the parties’ expectations as to what needs to be done to achieve final payment can best be handled during the contract negotiation stage as opposed to the often stress-filled end of the project. Subjective, broad or one-sided

¹ *Guidelines for a Successful Construction Project* (AGC/ASA/ASC), 2003.

contract provisions that allow for final payment to be withheld until, for example, “when the owner or contractor in their own opinion believes that all work is completely done to their own satisfaction,” create a situation that leaves the subcontractor that is working to achieve completion virtually unable to determine exactly what needs to be done to get paid.

Avoid Incomplete Punch Lists

Perhaps the most common excuse for not making final payment is the claim that punch list items are incomplete. The subcontractor should seek to have terms that allow for final payment upon “substantial” completion as opposed to absolute completion of all work. Providing for “final” completion as the trigger for the last payment can allow an argument for payment to be delayed when inconsequential issues remain with the work. Also, the contractor can delay final payment by creating rolling or unending punch lists that are constantly expanded or revamped or that contain the inevitable few items that are disputed. Next, allowing several parties, such as the architect, construction manager, owner and even end-user occupants the opportunity to develop separate punch lists can contribute to an unending “final” completion.

Issues with regard to punch lists arise because a contractor wants its subcontractor to be motivated to

complete outstanding items. A subcontractor, however, wants any amount withheld to be rationally related to the value of outstanding items. This balance of interests often is achieved by delaying payment until disputed items, punch lists, or minimal and inexpensive fixes remain outstanding. From the subcontractor’s perspective, any restrictions on final payment that are tied to outstanding repairs at substantial completion should be in line with the amount of the repairs. Common contract clauses allow for an amount to be withheld that is sufficient to cover the costs to complete the punch list of omissions or deficiencies.

Stay in Control

Final payment should not be conditioned on occurrences that are outside of the control of the party seeking final payment. For instance, a subcontractor does not want final payment tethered to matters such as requiring that the certificate of occupancy be issued or that the building be fully occupied by tenants. Delays by the owner or contractor, or another third party’s failure to perform certain duties, might postpone payment that otherwise would be due.

Shorten the ‘Laundry List’

Moreover, a subcontractor should resist agreeing to any excessive laundry list of requirements that must be met before final payment is made. The types of restrictions on final payment that would be considered problematic vary depending on the nature of the project and the type of work involved. One of the more commonly seen requirements is to condition final payment on a subcontractor providing lien waivers from, among others, every one of its suppliers. If a subcontractor has no suppliers, the job is easy. However, such a requirement can be unworkable if a project involves secondary suppliers that are unlikely to provide lien waivers. In any case, a subcontractor should evaluate the list of requirements for final payment and determine up-front if they are achievable.

Pay Attention to Paperwork

Early in the project, a subcontractor should be mindful of necessary closeout documents and begin to gather them as soon as possible instead of waiting until just before preparing the final payment application. For instance, if a subcontractor knows that certain documents will be needed (e.g. invoices, as-built plans, or warranty documents), this paperwork should be addressed in the planning stage. Along this line, a subcontractor should resist agreeing to vague provisions such as one that attempts to condition final payment upon providing an unspecified and unnamed list of “any and all documents requested by the contractor.” The party seeking payment should seek the earliest possible confirmation that it has provided all required closeout documents and paperwork so that it can handle any noted deficiencies and not contribute to delayed final payment. To this end, it can send correspondence with the final payment application that includes language such as: “Enclosed is our final payment application and all necessary documents. If you have any questions or believe that we are lacking any documentation, other information, or anything else that would prevent timely final payment, please let us know.”

Be Specific on Application

While it is important to request final payment promptly, anyone submitting a final payment application should remember to include all items for which payments are due in the request. For example, a subcontractor owed for amounts not yet quantified such as delay damages or unresolved change orders should at least note those issues on the final payment application. This is particularly true where the payment application contains broad waiver language which says that the application covers any and all amounts owed on the project and states that all other claims are waived. Similarly, a contractor making final payment to a subcontractor can argue that the subcontractor’s act of accepting final payment constitutes a waiver of all other payments by the subcontractor. For example, the standard owner-contractor document published by the Construction



Management Association of America expressly provides that acceptance of final payment constitutes a "waiver of all claims by the Contractor against the Owner."² Likewise, AGC's 650 subcontract form states, "Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontract Work."³

Follow Up Promptly

After submitting a complete final payment application, the subcontractor

should immediately follow up if timely payment is not made. A contractor may receive several requests for payment from various subcontractors or suppliers but not be in a position to be able to pay all of them. In these circumstances, remember the theory of project management that "[t]he wheel that squeaks the loudest is the one that gets the grease."⁴ If payment does not come when it should, the party seeking payment should follow up in writing. As with any written communication,

remember that whatever is written may one day be enlarged as an exhibit in a mediation, trial or arbitration. As such, be cordial and polite. Also, nice letters are more likely to get the desired results as "[t]he squeaky wheel gets the grease, the quacking duck gets shot."⁵

Address Tardiness

In negotiating to obtain final payment, a subcontractor should consider that a contractor may be less likely to withhold final payment if the contractor recognizes that, if it pays late, then the subcontractor may be entitled to interest and possibly attorney fees. Therefore, the subcontractor may contractually provide for interest to be added to late payments and to allow for the prevailing party in a dispute to recover attorney fees. Depending on the type of work, federal and state prompt pay laws can help subcontractors seeking interest on late payments, and with other aspects of final payment, such as recovery of attorney fees in disputes over payment of retainage.

Disputes about final payment can make or break a project from the subcontractor's point of view. Giving this issue the attention it is due means considering and clearly defining final payment terms before work begins. As a project progresses, a subcontractor should carefully handle all administrative responsibilities and requirements, beyond just doing the work properly, to try to ensure prompt final payment. Then, if final payment is not made when it is due, the subcontractor should quickly and firmly, but respectfully and politely, follow up and take steps to get payment. ■

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² CMAA Document A-3 (2002) at ¶ 11.13.1.3.

³ AGC 650 (1998) at ¶ 8.3.5.

⁴ Henry Wheeler Shaw, *Farmer's Allminax* [sic] (1869-80).

⁵ Author unknown.

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