

Why Can't I Get Paid For My Work?

By John G. de Vries

Current laws governing construction contracts are unfair to subcontractors, and it's time to do something about it.

The names of the companies in the hypothetical scenario below are fictitious. The views given are not intended to be "expert," but rather are intended to provide a discussion of topics of interest to subcontractors.

Adam and his crew at Harbor Iron, a miscellaneous steel fabrication shop, had worked overtime for the past three months. They were doing two jobs simultaneously for Acme Construction, and Adam was excited to reap some real returns on his recent investments in equipment and a new, larger shop. After five years in business, he was no longer a tenant but a mortgage holder with more than 20 employees.

A lull in work from his regular customers—small contractors, owners, and property managers—came at a bad time and forced Harbor Iron into the arena of contract bid work for large GCs. After investing so much of his money into a great new shop and finally having assembled the right crew, the last thing Adam wanted to do was scale back!

Adam's first job for Acme was near completion and he was proud of his crew's timely and excellent workmanship. His close relationship with John Smith, Acme's project manager, was a result of his crew's "above and beyond performance." John could count on Adam to "make it happen." In turn, John would expedite Adam's requisitions and see that Acme produced timely partial-progress payments.

When John asked Adam to complete a punch list of work left undone by the job's large structural steel fabricator, Adam agreed to do it without hesitation. After all, if the punch list was not done, it would only hold up Adam's schedule and, therefore, his payments. John assured Adam he would get paid for the additional work as he signed off on the work order. His payments, however, were always short of the requisition amounts—reduced by the standard 10% retainage, and then further by arbitrary amounts that resulted from the "paid when paid" clause in his contract.

Adam was constantly assured that as the amount owed by the owner to the GC shrunk toward the end of the contract, he would be paid for any shortfalls, including the retainage.

Adam knew something was really wrong when he showed up on the job one Monday morning to find a new PM in place of John. John had suddenly been transferred to California to run another Acme job. The new PM seemed rather cold and told Adam they were way over budget on the job. He told him he had better not ask for any more progress payments since the owner had not yet paid Acme.

By this time, Adam was almost done with the first job and halfway into the second. Acme owed him over \$150,000. His steel supplier was calling, looking for over \$50,000 in invoice payments that

best interest for the long term. Unfortunately, construction is a very complex process that inherently breeds job overruns and litigation. As jobs go over budget, owners look for ways to not pay the overruns and, in turn, the GCs do their best to avoid losses on the job. When the owner refuses to pay, the GC is left with a choice: sue the owner who keeps him in business, or fail to pay the subcontractor who, in many cases, can be replaced and probably cannot afford litigation.

This scenario happens all too often and is not limited to steel fabricators. Sheet metal shops, plumbers, dry wall hangers, electricians, etc. have all been burned. Most New England states, for example, have left private construction contracts up to negotiation between the GC and their subs or the GCs and the

When the owner refuses to pay, the GC is left with a choice: sue the owner who keeps him in business, or fail to pay the subcontractor who, in many cases, can be replaced and probably cannot afford litigation.

had grown to more than 60 days old, and he did not know how he was going to make payroll on Friday.

Three weeks later, with 99% of the work completed on the first job and 60% completed on the second job, Adam had to lay off his crew and withdraw from both job sites. The GC already had another steel fabricator waiting in the wings to finish his work—work that he was so close to completing, yet would never be paid for.

How did this happen? Adam had earned a great reputation and was proud to have always paid his vendors on time. The American dream that Adam and his crew had worked so hard for would soon end in bankruptcy.

Most steel fabricators have excellent relationships with reputable GCs. Many GCs have learned that taking advantage of weak subcontractors is not in their

owners. There are few laws that protect the smaller and often financially weaker subs.

The current system has allowed subcontractors and their suppliers to become the ones who carry the cost of financing construction work, rather than the GCs and the owners. What is more disturbing is that the combination of non-escrowed retainage and "paid when paid" clauses in contracts can create the incentive for a GC to settle for less than the full contract amount on behalf of their subs, to gain last look on the owner's next job!

In one state this unfair scenario can no longer take place. In Connecticut, it took only one state senator, Thomas A. Colapietro (whose son, a plumbing contractor, did not get paid for a large job), and about a dozen members of the American Subcontractors Association of Connecticut to draft a series of laws aptly called

the "Fairness in Construction Financing Act." This series of laws, passed between 1999 and 2005, has helped level the playing field for subcontractors. Highlights of its provisions state that:

- ✓ Retainage must be limited to 7.5% for private construction, and retainage payments must be made alongside progress payments and held in escrow.
- ✓ Owners must pay amounts due for labor and materials within 30 days after receiving a written payment request, unless it is in dispute.
- ✓ The GC is required to pay for labor and materials within 30 days after payments were received from the owner for such labor and materials.
- ✓ A subcontractor has the right to sue an owner directly for late payments, effectively eliminating the use of "paid when paid" clauses.
- ✓ Waivers of mechanics' lien rights for work not yet performed or paid for (i.e. blanket "no-lien" clauses) are invalidated.
- ✓ Courts or arbitrators have the power to award a claimant its attorney fees, interest, and even punitive damages if it was found that payments were "unreasonably withheld" or were withheld in bad faith.

My only question is this: If only a handful of people could help pass such fair and revolutionary legislation, why can't we get similar laws passed in the rest of the country? Here is our chance to do something right now!

I encourage all structural steel subcontractors to contact their local state representatives. If you are a sheet metal fabricator, get involved with your local Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) chapter (www.smacna.org). And whatever your trade, it is good idea to get involved in your state's association of subcontractors, who are also working to pass favorable legislation (www.asaonline.com).

We can no longer just complain about how unfairly we are treated in the contract process—it is time for us to do something about it! As business owners and managers, we have to get involved. We have to speak out as one voice to help legislate changes that will make being a subcontractor a more financially rewarding and stable career. ★

John G. de Vries is President and CEO of Central Steel Supply Company in Somerville, MA. This article first appeared in Central Steel Journal, fourth quarter 2005.