

Getting Paid: Some Suggestions

Executive Summary: The law* provides the rules of getting paid in construction. Sometimes contractors must use the law, other times there are other easier (less expensive and quicker) ways of getting paid.

*I'm not a lawyer, so please make sure to consult with your attorney on any of your legal questions resulting from this read – also know that each of the fifty (50) states handles payment rules and laws differently!

The Biggest Hammer - the Lien. Gerald Clay, Esq., of Clay Chapman Iwamura Pulice & Nervell, Attorneys at Law, put on a great seminar on behalf of the GCA of Hawaii. The most common tool used for getting paid is “the lien”. What is a lien?

A lien, or a mechanic's lien, most simply defined gives the filer the right to foreclose on a property so they can get paid. You can sell the property from under the owner! General contractors (GCs), subcontractors, material suppliers, and even professional service providers, can use this tool.



Filing a lien in Hawaii is a long drawn out process. You'll need a lawyer. In other states, like Washington for example, it looked to be the opposite – no more difficult than buying a candy bar at the local quick mart.

As a side-note, the process by which you “lien” on a public job is different because you cannot file a lien on public projects. The process is similar in that contractors follow what's called the Miller Act in federal matters, or the Little Miller Act for state ones in Hawaii. This process involves suing on a payment bond versus foreclosing on private property.

Generally Good Practices. Mr. Clay is an expert in getting contractors paid. The takeaway for good day-to-day practices for construction professionals follow:

- Negotiate – negotiate your contracts. “Negotiate, negotiate, negotiate” as Mr. Clay stated. Fight the “boilerplate” language. This may head off any downstream problems if your contract is favorable from the beginning.
- MAIN contract – get it – if you are a subcontractor and, as is typical, the general contractor is holding you the MAIN contract (the GCs contract with the owner), demand a copy. This is a normal request and the GC will likely oblige without complaint. You are signing up to two contracts when you're a subcontractor – the GC to subcontractor contract, and the GC to owner contract.
- Maximize retention – in regard to the MAIN contract above, you need to read it. Are you getting the same options on retention? It may be that the owner is releasing 50% of the retention at 50% of job completion, or that the GCs retention with the owner is 5% while he's holding 10% on you. That's not fair and most GCs will pass on the same terms – but you have to know to ask!

- Interest on late payment – check with your attorney, but the law allows you to charge varying levels of interest depending on the transaction. Interest can be 1.5% per month, prime rate, or maybe it's undefined. Each state differs and it's not easy to decipher.
- Check for contractor license status – if you are working under a non-licensed contractor, you may waive your rights to file a lien.

Good Practices on Getting Paid. Here's now some discrete ways to get paid:

- Call the GC – sometimes subcontractors aren't getting paid because the GC can't get paid. Start with a call because maybe you can help your GC help you.
- Call the Owner – if you're a subcontractor, call the GC's client: the project owner. GCs hate this which is why it works.
- Joint checks – A joint check, or a two-party check, is written to the GC and to you. The check actually reads "General Contractor, Inc./Subcontractor, LLC" (obviously the parties would be the actual party names). If the owner will cut joint checks, the check is first endorsed by the GC and then you take it to your bank and endorse it for full deposit in your account.
- Use the legislature – if it is a city, county, state, or federal project, contact the appropriate councilperson or senator.
- An attorney letter – you can write threatening letters all day long, but once it hits an attorney's letterhead it starts to get real.
- File a Complaint at RICO – Hawaii has an office called the Regulated Industries Complaints Office (RICO) in which parties may file a complaint about not getting paid. Offices like these across the country may or may not be able to suspend a license which is a blow to a contractor's livelihood.



My Story. I've been on all ends of collection from asking for the money to being asked for the money. None of it's fun.

From the legal side, the attorney pressure is relentless and ruthless and cold which can be a good thing depending on which side of the table you're sitting. In one of my experiences, it was me on one side of the table and Mr. Clay on the other. Let's just say that his technique was effective.

And now, not from the legal side, there are techniques such as when someone tells you they're not afraid to go back to prison, and that they know of places where one can bury a body.

My experience is that there are many options of varying effectiveness. Choose accordingly. And wisely.

PS. And, oh, I've never been to prison.