

You fulfill the terms of your agreement with your customer on the construction project whether it be a private, public or federal funds paying for your labor and materials. You provide equipment or other services, but do not receive payment. This is a common and real possibility in the construction industry. The following are some of the landmines to avoid in your collections remedies.

# Sidestepping the Minefields When Collecting Your Money

## Signing Away Your Rights

I believe many in the construction industry would be surprised to know how often companies seeking payment sign their rights away to important third-party rights, including mechanic's liens, without even knowing they are doing so. Two of the most common ways of signing away your rights can occur when using joint checks or the releases common to the construction industry.

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check certifies payment of all amounts due to it up to the amount of the check. So, if the material supplier signs the joint check back to the subcontractor (other party on the joint check), the material supplier has lost its third-party rights, including mechanic's lien rights, for the amount due by the maker of the check as the material supplier is deemed to have been paid. The intent of the maker of the joint check is to discharge its obligations to all payees. This does not, however, appear to impact a company's ability to pursue breach of contract remedies against its customer.

**Releases:** Most states use the standard construction industry releases in some format consisting of both progress releases and final release, each with a conditional and unconditional format. Over the years, I cannot tell you how many clients unknowingly lost their third-party rights when signing the releases. One of the most common mistakes is the providing of an unconditional release (whether progress or final) before the funds are safely deposited into their bank accounts. Make no mistake about it, if you are providing an unconditional release, you are giving up your third-party rights the moment the release is handed to another party.

Conditional releases can also negate third-party rights if the dollar amount stated in the conditional release is incorrect in that it does not cover the amount in the progress release for the coverage period, or is not the full amount needed to pay off the job in its entirety for the conditional final release.

In either case, there are breach of contract remedies which can impact the claimant's customer.

## Knowing the Chain of Command on a Project

In the world of third-party collection rights on construction projects, knowing where you stand in the chain of command on each job is crucial.

On federal projects, the rules are the same in every state when it comes to using and enforcing your rights against the Miller Act payment bond. There are strict limitations on who has access to pursue the Miller Act payment bond. For instance, a supplier to a

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**Joint checks:** How often is a company presented with a joint check and asked to sign the check back over to the other party on the check? How often have you asked a tier below you to do the same? A common request is, "If you sign the check back over to us, we will write a single-party check to your company." That sounds simple and fair enough, especially if you are not owed the entire amount of the joint check. However, you need to make sure the state where you are working does not have statutes or case law that supports the loss of third-party rights if a party signs the joint check over to the other party on the check. For example, in California there is the "joint check rule." This rule, supported by case law, states a material supplier endorsing the

supplier has no rights to pursue the Miller Act payment bond. Another important reason to know where you are in the tier on the job is that the rights against the Miller Act payment bond cut off at the second tier. You count the tiers starting below the general contractor, so the subcontractor(s) contracting with the general contractor are tier 1 and any sub-subcontractor or material supplier contracting with the subcontractor is tier 2. The danger usually comes into play when a supplier is contracting with a sub-subcontractor as that makes the material supplier tier 3 and below the cutoff line. Thus, the material supplier would have no rights against the Miller Act payment bond issued by the general contractor, but if the subcontractor was required to issue a payment bond, the material supplier may have rights against the subcontractor's payment bond.

Also of note is the importance of knowing where in the tier you are on the federal job in regard to the 90-day notice requirement. A Notice is required to make a claim against the Miller Act payment bond when the

claimant's customer is not the general contractor. The rights are lost when a claimant thinks its customer is the general contractor and no 90-day notice is sent; only to find out the customer is a subcontractor.

On jobs other than federal projects, it is important to find out any limitations of rights in the state where the project is located. In California, a material supplier to a material supplier, or a rental company that provides equipment or material to another rental company has no third-party rights, including stop payment notices, mechanic's liens or payment bond rights.

It is also important to know where in the chain of command on any project your company is, especially on larger jobs where there could be more than one general contractor. In this case, send any required preliminary notice to the correct general contractor. A claimant's third-party rights would most likely be lost if the required preliminary notice is sent to a general contractor not directly in the chain above the claimant.

### Knowing the Type of Project and the Rights Available

It may sound easy to figure out whether the project is a private, public or a federal job, but that is not always the case. The need to know the type of job relates directly to which third-party rights are available to help collect the money owed. For example, schools and hospitals are just two types of projects that can be either private or public works of improvement. When there are natural disasters, there could be federal or state funding for private property. This is one of the trickier situations where a project appears to be a federal project because there is federal funding, but if the funding is for private property, there could be mechanic's lien rights pursue and likely no Miller Act payment bond.

The above are just a few of the landmines that may impact your ability to use the third-party rights available to collect money owed to your company. Knowledge is key in the area of construction collection and it is best to utilize all paths of recovery available to your company.

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