



Getting the Last Check

by David R. Glissman, Esq.

Every contractor has no doubt watched in dismay as their final payment due from a job is held hostage to a punch list which changes, expands and ultimately consumes the final payment. A desire to stand by your "good reputation" gives way to the reality that your owner or general either has no intention of paying or will be forever displeased with work which was performed to specification. To make matters worse, these final payments are often a small percentage of the completed contract price and less than it would take to collect. This article gives useful tips on collecting sums due you after the job is completed and—given that collection costs would probably exceed the economic value of the claim—assumes minimum use of professional advisors.

Before the Contract is Signed

First and foremost, know your customer. Do they pay? Are they impossible to work with? Second, since many "punch list" claims arise from mismatched expectations, make sure labor, materials, and plan specifications are carefully spelled out in the contract.

To the extent it is appropriate and cost effective, drawings and material samples should be provided and referenced by number and date on the contract. The customer should be encouraged to review these and acknowledge their satisfaction with each by a signature on the document or on some reference line in the contract. The specifications should be written or referenced in a manner that allows a third party to easily and objectively determine what your obligation was. *A warning:* Remember, specifications are a two-edged sword. You are expressly

contracting to perform that which is described. A drawing or sample, if out-of-scale or exaggerated, may haunt you at the time of collection. In addition, your contract should set forth clear and unambiguous milestones for payment and you should carefully review them with the customer. What is 50 percent completion? Do you define it by completed product, by time and material, or otherwise? What is "substantial" completion? Is it issuance of a Certificate of Occupancy? If so, is a conditional Certificate of Occupancy acceptable? Regular payments during the course of work are far superior to a lump sum at the end. Get a deposit as well.

During Construction

Regular communication as to project status and customer satisfaction are critical. Many "collection" problems are in fact miscommunication problems that could and should have been addressed during the construction period.

Sensing Trouble

Contractors often sense when a job is going bad. Complaints are on the rise, changes are constant and seemingly inappropriate, and "blame" is beginning to surface. Recognition of a developing dispute is critical, and the contractor should immediately begin to prepare for dispute resolution at the first sign of conflict. Preparation for dispute resolution should include: (1) careful review of and strict compliance with contract terms and conditions; (2) at minimum, limited involvement of your advisers at an early stage (a simple call for guidance may cost \$50 to \$100, but may pay off handsomely in preparing to respond to the dispute or extricating yourself

from further involvement); and (3) preparation of documentation and preservation of important facts should be a standard routine on all jobs, but it is a must as dispute resolution begins. In general, one should compile facts with respect to:

- *Obligations*—via contract; change orders; written confirmation of oral change authorizations; notebook entries of oral agreements (but please confirm "oral agreements" in writing).
- *Performance*—via daily logs of crew activity; owner or other contractor interference; material delivery dates and problems; photographs of the work at various stages with some evidence of the date within the four corners of the picture; invoices and support data.
- *General facts*—via notes on desk calendar, phone slips, correspondence, etc.
- *Dispute issue*—via an accurate statement of the problem, the basis (best case) for the claimant's position and the response to each of the claims against you.

Making Your Case

The information described above should be compiled in the form of a written report establishing your obligation, full performance, and the amount due. That report should be presented in a face-to-face meeting between the owner and a principal in your company. The presentation should start with delivery of the report. The amount currently outstanding should be recreated with each invoice and the payment and performance compliance documents attached and referenced as an exhibit. A covering narrative should be prepared in simple language reciting contract and performance history, the applicable contract provisions, change orders, written communications, and conversations by date and party. As applicable, photographs and specification exhibits should be attached. If the records have been maintained as discussed above and placed in a job file, preparation time can be limited to two or three hours by anyone familiar with the file. If the package and your presentation of it, together with a few follow-up phone

calls fails to produce results, a professional can be contacted to advise you of the legal basis for your claim. That legal basis can then be put into writing and sent along to the customer in the form of a formal collection letter.

Next Stage

If, after submitting a written report, you still haven't collected the amount due, then a practical business decision must be made. Is collection worth the cost? Inexpensive alternatives include assignment of the claim to collection companies on a contingency basis, small claims court if your claim falls below the maximum amount (you can always reduce it to bring you within small claims jurisdiction), and/or filing of a mechanics lien and not foreclosing on it until the last possible moment in the hope that the cloud on title will produce results. Mechanics liens vary by state, but each must be properly and timely drafted, served, and recorded. The applicable statute should be reviewed and lien compliance dates flagged on your calendar. You may also wish to use a lawyer on a limited basis to send letters and make phone calls. Another advantage of preparing the report discussed above is that your legal fees will be reduced since you've already done the homework of piecing the transaction and documentation together.

Other Options

As a final word of caution, this article is not intended to be all-inclusive in its coverage. No mention is made of debtor protection laws such as bankruptcy, creditors' rights statutes, contract clauses, and preventative legal steps which may be taken during the construction stage. It may be useful to have your legal advisor review your contract form to make sure it is up-to-date with current law and to be familiar with your on-site practices such as use of sub-contractors, change orders, bonding, issuance and obtaining of lien waivers and the like. ■

David Glissman is a member of the Land Use Group of Robinson & Cole, a 120-lawyer firm in Hartford, Conn. He specializes in commercial real estate.