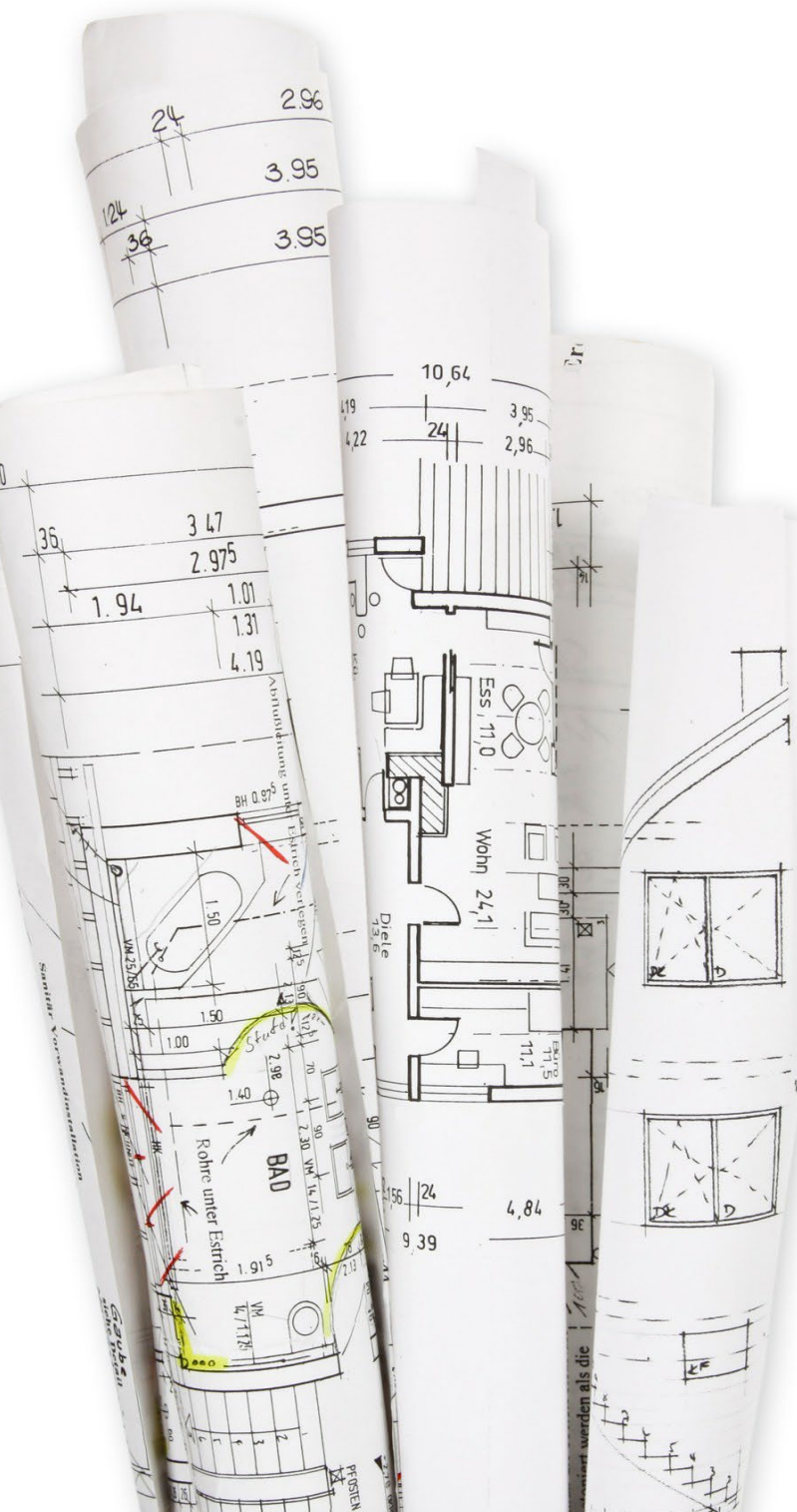


BUILDING BLOCKS

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“Pay If Paid” vs. “Pay When Paid” in the Design & Construction Industry

By: *Eric O. Pempus, FAIA, Esq., NCARB*
DesignPro Insurance Group

There are two basic types of payment approaches in the design and construction industry, involving architects/engineers (A/Es) and construction contractors regarding payment for their services. One is “pay if paid” and the other is “pay when paid,” and each is very different for purposes of compensation. Both have different implications within the concept of “work first then get paid later.”

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Do you pay someone before or after a service? Depends on the service and the vendor. Most contractors and builders want a partial payment to get started and more as the work progresses, then a final payment when complete. Other services are paid only upon completion, and some want payment up front.

work+first+then+get+paid+later&rlz=1C1CHZN_enUS1087US1087&oq=work+first+then+get+paid+later&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQIRigATIHCAIQIRigATIHCAQIRigAdIBCTU4MjhqMGoxNagCCLACAQ&sourceid=chrome&ie=UTF-8

To that point, for example, a young student on summer break cuts a neighbor's grass, then gets paid (work first then get paid later). On the other hand, you go to the fast-food restaurant drive through (you pay first then you get your food). There are various variations in the world of compensation. Let's compare "pay if paid" and "pay when paid" for design and construction industry professionals with examples of compensation approaches.

"PAY IF PAID"

Design-Build Institute of America's Standard Form of Agreement Between Design Consultant and Design Sub-Consultant, DBIA Document No. 575 (2022), Article 6.6.1 states that:



Design Sub-Consultant agrees that **as a condition precedent** (these are

<https://tap2pay.me/9-payment-methods-businesses-integrate-competitive/>

magic/legal words) all payments to Design Sub-Consultant hereunder, whether progress or final payment, or for changes or delays to the Services, shall **not be due and payable until after Design Consultant actually receives payment on account of same from Owner through Design-Builder** and that Design Consultant shall only pay Design Sub-Consultant in proportion to amounts actually received from Owner through Design-Builder which are attributable to the Design Sub-Consultant's services rendered. **Design Sub-Consultant understands the risk of Owner nonpayment and agrees that this is reasonable since Design Consultant has no control over Owner** and carries their own risk of nonpayment from Owner for Design Consultant's work, and therefore should not be liable for Owner's actions or inactions regarding payments to Design Sub-Consultant. **(Emphasis added)**

Here is an actual custom "condition precedent" pay if paid clause between an A/E and construction manager that emphasized the payment arrangement in all capital letters, just to make sure it is understood.

IT IS EXPRESSLY AGREED THAT OWNER'S ACCEPTANCE OF ARCHITECT/ENGINEER'S WORK AND OWNER'S PAYMENT TO CONSTRUCTION MANAGER FOR ARCHITECT/ENGINEER'S WORK ARE **CONDITIONS PRECEDENT** TO ARCHITECT/ENGINEER'S RIGHT TO

PAYMENT HEREUNDER BY CONSTRUCTION MANAGER. ARCHITECT/ENGINEER ASSUMES RISK OF NONPAYMENT BY THE OWNER FOR INSOLVENCY OR OTHER INABILITY TO MAKE PAYMENT FOR ARCHITECT/ENGINEER'S WORK.



<https://www.govtech.com/sponsored/governments-add-cash-payment-option-for-digital-services.html>

“PAY WHEN PAID”

American Institute of Architects AIA A401 – Standard Form of Agreement Between Contractor & Subcontractor (2017), § 11.1.3 states that:

The Contractor shall pay the Subcontractor each progress payment no later than seven days after the Contractor receives

payment from the Owner. If taken literally, this language would mean that if the contractor never gets paid by the owner, then the contractor is never required to pay the subcontractor. With rare unanimity, every state has considered the issue in a reported decision currently has come to the conclusion that it should not be construed in that way. Rather, the courts say, this type of clause is intended to cover the timing of payment in the normal course, but if the contractor does not receive payment from the owner in the normal course, or within a reasonable time thereafter, the contractor remains obligated to pay the subcontractor the amount otherwise due. Thus, the clause is construed to apply only to the timing of payment and has come to be known as a “pay when paid” clause.

What Difference Does It Make? Pay If Paid vs. Pay When Paid – Taft Stettinius & Hollister, LLP

<http://www.taftlaw.com/news/publications/detail/1205-what-difference-does-it-make-pay-if-paid-vs-pay-when-paid/>

FROM THE PERSPECTIVE OF A/Es, THEY SHOULD BE PAID AFTER THEY SUBMIT THEIR INVOICES WITHOUT ANY STIPULATIONS (“PAY WHEN PAID”)

The American Institute of Architects’ Standard Form of Agreement Between Owner & Architect, B101 (2017) states that:

§ 11.10.2 Progress Payments

§ 11.10.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable upon presentation of the Architect’s invoice. Amounts unpaid « » (« ») days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Architect.

The Engineers Joint Contract Documents Committee Agreement Between Owner & Engineer for Professional Services, EJCDC E-500 (2014) states that:

4.01 Invoices

A. *Preparation and Submittal of Invoices:* Engineer shall prepare invoices in accordance with its standard invoicing practices and the terms of Exhibit C. Engineer shall submit its invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of

receipt.

4.02 Payments

A. *Application to Interest and Principal:* Payment will be credited first to any interest owed to Engineer and then to principal.

FOR A VARIATION IN THE WORLD OF COMPENSATION, CONSIDER THE FOLLOWING

The American Institute of Architects' Standard Form of Agreement Between Architect & Consultant (2017) states that:

§ 11.6 PAYMENTS TO THE CONSULTANT

§ 11.6.2 Payments to the Consultant shall be made promptly after the Architect is paid by the Owner under the Prime Agreement. The Architect shall exert reasonable and diligent efforts to collect prompt payment from the Owner. The Architect shall pay the Consultant in proportion to the amounts received from the Owner which are attributable to the Consultant's services rendered and Reimbursable Expenses incurred.

IN CONCLUSION

It is safe to say that for design and construction industry professionals, suing for unpaid fees is not equivalent to securing payment in the first place, as the mire of litigation will erase a project's original profitability. That is why compensation terms and conditions must be clearly spelled out in an agreement, so that there are no misunderstandings when it comes time to pay in a reasonable and timely manner.

About the Author of this Risk Management Building Block Article

As a risk manager for the last 18 years for the design profession, Eric has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years at Kent State University's College of Architecture & Environmental Design.

As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals since 2000 on topics of ethics, contracts, and professional practice in various venues across the United States and Canada. He is a former member and chair of his city's Board of Zoning & Building Appeals for 24 years, and is a licensed architect, attorney, and property & casualty insurance professional.

His educational background includes a JD from Southwestern University School of Law, Los Angeles; Master of Science in Architecture from University of Cincinnati; and BA in psychology/architecture from Miami University, Oxford, Ohio.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

Disclaimer: The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individuals, groups, or institutions. This article is an expression by the author(s) to generate discussion and interest in this topic.

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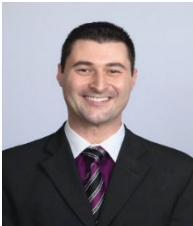
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