

CONSTRUCTION BLOG

When owners don't pay - "pay when paid" vs. "pay if paid" clauses in Illinois.

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A recent decision of the 1st District Appellate Court is cause for contractors and subcontractors to review your contract forms *extremely* carefully, in regard to payment obligations when the project owner fails to pay the contractor. In *Beal Bank Nevada v. Northshore Center THC, LLC, et al*, 2016 IL App (1st) 151697, the court rejected the contractor's position that the subcontractor was not entitled to be paid, until the contractor had received payment from the project owner. The contract involved stated that "payment will be made within thirty (30) days after the work called for hereunder has been completed by the Subcontractor to the satisfaction of the Owner and the Contractor and the Contractor has received from the Owner written acceptance thereof together with payment in full for this portion of the work. ~~welcome to illinois 800x400~~ " The 1st District held the Contractor had to pay the sub, even though the owner never paid the contractor. In doing so, the court distinguished prior rulings holding no payment was required, until the project owner paid the contractor, based on a distinction the court referred to as the difference between "pay-when-paid" clauses; and "pay-if-paid" clauses. In the former case, the court held that the risk of the owner defaulting and never paying was not assumed by the subcontractor; so, ultimately, even if the owner never paid the contractor, the contractor is still obligated to pay the sub. In the latter case, i.e., under a "pay-if-paid" clause, however, the risk of non-payment was found to be accepted by the subcontractor, so that the contractor had no obligation to pay, if the owner never paid the contractor. The court held that the language quoted above was a "pay-when-paid" clause, that addressed when the subcontractor, generally, was to be paid – but did not shift the risk of ultimate non-payment by the owner to the subcontractor. The court cited to several other states that have made this distinction.

This ruling makes it imperative that contractors and subs review your form contracts and understand who holds the risk of an owner failure to pay.

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