



2022 Town Hall Diversity Series

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Title: How to Deal with Pay When Paid Contract Provisions

Facilitator:

Marvin L Johnson, CCA, CCP | Senior Manager & Team Leader | Project Risk, Management and Advisory Services | Construction Audit Services | National Association of Construction Auditors | Construction Management Partners, LLC

Synopsis:

In today's design and construction industry, understanding your contract rights starts with proper negotiations, clarity of scope, performance guidelines for all parties, contingencies for non-performance and lastly, actually reading your contract. Obtaining the desired project outcome for your firm requires a delicate integration of effective and direct communication.

Pay When Paid contract language is an industry standard, however, utilization of this language without clarity and understanding renders your firm subject to non-payment of professional/construction services and/or costly legal fees to defend your payment rights and entitlement for work performed.

Too often, more time is spent bidding a project than actually reviewing the agreement that formalizes a party's selection to perform the work. Generally, pay-when-paid provisions are not discovered or really understood until the parties are well into a job. By then, it's normally too late and too costly to do what could have, and should have, been done during contract negotiations.

Session Content:

When it comes to ensuring you have the best chance of success with your design and construction contract, nothing matters more than understanding your contract provisions on **When and How you will get paid.**

A "Pay When Paid" clause provides that payment to the Subcontractor will be made within a certain period of time after the contractor has been paid by the owner, rather than within a period of time after the subcontractor has performed its work. Generally, "Pay When Paid" clauses are interpreted to merely **postpone** payment for a **reasonable** time. "Pay When Paid" clauses do not excuse an unpaid prime contractor from all obligations to pay the valid invoices of subcontractors and suppliers.

A New York Court of Appeals refused to enforce a "Pay If Paid" clause on public policy grounds. The court reached its result by noting first that the Subcontractor's lien right depended upon its contract rights and then observed that a "Pay If Paid" clause could indefinitely suspend a Subcontractor's contractual right to payment. It, therefore, concluded that a "Pay If Paid" clause amounted to a forfeiture of the Subcontractor's lien right.

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