WHEN CAN YOU STOP WORK FOR NONPAYMENT?

PLANNING AHEAD

When an owner or general contractor has not paid a roofing contractor the sums it is owed under the contract, the roofing contractor is faced with a difficult decision: Does the contractor continue to invest time and money in the project, with no assurance of payment, or does the contractor pull off the job and engage in what might become a costly confrontation?

The language of a contract is critical in determining whether a roofing contractor is entitled to suspend the work because of nonpayment. Before executing contracts, roofing contractors should review the circumstances under which they have the express right to suspend the work in the event payment is withheld or delayed because of reasons that are not the fault of the roofing contractor. Although some contracts expressly provide that a roofing contractor is entitled to suspend the 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 dealing with payment.

When in doubt as to the effect or meaning of a particular clause or whether and under what circumstances a contract allows the roofing contractor to suspend the work for nonpayment, he or she should consult an attorney. Alternatively, a contractor should compare the clause in the contract to Article 9.7 of the AIA A201-1997 General Conditions of the Contract for Construction. That clause, an example of a fair and reasonable suspension for nonpayment

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clause, provides that if 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 the 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 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 startup plus interest.

CONTACT THE OTHER PARTY

Regardless of whether the contract provides for suspension of the work in certain circumstances, if the nonpayment is allegedly the roofing contractor’s fault, the contractor probably will not have a right to stop working even if he or she disputes the propriety of the allegation. If, on the other hand, the nonpayment is not the roofing contractor’s fault, he or she may have the right to stop working until payment is received. Accordingly, no determination of whether to suspend the work can be made without a firm grasp of the other party’s reasons for not paying. When the other party claims payment is being withheld because of the roofing contractor’s fault, other remedies remain available to the roofing contractor. For example, in that circumstance, a roofing contractor still has the right to place a lien on the property, make a claim on a payment bond, and/or invoke the protection of the state’s prompt pay act. Regardless of whether the nonpayment is allegedly the roofing contractor’s fault, subsequent invoices should reflect past-due amounts and accruing interest.

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READ THE CONTRACT

When nonpayment is not the roofing contractor’s fault, he or she must review the contract before deciding to suspend the work temporarily. Most contracts that allow for suspension of the work in certain circumstances identify specific steps that must be taken before doing so. The steps and notices required by the contract should be closely and strictly followed. Typically, before suspending the work, a roofing contractor must provide the other party with written notice of the overdue payment and an opportunity to pay within a given time period. Some contracts require a second written notice before suspension of the work can begin. In addition, the contract may set forth what is and what is not a valid ground to withhold payment. If, for example, the roofing contractor’s contract with a general contractor contains a contingent payment clause and the general contractor has not been paid, the roofing contractor may not have the right to suspend the work for nonpayment even if the reason the general contractor has not been paid is unrelated to the roofing contractor’s work. In that case, the prime contract must be reviewed, as well, to determine what the general contractor’s obligations are to its subcontractors and suppliers when the general contractor has not been paid.

WHAT TO DO IF THE CONTRACT DOES NOT ADDRESS THE ISSUE OF SUSPENSION FOR NONPAYMENT

If a contract neither grants nor denies a roofing contractor the right to suspend the work when payment is not received, in most states, a court will evaluate 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 terms of the

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contract as opposed to a small or technical violation. State laws vary, and it is best to seek the advice of an attorney in this scenario before suspending the work. Moreover, if the failure to pay was not a material breach, the roofing contractor may be found to have materially breached the contract when he or she suspended the work, exposing himself or herself to liability for damages suffered by the owner as a result of the improper suspension. In determining whether the failure to pay was a material breach, courts will typically consider facts such as the amount due, the size of the contract, the degree of lateness of the payment, and whether the roofing contractor has acted reasonably and in good faith. The context of the nonpayment is generally 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. Written notice should be provided to the other party because a written warning that continued nonpayment will preclude the roofing contractor from continuing to work because of a lack of resources to pay employees or suppliers demonstrates reasonableness and good faith on the part of the roofing contractor, and such written notice may be important evidence in a later trial.

Even in seemingly one-sided scenarios, a roofing contractor must make a judgment call and, if he or she decides to suspend the work, risk a subsequent finding that doing so amounted to a breach of contract. There are simply no guarantees that a judge will rule as expected, and 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 the nonpayment protects against claims that suspension of the work was not justified and allows the roofing contractor to pursue other methods of recovery. Besides – more –
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an action for breach of contract against the nonpaying party—without the attendant risk of a finding that the roofing contractor breached the contract by suspending the work—every state has some form(s) of statutory protection for unpaid contractors, such as lien statutes, payment bonds and prompt pay acts.

An important factor to consider in making this judgment call is the potential exposure of delay or liquidated damages. If a schedule is tight and the potential for extensive delay damages is great, this is a factor to be considered when deciding to stop the work. Alternatively, if delay damages are not a concern, a roofing contractor might decide simply to not show up for two days, especially if crews can be put to work elsewhere.

CONCLUSION

The best way to protect a roofing contractor’s right to suspend work for nonpayment is to take affirmative steps before signing a contract. Roofing contractors should review their contracts to see whether the roofing contractor has the right to suspend the work in the event of nonpayment and negotiate the addition of such language. When faced with a nonpayment situation, a roofing contractor should review the contract carefully and be sure to abide by all notice and timing requirements strictly. If the contract does not expressly provide for suspension of the work, the roofing contractor should exercise caution, prudence and thoughtfulness in deciding a course of action. Consultation with legal counsel can help identify and quantify the risks and benefits associated with suspension of the work. Ultimately, the goal is to gain as much leverage while managing and limiting risk exposure.

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