



A Roofing Contractor's Guide to Obtaining Payment

National Roofing Legal Resource Center

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This guide addresses broad topics from the perspective of standard practices and rules as of the date of its publication and does not constitute legal advice that should or may be relied on by readers. This guide does not exhaustively discuss every clause that may impose liability on a roofing contractor. Many rules vary from state to state. A roofing contractor should always contact an attorney for state-specific interpretations and approaches to contracts and to the principles discussed herein.

A Roofing Contractor's Guide to Obtaining Payment

Every successful roofing contractor knows obtaining and performing work is only half the battle. Getting paid for work presents the other half of the battle. Although it is essential for the success of any roofing company to obtain work, unless a roofing contractor is paid for the work performed, there is no hope for the company to succeed. This guide discusses the legal steps roofing contractors are advised to take and, in some instances, may be required to take to place themselves in the best position to get paid for work performed.

Before beginning work on any roofing project, roofing contractors should become familiar with the laws that affect payment within the jurisdiction where the work is to be performed. Roofing contractors who go outside their home state must consider whether there is a licensing requirement in the state where the work is to be performed.

For example, in California, the licensing law is what is commonly referred to as a “forum closing statute” in that any contractor or subcontractor performing construction work without first being properly licensed is prohibited from using the courts of that state to enforce a contract regardless of the merits of a particular claim. Effectively, the unlicensed roofing contractor is left without any judicial remedy in California to enforce a contract in the event of a breach. Arizona, New Mexico and Washington are examples of other states with licensing statutes with forum closing provisions.

Alabama's and Florida's licensing statutes take the “forum closing” concept a step further by declaring all contracts entered into by unlicensed contractors void as a matter of public policy. Accordingly, though courts may be available to an unlicensed roofing contractor in Alabama or

Florida, the law will not allow an unlicensed roofing contractor to enforce the voided contract leaving the roofing contractor without a mechanism to get paid.

To avoid issues with licensing statutes, roofing contractors intending to perform work outside their home states should seek guidance from qualified attorneys and do so before entering into an agreement to perform the work.

In addition to state licensing statutes, states may require corporations legally organized in another state (known as “foreign” corporations) to obtain a certificate to transact business before commencing work. A certificate to transact business, which also is commonly referred to as a certificate of authority, can typically be obtained through the secretary of state’s office of the particular state where the work is to be performed. In Alabama, failure to obtain a certificate of authority to transact business precludes a contractor from maintaining any action on a contract entered into before the contractor’s obtaining of the certificate of authority. In contrast, Georgia allows an out-of-state contractor who commences work without a certificate of authority to file suit in Georgia once the certificate of authority is obtained. Any contractor conducting business in a state for the first time should become familiar with the requirements to transact business in that state before commencing work. Failure to do so may result in forfeiture of the contractor’s right to receive payment for work performed even if such work is performed in accordance with contractual terms and conditions.

Roofing contractors who work outside their home states also must concern themselves with “nonresident contractor” statutes. These statutes are intended to protect the state’s collection of sales or use tax from a nonresident contractor who performs construction work within the state. Most of these statutes require nonresident contractors to post bonds with the state department of revenue. A failure to post a bond or otherwise comply with any applicable

nonresident contractor statute also can act to prohibit the nonresident contractor from using the courts of the state to recover payment for work performed.

Before beginning work on any private project, regardless of the project location, roofing contractors are advised to consult the lien laws of the state where the work is to be performed. Although a claim of lien will not act to guarantee payment to a roofing contractor, it provides some additional security that the contractor will be paid.

A claim of lien has the potential effect of disrupting the sale or refinancing of a property. After a roofing contractor's lien is filed, it must be paid in full or canceled before any subsequent purchaser can take the property free and clear of the lien. A purchaser or lender providing the financing for the purchase of the property will want to ensure it has the senior secured interest in the property being purchased so it can foreclose on the property if there is a default under the loan terms. Similarly, any entity providing refinancing for the property also is going to want to ensure it has the senior security position in the property. Before the entity providing the mortgage or refinancing can obtain the senior security position, it must remove all pre-existing liens, including a roofing contractor's claim of lien. When this happens, roofing contractors with claims of lien on properties being sold or refinanced will be contacted by lenders who will want to know the payoff figure for cancellation of the claim of lien. The payoff amount is generally paid out at the closing of the sale or refinancing.

There are, unfortunately, instances when a claim of lien proves to be of little security for roofing contractors. The most common scenario when a claim of lien turns out to be of little value to a roofing contractor involves the foreclosure of a senior secured interest in the property. If a senior secured party forecloses on the property, all junior liens, including the roofing

contractor's claim of lien, will come off the property. In this instance, a roofing contractor will find himself without a lien while it is still owed payment for work performed.

Before beginning work on any project, roofing contractors need to know what preliminary steps must be taken to preserve lien rights against a project. The first step may involve providing preliminary notice of the roofing contractor's lien rights. In almost all states that have a preliminary notice requirement, the failure to provide the preliminary notice in a timely manner acts to void roofing contractors' lien rights.

Each state will have different preliminary procedural requirements. The most common preliminary procedural requirement involves providing notice of the claim of lien to the project owner and general contractor and to do so within a specified time period from when the claimant's work began. State statutes that contain preliminary notice requirements are often specific about the required content of the notice, which entities must be provided with a copy of the notice, how the notice is to be sent and when the notice must be sent. Those states that require a preliminary notice of lien rights generally only impose this requirement on those contractors who do not have a contract with either the project owner or the prime contractor (such as, second-tier subcontractors and lower) though there are states, such as Arkansas, Colorado Louisiana and Massachusetts, that impose preliminary notice requirements on prime contractors. Other states, such as Alabama, Arizona, California, Colorado, Florida, Michigan and Texas, impose a preliminary notice requirement on first-tier subcontractors who contract directly with prime contractors.

Once a roofing contractor's work is complete and he or she has complied with any applicable preliminary notice requirements, the next step is to file its claim of lien in a timely manner. The law of each state where a roofing contractor works should be consulted to

determine the due date for the filing of a claim of lien. The due date for the filing of a claim of lien may be as soon as 30 days after completion of the work, or the time period may extend to six months following completion of the work. Regardless of the deadline, a failure to timely file a claim of lien will act to defeat or void a roofing contractor's lien rights.

Beyond the timing requirement for filing a claim of lien, roofing contractors must also be sure to provide proper notice of filings of liens and to timely file lawsuits on liens in accordance with the laws of the state where work is performed. Some states require contractors to provide notice of nonpayment after completion of the work before they are permitted to proceed with the filing and recording of a claim of lien, and other states have specific requirements for providing notice to the owner of the filing or recording of a claim of lien. Lastly, almost all states require unpaid contractors to file lawsuits to enforce liens and to do so in a specified time period. In some states, a lawsuit to enforce the lien must be filed within six months of completion of the work though other states provide unpaid contractors with a one-year period running from the date of the recording of the claim of lien. Roofing contractors are advised to consult with qualified lawyers to learn the deadlines for filing a claim of lien, the required notice of the filing of a claim of lien, if any, and the time period within which a lawsuit must be filed to enforce a lien.

Most states prohibit the filing of a claim of lien against public property. Instead of providing subcontractors who improve public property with lien rights, state statutes require the prime contractor on a public project to obtain and provide a payment bond for the work. The payment bond is intended to ensure payment to all people or entities performing work that improves the public property.

Before beginning work on any public project, it is important roofing contractors obtain a copy of the payment bond provided for the work. A payment bond can be obtained by making a request to either the public owner or prime contractor. Alternatively, a copy of the payment bond provided for any public project can be obtained by making a formal request under the state's Freedom of Information Act or Open Records Act.

Roofing contractors should become familiar with the payment bond statutes of the state where the work is to be performed. Similar to lien laws, payment bonds and payment bond statutes may contain preliminary notice requirements to preserve a claim against a payment bond.

For example, most labor and material payment bonds require roofing contractors with direct contracts with prime contractors to provide notice of claims to the surety and project owner. Roofing contractors who have contracts on public projects with an entity other than a prime contractor may be required to provide notice of a claim to the prime contractor and to do so within a specified time period after beginning the work. State laws also may set forth the time period within which a lawsuit must be filed by the unpaid contractor to enforce the bond's terms. Generally, most states allow an unpaid contractor either one year from the completion of the project or one year from the unpaid contractor's last day of work at the project to file a lawsuit to enforce a bond's terms.

Roofing contractors who perform work on federal projects where the prime contract exceeds \$100,000 should know such projects are governed by the federal Miller Act (40 U.S.C. § 3131, et seq.). The Miller Act requires prime contractors on covered projects to provide payment bonds for the protection of first- and second-tier subcontractors. Although the Miller Act contains no preliminary notice requirements before the start of work, requests for a Miller Act

payment bond should be made by roofing contractors before commencement of work at federal projects. The Miller Act contains a procedure by which payment bonds can be obtained by submitting an affidavit to the federal contracting agency.

On a private project, roofing contractors may not know whether an owner has required the prime contractor to provide a payment bond for the protection of those providing labor, materials or equipment the work. A roofing contractor should not hesitate to request a copy of the prime contract from the prime contractor to determine whether it contains an obligation for the prime contractor to provide a payment bond for the work. After all, the roofing contractor more often than not is bound to the terms of the prime contract by a clause in the roofing subcontract, which incorporates into the subcontract the terms and conditions of the prime contract by reference. A roofing contractor also can simply request a copy of the payment bond from the project owner. The project owner has every incentive to produce the payment bond with hopes that the roofing contractor will forego his or her lien rights against the owner's property and instead pursue a claim on the payment bond. It is absolutely critical roofing contractors working on private projects where payment bonds were provided obtain a copies of bonds because notice requirements and deadlines within bonds will control rather than any state law addressing payment bonds applicable to public projects. Failure to meet deadlines or provide required notices likely will result in a waiver of roofing contractor's claim under a payment bond.

One common payment bond required for private projects is the AIA A312 payment bond. The notice requirements under the A312 payment bond depend on whether a roofing contractor has a contract with the prime contractor or is instead a second-tier subcontractor or lower. If a roofing contractor contracts directly with the prime contractor, the A312 does not require the

roofing contractor to provide any notice during construction of the project. A roofing contractor who contracts directly with the prime contractor must provide notice of his or her claim to the payment bond surety and project owner, but there is no timing requirement for this notice. The only timing requirement under the A312 bond for a roofing contractor who contracts with a prime contractor is to file a lawsuit within one year of completion of the project but after providing notice of the claim to the surety with a copy of the notice sent to the project owner.

Roofing contractors who do not contract with prime contractors have notice obligations under the A312 bond that must be met soon after the completion of work. Specifically, the A312 payment bond form requires second-tier (and lower) roofing contractors to provide notice of claims within 90 days after their last day of work at a project. If payment is not made within 30 days following the date of the notice of the claim, the second-tier (and lower) roofing contractor proceeds with notice of a claim to the surety, and the surety then has 45 days to respond to the claim. Under the A312 payment bond, the lawsuit to enforce the bond's terms must be brought within one year of project completion.

Roofing contractors must be sure their claims under payment bonds are preserved following completion of work. When work is complete and payment is not forthcoming, roofing contractors need to be sure to review the terms of the applicable payment bond to determine whether there is any time limitation within the bond for filing a lawsuit to enforce the terms of the bond.

On a federal public project where the Miller Act applies, the Miller Act payment bond covers subcontractors and material suppliers that have direct contracts with prime contractors. These are called first-tier claimants. Subcontractors and material suppliers that have contracts with subcontractors but not those that have contracts with suppliers also are covered and are

called second-tier claimants. Anyone further down the contract chain is considered too remote and cannot assert a claim against a Miller Act payment bond posted by a contractor. Second-tier claimants are required to provide notice of a claim under the payment bond within 90 days of the last day of work at the project, and a lawsuit to enforce the terms of the bond must be filed within one year of an unpaid contractor's last day of work at the project.

Although lien rights and payment bond rights go a long way to securing payment for work performed, it is also essential roofing contractors address payment in contracts that governs work. One good place for roofing contractors to start when negotiating a contract is to make sure the money is there for payment if the work is done in accordance with the contract documents. A roofing contractor can obtain this information by seeking to include a provision that allows the roofing contractor to access evidence that financial arrangements have been made to fulfill the general contractor's or owner's obligations under the contract. The general conditions of the standard construction contract documents promulgated by The American Institute of Architects, AIA Document A201, includes such a clause that permits a roofing contractor to request from the owner reasonable evidence that financial arrangements have been made to fulfill contract obligations. Per AIA A201 general conditions, if a roofing contractor is not provided with such evidence, he or she is under no obligation to commence or continue the work.

Another option to ensure that money is available to fund work is to negotiate with an owner to have the funds for the work placed into a trust account governed by a trust agreement. The trust agreement can impose upon the trustee the duty to ensure correct distribution of the proceeds.

Roofing contractors should seek to include objective standards for payment in contracts. For example, contract language that entitles a roofing contractor to payment upon completion of

work in a good, workmanlike manner in accordance with the plans and specifications and industry standards sets forth an objective standard for payment. To the contrary, subjective standards, such as a requirement that the work be performed to the satisfaction of the owner or general contractor before payment is due, should be avoided.

Roofing contractors who perform work as subcontractors need to be particularly concerned about pay-if-paid provisions often found in roofing subcontracts. A properly drafted pay-if-paid provision contains an express “condition precedent” to a roofing contractor’s right to payment for work performed. A properly drafted pay-if-paid provision conditions a roofing contractor’s receipt of payment from the general contractor on the general contractor’s receipt of payment from the project owner. Consequently, if a project owner withholds payment from the general contractor because of defective work performed by another trade, the general contractor has no obligation to pay the roofing contractor even if the roofing contractor’s work has been accepted¹. Roofing contractors presented with contracts that contain a pay-if-paid provision should seek to revise the clause to limit its applicability to only situations in which general contractors are not receiving payment from project owners. With this contract language, if a general contractor does not receive payment from a project owner because of reasons unrelated to the roofing work, the general contractor still would be contractually obligated to pay the roofing contractor.

Pay-if-paid provisions should not be confused with pay-when-paid provisions. Courts throughout the U.S. have repeatedly required general contractors to make explicitly clear in subcontracts that receipt of payment from a project owner is a “condition precedent” to a general contractor’s obligation to pay subcontractors. In the absence of words that clearly reflect the

¹ In some states, such as California, Delaware, New York, North Carolina and Wisconsin, pay-if-paid provisions are not enforceable as a matter of law either because of statute or case law.

parties' intent that the general contractor's receipt of payment from the owner is a condition precedent to the roofing subcontractor's entitlement to payment from the general contractor, courts are likely to interpret these provisions as setting forth a reasonable period of time for payment rather than a condition precedent.

Roofing contractors also can put themselves in a position to better secure payment for work performed by including in contracts a clause that calls for a reduction in retainage when the status of project completion reaches 50 percent. Almost all states have laws that address retainage on public projects. These laws generally provide a maximum rate of retainage and may require that retainage be placed in an interest-bearing account for the benefit of the contractor whose money is being retained. Retainage on private projects also may be addressed, such as in California, which requires retainage on private projects to be released within 45 days of the date of completion as defined by statute. In Connecticut, the maximum rate of retainage on a private project is 7.5 percent.

Contracts that govern roofing work also should include a specific provision addressing how payment will be made for extra work or change order work. Change order provisions in roofing contracts often empower general contractors, owners and/or architects to direct roofing contractors in writing to proceed with changes without any correlative responsibility to pay roofing contractors or agree to pay roofing contractors for the consequences of the change. This leads to roofing contractor performance followed by a long wait for eventual resolution of the change order proposal and ultimate payment. Roofing contractors should seek to include a clause in roofing contracts that permits substantive changes only when parties agree (by bilateral change order) or at least when a general contractor or owner and architect must first concede there is a change before unilaterally directing a change. Such a contract provision should then

allow a roofing contractor to recover payment for the change order work immediately, at least to the extent there is agreement about the value of the change pending final resolution of the entire amount in dispute.

Regardless of the contract language negotiated by the parties, a roofing contractor must be familiar with the contract clause addressing extra work. The steps and notices required by a contract should be closely and strictly followed. Typically, a roofing contractor must provide written notice within two to three days of his or her knowledge of the events giving rise to a condition that requires extra work that should be the subject of a change order. A contract may require this notice to include a description and estimation of the effect on the schedule and the cost to the roofing contractor. In addition, many contracts provide that if a roofing contractor performs additional work without a written change order and without providing the required written notice, the roofing contractor has waived his or her right to dispute the other party's decision or has conclusively agreed he or she is not entitled to any additional time or compensation.

Regardless of the particular contract requirements, the best practice is for roofing contractors to provide written notice to the other party of the interpretation of the facts at the earliest possible time. The actions a roofing contractor takes at this time may be scrutinized in the future, and it is important to have a written record of a roofing contractor's position and understanding. Moreover, sending written notice puts the onus on the other party to respond, and their failure to do so in a timely manner may be construed as an implied acceptance of the roofing contractor's position. Any telephone conversations should be summarized in a letter to the other party confirming any oral agreement or understanding.

If the other party disputes the roofing contractors position, should continue to treat the extra work as entitling him or her to a change order by sending a proposed change order in the proper format to the other party and by referring to the entitlement to additional time and compensation in any pay applications, schedules, lien waivers, and correspondence relating to payment or schedule. Generally, a roofing contractor may expressly reserve his or her rights to additional time and/or compensation in writing, proceed to perform and complete the change work, then resolve the dispute with the other party at a later time, including in an arbitration or litigation. The roofing contractors should seek to negotiate payment for the disputed work at the earliest possible time. As the end of a job approaches and the other party is holding a retainage that is soon to become due, a roofing contractor's leverage improves. If a resolution cannot be reached, roofing contractors should explore options regarding filing a lien or a claim against the payment bond.

Roofing contractors also can use a payment provision in a contract to create an incentive to make timely payment. Roofing contractors should seek to include a provision in all roofing contracts that entitles the roofing contractor to collect interest on late payments. Moreover, roofing contractors should seek to include a clause in their contracts that entitles the roofing contractor to recover attorneys' fees and other costs of collection in the event a legal action is necessary to recover money for work performed. Indeed, in states that have Prompt Pay Act laws, it may be necessary for a roofing contractor to include certain language in the contract to avail himself or herself of the protection afforded by most Prompt Pay Act laws, such as entitlement to interest and attorneys' fees. Similarly, roofing contractors should seek to delete any language in contracts that purports to have the roofing contractor waive its rights under any applicable Prompt Pay Act laws. Lastly, roofing contractors should seek to include a clause in all

contracts that explicitly sets forth the condition under which the roofing contractor can stop its work at the project.

Many roofing contractors are surprised to hear that lack of payment does not necessarily entitle them to stop work. When faced with this situation, a roofing contractor essentially has two choices: continue working on the project and risk suffering further losses in the event payment is never made or cease work on the project and risk a potential breach-of-contract claim from an upstream party. The choice a roofing contractor makes can have far-reaching consequences, including affecting the roofing contractor's potential liability exposure to pay the costs incurred by the general contractor or owner to have another roofing subcontractor complete the work. Unfortunately, either choice carries with it a certain degree of risk.

The contract language of the contract is critical to determining whether a roofing contractor is entitled to suspend the work because of nonpayment. Before executing a contract, a roofing contractor should review the circumstances under which he or she has the express right to suspend the work in the event payment is withheld or delayed because of reasons not the fault of the roofing contractor. Although some contracts expressly provide a roofing contractor is entitled to suspend work for nonpayment in certain situations provided the proper notices are given, some contracts simply do not address this question. If a contract does not address this question, a clause stating that the roofing contractor shall not be required to continue to work if not paid should be added to the section of the contract addressing payment.

When in doubt as to the effect or meaning of a particular clause or whether and under what circumstances a contract allows a roofing contractor to suspend the work for nonpayment, roofing contractors should consult their attorney. Alternatively, they can compare the clause in their contracts to Article 9.7 of the AIA A201-2007 General Conditions of the Contract for

Construction. That clause is an example of a fair and reasonable suspension for nonpayment clause. It provides that an architect does not issue a certificate for payment through no fault of the contractor within seven days after receipt of the contractor's application for payment or if an owner does not pay the contractor within seven days after the date for payment established by the contract, after giving an additional seven days written notice to the owner and architect, the contractor may stop the work until full payment has been received. That clause further entitles the contractor to an extension of time and an increase in the contract sum equivalent to the contractor's reasonable costs of shut-down, delay and start-up, plus interest.

When a contract neither grants nor denies a roofing contractor the right to suspend work when he or she does not receive payment, in most states, courts will evaluate all the surrounding circumstances to determine whether the failure to pay amounts to a "material" breach of contract by the other party. A material breach is, generally, a significant divergence from the contract terms as opposed to a small or technical violation. In determining whether failure to pay was a material breach, courts typically will consider facts such as the amount due, contract size, degree of lateness of the payment and whether the roofing contractor has acted reasonably and in good faith. The context of the nonpayment generally is more important than the amount of money owed; an outstanding balance of \$50,000 is much different on a \$70,000 contract than on a \$10 million contract.

When a roofing contractor can show nonpayment is a material breach of contract, stopping work will not be considered a breach of the contract by the roofing contractor. However, if a court or arbitrator determines failure to pay was not a material breach, a roofing contractor may be found to have materially breached a contract when he or she stops work, exposing him or her to liability for damages suffered by the general contractor or owner as a

result of the improper stopping of work. To help avoid this potential exposure, roofing contractors are advised to provide written notice to other parties of the alleged material breach. Written notice of the alleged breach demonstrates reasonableness and good faith on the part of a roofing contractor, and such written notice may be important evidence in a later legal action, but, it does not solve the problem.

Even in seemingly simple scenarios where nonpayment must constitute a material breach of the parties' contract, a roofing contractor must make a judgment call and, if he or she determines to suspend the work, risk a subsequent finding that it breached the contract. There are simply no guarantees that a judge will rule as anticipated, and therefore, there is always some risk that accompanies the decision to suspend the work. Therefore, it is best to err on the side of continuing to work, provided it is feasible financially and there is no evidence of larger problems with the nonpaying party, such as an impending bankruptcy. Continuing to work despite nonpayment protects against claims that suspension of work was not justified and allows a roofing contractor to pursue recovery of money without fear of facing a counterclaim.

An important factor roofing contractors should consider when making this judgment call is the potential exposure of delay or liquidated damages. When a schedule is tight and the potential for extensive delay damages is great are factors to be considered when deciding to stop work. Alternatively, if delay damages are not a concern, a roofing contractor might decide to send crews to other projects rather than staff the project where payments are not being made.

Those roofing contractors who are due payment for work performed often hope to withhold issuance of roofing warranties with hopes that this action will prompt payment from the general contractor or owner. When a contract requires a roofing contractor to provide a warranty, withholding the warranty gives the general contractor or owner the argument that the roofing

contractor is in breach of contract. Although a roofing contractor may argue he or she is withholding the warranty because of nonpayment, unless there is a contract clause that allows the roofing contractor to withhold the warranty because of nonpayment, this argument most often fails. Rather than withhold a warranty when payment is past due, a roofing contractor should carefully consider releasing the warranty, which will have the effect of leaving the general contractor or owner without the argument that the roofing contractor is in breach of contract. The roofing contractor in this situation should seek to include language in the warranty stating there is no obligation on the roofing contractor's part under the warranty until and unless the roofing contractor is paid in full. Roofing contractors should rely on this language in warranties rather than withhold warranties.

All roofing contractors are encouraged to execute contracts before performing any roofing work. There are times, however, when roofing work proceeds without a contract. For example, most often, leak repair work is performed without a formal contract establishing the terms of the parties' agreement.

In the absence of a formal contract setting forth the terms and conditions of the parties' agreement, a roofing contractor is still entitled to payment. Presumably, the parties have agreed, orally or in writing, what work is to be performed and the price to be paid for the work. Preparing and sending accurate invoices promptly after performing the work will help speed up the process of turning outstanding invoices to cash.

When sending invoices to customers to obtain payment, a roofing contractor should identify the document as an invoice with the words "Invoice" or "Bill" and state unequivocally the amount due. Any confusion over the amount due will only act to delay payment. If the services were for a project and the payment amount was a flat fee agreed upon beforehand, this

should be listed on the invoice. If, on the other hand, the arrangement was an hourly fee arrangement, the number of hours billed should be included on the invoice. It will also be helpful to getting paid to include the date or dates on which the services were rendered.

Invoices also should include the payment due date. Along with the amount of payment due, this is one of the most important elements of an invoice. Without it, a roofing contractor cannot count on being paid on time and have no real method to track his or her accounts receivable. It also is important for invoices to include the invoice date. This shows customers when the grace period for payment begins and gives them a general idea of when the services were performed. Roofing contractors' invoices also should list a thorough description of the services provided and the conditions under which they were provided. This lets customers know what they are paying for. Many times, the person reviewing the invoice is different from the person who organized the work to be performed. Without this information, the customer might not know what the invoice is for and, consequently, will not return payment.

Invoices should also include the customer's information. This includes the customer's address, telephone number, Social Security or tax identification number, and any other relevant information. When a customer sends a payment, a contractor will know exactly who it is from. With an invoice, a contractor can position himself or herself to recover interest and attorneys' fees by adding a sentence that reads: "Payments due the roofing contractor and unpaid shall bear interest from the date payment is due at the rate of 1½ % per month, and roofing contractor shall be entitled to recover all costs of collection, including reasonable attorneys' fees, incurred by roofing contractor as a result of nonpayment by owner or general contractor." Many states enforce these interest and attorneys' fees provisions that are set forth in an invoice, especially if the recipient of the invoice voices no objection to the language once it receives the invoice.

A number of states have enacted so-called “trust fund statutes” to protect subcontractors from the risk of nonpayment by a general contractor. A typical trust fund statute requires that any money paid to a contractor for the work of another be held in trust for the benefit of the party who actually performed the work. The party initially receiving payment for the work of another in effect becomes a fiduciary with no legal interest in that money until the party who performed the work has been paid. The creation of a fiduciary relationship also has the added bonus in a number of jurisdictions of protecting the subcontractor from the possibility of a bankruptcy filing by the general contractor because the misappropriated funds may be deemed to constitute nondischargeable debts under Section 541(d) of the federal bankruptcy code.

Trust fund statutes vary in form from state-to-state. For example, Texas requires construction funds be placed in a separate construction account under certain circumstances. New York, by contrast, only requires that trust funds be clearly allocated if kept in a general account. Roofing contractors should be mindful of whether the law of the state that governs the contract permits commingling of project construction funds with other company funds to ensure compliance with any applicable trust fund statute by general contractor which receives payments from owners in trust for the trades performing the work.

Civil penalties for a violation of a trust fund statute typically require the violating party to pay the full amount of the misappropriated funds plus a penalty. In addition to providing civil remedies, a number of states also have enacted criminal statutes that punish contractors who fail to pass payments through to their subcontractors and suppliers.

The existence of a trust fund statute can help procure payment for roofing contractors during project construction because it provides additional protection and security intended to cause payments made by project owners to the general contractors to be properly distributed to those

trades providing labor, materials or equipment to the project. A roofing contractor who is due payment and learns the general contractor has received payment for his or her work can threaten an action under the applicable trust fund statute with hopes that the threat will prompt payment. Any roofing contractor interested in potentially using the benefits of a trust fund statute to obtain payment should contact his or her attorney to determine whether a trust fund statute can provide assistance in a particular case.

Many states have laws that address payment to people and entities providing labor, materials and equipment to improve property. These laws commonly are referred to as Prompt Pay Act laws. Generally, Prompt Pay Act laws require contractors to pay subcontractors within a specific period of time. A failure to pay subcontractors in accordance with the terms of the Prompt Pay Act statutes subjects the contractor to additional charges, such as interest and attorneys' fees in the event a legal action is necessary to recover payment.

Roofing contractors should be sure to consult with a qualified attorney to determine whether there is a Prompt Pay Act in the state where work is to be performed. Where Prompt Pay Act laws exist, there may be an obligation imposed on the subcontractor to include certain language in contract to avail itself of the protections afforded by the Prompt Pay Act laws. Without this required language in a contract, an unpaid contractor may be left without recourse under the applicable Prompt Pay Act law.

If payment is not forthcoming, even after filing a lien or making a claim on a payment bond, it may be necessary to file a legal action to recover payment. Whether the legal action filed is a lawsuit or a demand for arbitration will depend on whether the parties' contract, if any, contains an arbitration agreement. In the absence of a contract clause requiring arbitration, roofing contractors would file civil lawsuits to recover past due money.

Whether the legal action is a lawsuit or a demand for arbitration, the objective is the same. The objective when filing a legal action is to turn the past due debt into a judgment against the debtor. Once a judgment is obtained against the debtor, the roofing contractor can begin collection attempts to recover on his or her judgment.

Collection tools available to a roofing contractor who has obtained a judgment against the underlying debtor include levying against the debtor's bank accounts or other projects with amounts due the debtor from third parties. Once a judgment is obtained, the roofing contractor can send the sheriff to levy on the property of the debtor. The property obtained by the sheriff is sold from the courthouse steps with most of the proceeds of the sale being paid to the roofing contractor to reduce the outstanding amount of the judgment.

A roofing contractor also can institute a garnishment action against the debtor's bank. A garnishment seeks to have the bank holding the account of the judgment debtor to pay the money in the account to the court in satisfaction of the judgment. The bank that is served with a garnishment action is required to take the debtor's money out of its account and pay into the court in accordance with the instructions accompanying the garnishment action.

If a roofing contractor is aware where the debtor may be working, the roofing contractor can file a garnishment action against the person or entity that is employing the debtor on a different project. The purpose of this garnishment action is to require the person or entity employing the debtor to pay the debtor's earnings into the court for disbursement to the roofing contractor to reduce the outstanding amount of the judgment.

For those roofing contractors who took the steps necessary to preserve either a claim of lien, the legal action to be filed may include the property owner as a defendant. The property owner will, of course, be a proper defendant in any legal action where the property owner is the

underlying debtor. If a property owner is not the underlying debtor, it still can be made a party to the lawsuit if the roofing contractor brings a cause of action seeking to foreclose on the claim of lien. If the roofing contractor is successful on its lien foreclosure cause of action, a lien is established on the property (the owner, who is not the underlying debtor, is not personally liable for the debt if a roofing contractor succeeds on a lien foreclosure cause of action, only the property on which the lien attaches is liable for the debt). Once the lien is established, the roofing contractor can force a sale of the property from the courthouse steps.

Roofing contractors who preserved their claims on applicable payment bonds may include a payment bond surety as a defendant in any lawsuit seeking to recover past due amounts. If a surety wrongfully or improperly denies a claim on a payment bond, it is subject to a claim alleging a breach of the payment bond. Moreover, many states subject payment bond sureties to additional penalties for denying a claim in bad faith. Roofing contractors would be wise to review such “bad faith” statutes to determine whether there are any conditions precedent to fall under the statute’s protection.

It is important that roofing contractors know and understand there may be a time limitation for the filing of a lawsuit to recover payment under a payment bond. For example, the AIA A312 payment bond requires roofing contractors who contract directly with prime contractors to file lawsuits within one year of completion of the entire project. Roofing contractors who do not have a contract with prime contractors must file a lawsuit on the bond within one year of their notice of a claim under the bond or one year from completion of an entire project, whichever is earlier. Under the federal Miller Act, a lawsuit on the Miller Act payment bond must be filed within one year of the claimant’s last day of work. Generally, the length of the statute of limitations for the filing of a lawsuit alleging a breach of a written

contract is anywhere from four to six years. Roofing contractors would be wise to verify the statute of limitations for bringing a breach of contract action in every jurisdiction within which they provide labor, tools and equipment.

Besides the filing of a legal action to recover payment, there are other options available to roofing contractors who are due payment. If payment is undisputed, one available tool for roofing contractors is to have the debtor execute a promissory note coupled with a personal guaranty from one of the executives from the debtor. The personal guaranty has the effect of making an individual liable for the underlying debt. This places the roofing contractor in a better position than just having to rely on the viability of the corporate debtor.

An unpaid roofing contractor also may obtain additional security for payment by having the debtor execute a deed to secure debt in conjunction with the execution of a promissory note. This is a particularly valuable tool for those roofing contractors who failed to preserve their lien rights. The deed to secure debt, in effect, acts as a claim of lien allowing the roofing contractor to foreclose, subject to senior secured interests, if payments are not made in accordance with the promissory note.

If a debtor is unwilling to provide a personal guaranty to guaranty repayment of a promissory note, a roofing contractor should seek to include language within the promissory note or settlement agreement that requires the debtor to execute a consent judgment whereby the debtor consents to judgment against it without the need for a lengthy, disputed lawsuit. If the parties are to proceed in this matter, it will be necessary for the roofing contractor to file a lawsuit, but the lawsuit can be paused, or stayed, while payments are made in accordance with the terms of the promissory note. At the time the promissory note is executed and the lawsuit is filed, the debtor executes the consent judgment for the roofing contractor to hold in trust pending

completion of all required payments under the note. If a payment is missed, the terms of the promissory note should entitle the roofing contractor to proceed immediately with the filing of the consent judgment. Once the consent judgment is approved by a court, the roofing contractor is free to engage in post-judgment collection efforts, such as levying the debtor's assets or garnishing its wages on other projects, as discussed previously.

Yet another tool available to roofing contractors with payments due from a general contractor involves the assignment of the general contractor's claims against the project owner. For example, consider the first-tier roofing subcontractor whose subcontract agreement has a pay-if-paid clause and assume the owner has not paid the general contractor. Although the underlying debtor is the general contractor, the roofing contractor may be better served pursuing money from the project owner. To pursue breach-of-contract claims against an owner, a roofing contractor will need an assignment of a general contractor's contract claims against the owner. Obtaining this assignment of claims allows the roofing contractor to pursue a breach-of-contract action against the owner.

A prudent roofing contractor will avail himself or herself of all protections available to ensure or secure payment for work performed. Those roofing contractors who know and understand the law of the state where work is to be performed, including the lien laws and bond laws of the state, will be the roofing contractors that best avoid unpaid accounts. Moreover, by knowing and understanding the contractual provisions to be negotiated to help ensure payment is made, roofing contractors also can expect to find themselves writing off fewer bad debts.