

Recently, I had a client that had furnished the supplies and labor on a construction job. The general contractor on the job failed to pay my client due to the fact that it was not being paid by the owner, attempting to rely on a “paid if paid” clause contained within the subcontract with my client. Contingent payment clauses are often included in construction contracts to enable one party to avoid making payments to their subcontractors while waiting on payments from an upstream party with the payment obligation. Contingent payment clauses often have “paid if paid” and “paid when paid” language.

These clauses are highly frowned upon by the courts and typically found to be invalid if the clause is indefinite. The case law for provisions such as these only goes to timing; the Principal or general contractor cannot withhold payment indefinitely if it is not paid by the Owner. The clause simply goes to timing of payment, not whether payment will be forthcoming at all. *Gulf Coast, Co., Inc. v. Self*, 676 S.W.2d 624, 627-628 (Tex. App. Corpus Christi 1984), writ refused n.r.e., (Mar. 20, 1985). These clauses may only be relied on for a reasonable amount of time. *Id.* It is up to a judge or jury to determine what is “reasonable”. However, the determination of reasonableness behind clauses such as these, coupled with the Texas Prompt Payment Statute, Texas Property Code Chapter 28, gives us a good starting point as to how long it is considered reasonable to withhold payment. Texas courts have determined that conditional words such as “if” or “provided that” can be used to enforce clauses such as this. *Id.*

The Texas Legislature passed a Senate Bill, adding Section 35.521 to the Texas Business and Commerce Code. Section 35.521 states that a contingent payment clause is not effective against a subcontractor or supplier in the following situations:

- 1) If the owner fails to pay the contractor because of the conduct or work of the contractor, *unless* the nonpayment is the result of the subcontractor or supplier’s failure to meet the needs of the contract.
- 2) When the contingent payment clause would be unconscionable if enforced. For example, the contractor must provide the following information to the subcontractor to minimize the possibility of the clause being deemed unconscionable:
  - a. Name and contact information of project owner;
  - b. Legally sufficient property description;
  - c. Surety information; and
  - d. Project lenders’ names and contact information.

Further, a contingent payment clause may be invalidated or suspended during the project if the subcontractor subject to the clause has not been paid within 45 days after submitting written request for payment that is in substantial compliance with the pay application, it may send written notice to the contractor objecting to the further enforceability of the clause. Thereafter, the contractor or its surety may not continue to rely on the clause for any work or material provided by the subcontractor after the notice becomes effective.

With this legislation and case law comes an avenue of collection for subcontractors and suppliers where, in the past, those same subcontractors and suppliers just “wrote it off” if they signed a contract with one of these clauses and didn’t get paid.