



## Louisiana Construction & Collection Law Newsletter

Legal issues arise at all stages of construction — planning, design, contract negotiation, on-site, and post-completion. This newsletter is aimed to assist contractors, architects, engineers, design professionals, consultants, material suppliers and owners avoid many common legal landmines; how to navigate through project unscathed; and the steps to take to properly preserve rights and privileges when conflict and dispute arise.

### QUICK TIPS

#### I. CONTRACTS

1. PAYMENT TERMS. Are you running the risk of not getting paid? Contingent payment provisions may preclude payment altogether.
2. BETTERMENT CLAUSES. Reduce exposure for design driven changes with the inclusion of these clauses in you AIA contract.

#### II. THE LIEN BASICS

1. In writing.
2. Signed by the person asserting the Lien.
3. Reasonably identify the property where the work was performed or materials supplied with a full legal property description.
4. Set forth the amount of the claim and the basis for the debt owed.
5. There is no formal requirement to attach an invoice or proof of debt.



### I. CONTRACT CONSIDERATIONS

In Louisiana, is vital to fully understand all of the terms of your contract as well as the practical consequences of any breaches. Today, we look at some of the most questioned or overlooked contractual terms.

#### A. PAY-WHEN-PAID V. PAY-IF-PAID CLAUSES.

Contingent payment agreements are typically recognized in Louisiana jurisprudence as “pay-when-paid” or “pay-if-paid” provisions and are generally enforceable based on the fundamental notion of contractual freedom. Such agreements commonly appear within construction subcontracts. In Louisiana, “pay-if-paid” provisions are construed as transferring the risk of owner nonpayment to the subcontractor whereas “pay-when-paid” provisions are interpreted as simply delaying payment to a subcontractor until the owner pays the general contractor

“Pay-when-paid” provisions mean that the obligation to make payment is suspended for a reasonable amount of time for the contractor to receive payment from the owner. Accordingly, such agreements create a timing mechanism only - a reasonable period of time.

Conversely, under a “pay-if-paid” agreement, a general contractor’s obligation to pay the subcontractor arises if, and only if, he is paid by the owner. However, since these provisions create a possibility that there may be no payment to the subcontractor, Louisiana jurisprudence requires parties to use explicit language to indicate that payment by the owner is not a reasonably certain event.



### III. LIEN TIPS

1. GENERAL CONTRACTORS  
ALWAYS file your Notice of Contract before work on the project commences. If the value of the project exceeds \$25,000, failure to file the notice in the mortgage records will result in the forfeiture of your lien rights as a general contractor. Though, based on the scope of your work, the general contractor could preserve its lien rights solely as a laborer.

2. LIEN WAIVERS  
Based on your role on the project, it may be necessary to execute a waiver as a precedent to payment. In other words, you will be asked to waive your lien rights before receiving your next payment. Subcontractors and suppliers can protect themselves and preserve their lien rights by insisting the waivers be contingent upon receipt of funds. Thus, if payment is not received, then your prior waiver is null and void.

### B. BETTERMENT CLAUSES - DESIGN PROFESSIONALS

While project change orders are generally expected on most projects due to either new requests by the owner or unforeseen conditions, owners routinely get frustrated with change orders necessitated by design errors or deficiencies in the plans and specifications and, ultimately, struggle to understand why design professionals may not be liable for these change order costs.

The simple answer is the “necessary/betterment” clause which reduces the professional’s exposure and liability for any design omissions. Under an AIA contract, a typical clause reads as follows:

If any required item or component of this Project is omitted from the Drawings and Specifications, the Architect and Architect’s consultants shall not be responsible for paying the cost to add such item or component to the extent that such item or component would have been otherwise necessary to the Project or otherwise adds value or betterment to the Project. However, the Owner will not be responsible for the cost of Additional Service under Article 4 by Architect or Architect’s consultants arising out of or made necessary by such omitted item or component. In no event shall the Architect or Architect’s consultants be responsible for any cost or expense that provides betterment, upgrade, or enhancement of the Project.

Thus, under this provision, the design team is not liable for changes that were necessary or added value/betterment to the project. Likewise, while the owner is responsible for any construction work made necessary by the design changes, it is not liable to pay the architect for the architect’s work to make those changes.

## II. COLLECTIONS: PROMPT PAY CONSIDERATIONS

Every contract should establish the parties’ expectations and timing for which payments must be made. However, irrespective of the terms of the contract, there are statutory deadlines which require general contractors to make payment to its subcontractors or suppliers if the general contractor has received payment from the project owner. Moreover, failure to comply with these statutory deadlines can become quite costly to the contractor. Under La. R.S. §9:2784, a contractor’s failure to pay his subcontractors and suppliers without reasonable cause within fourteen consecutive days of the receipt of payment from the owner exposes the contractor to penalties (1/2% of the amount due, per day) and reasonable attorney fees.

Of course, circumstances routinely arise where the contractor and its subcontractor disagree on the amount owed and due. Thus, the issue quickly becomes whether the contractor has “reasonable cause” under the statute to withhold payment. The Louisiana Supreme Court has yet to consider the meaning of “reasonable cause” under the statute, but in 2016, the United States Court of Appeals for the 5<sup>th</sup> Circuit considered this issue in *Fisk Electric Co. v. Woodrow Wilson Construction Co., Inc.*

In *Fisk*, Woodrow Wilson Construction Co., a general contractor, hired Fisk Electric Company (“Fisk”) on a school construction project. Fisk’s subcontract provided that Fisk would receive monthly payments, and that when Wilson received payments from the school board, it would make progress payments to Fisk within seven days. Subsequent to substantial completion of the project, Fisk recorded a statement of claim for its remaining subcontract balance, as well as charges for project changes and extended labor and job expenses. However, Wilson did not make any payment to Fisk at this time, nor when it received additional payments from the school board over the next year and a half.

Subsequently, Fisk filed suit against Wilson to enforce its lien amount, plus penalties and reasonable attorney’s fees. In response to the prayer for penalties and fees, Wilson contended that it had “reasonable cause” to withhold payment.

In considering the arguments, the Court first reviewed the case of *Contractors Supply & EQ-Orleans v. J. Calderera & Co.*<sup>1</sup> In *Contractors Supply*, the court found the plaintiff contractor was entitled to a portion of his past services, but not penalties and attorney fees since the “amount demanded by the plaintiff was out of proportion to the amount owed. Therefore, the defendant had reasonable cause to withhold payments.”

Likewise, in *Fisk*, Fisk’s sworn statement of claim asserted that Wilson owed over two times the amount remaining on the subcontract. The Court noted that this “out of proportion” demand alone could have been sufficient under Louisiana law to constitute reasonable cause not to pay. However, the amount of Fisk’s demand was not the only outstanding dispute as other amounts related to Fisk’s subcontractors’ claims were also in dispute, so much so that the court could not discern the total value of those claims. Thus, given the holding in *Contractors Supply*, the 5<sup>th</sup> Circuit concluded that Wilson had reasonable cause to withhold payment.

While this holding case is not necessarily controlling, it offers guidance and insight into what may constitute reasonable cause for future matters. Of course, under most circumstances, the general contractor should make sincere efforts to pay any and all “undisputed” amounts and assert the “reasonable cause” defense against any claims out of proportion to the undisputed amount



### III. PROFESSIONALS: WHEN DOES YOUR EXPOSURE END?

Louisiana Revised Statute §9:5607 establishes that claims against engineers, surveyors, architects, landscape architects, interior designers, real estate developers (relative to plans certified by a professional engineer or professional architect), whether based upon tort, or breach of contract, or otherwise arising out of an engagement to provide any planning, construction, design, or building, cannot be pursued at the latest within five (5) years from:

- (1) The date the acceptance of the work is filed in the mortgage office; or
- (2) The date the owner occupies or takes possession of the improvement, in whole or in part, if no such acceptance is recorded; or

<sup>1</sup> 734 So.2d 755 (La. App. 5 Cir. 1999).

(3) The date the person furnishing such services has completed the services with regard to actions against that person, if the person performing or furnishing the services, as described herein, does not render the services preparatory to construction, or if the person furnishes such services preparatory to construction but the person furnishing such services does not perform any inspection of the work.

This five year limitation is a preemptive period, meaning that the timeframe cannot be interrupted or suspended and, once the period runs, any alleged causes of action are destroyed and extinguished. Certainly, depending on the factual circumstances, there may be other applicable prescriptive or preemptive periods that may further restrict the deadlines for filing actions against professionals. However, this statute provides piece of mind that claims have a definite expiration date.



Leake and Andersson, LLP is an established litigation and general business practice law firm with offices in New Orleans and Lafayette, Louisiana. Our construction practice group litigates and defends our clients in private, state and federal construction projects, including design defect, professional liability, comprehensive general liability and bond and surety claims.

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