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SHOULD A CONTRACTOR STOP WORK DUE TO NONPAYMENT?

As owners and contractors feel the bite of shrinking revenues due to the economic slowdown, contractors are bound to see payment problems arise on ongoing projects. Contractors may find themselves contemplating whether to stop work on-site in response to nonpayment.

At first blush, stopping work on-site may seem like a simple and obvious solution for nonpayment. But in reality, stopping work is fraught with risk, and almost always involves a difficult and complicated decision. If the contractor's entitlement to payment is unclear or in dispute, a work stoppage by the contractor could amount to a breach of contract exposing the contractor to potential liability for substantial damages. For example, the owner may claim to have an arguable contractual right to withhold payment due to some prior alleged breach by the contractor, such as defective work, or a lien claim asserted by a sub-contractor. Particularly on large and complex projects, it may not be difficult for an owner to find some arguable basis justifying nonpayment. A contractor that stops work due to nonpayment faces the risk that a court may later hold that the owner was legally entitled to withhold payment and that the contractor was not entitled to stop work.

The contract documents may govern how, and under what circumstances, a contractor may stop work due to nonpayment. Often, the contract imposes procedural requirements that a contractor may need to comply with before a work stoppage can be justified. For example, under Article 9.7 of the AIA A201-2017 General Conditions, a contractor is required to give the owner and the architect seven days' written notice before the contractor may stop work for nonpayment. Additionally, a contractor may be required to comply with Article 15, which contains a specific procedure for relevant claims and disputes. Similarly, under Article 9.5 of the ConcensusDocs 200, a contractor must give seven days' written notice to the owner before the contractor may stop work due to nonpayment.

A contractor should always consult legal counsel when considering whether to stop work due to nonpayment. The decision of whether or not to stop work usually requires analysis of the background facts, the contract documents, and the applicable law. The answer is seldom written in black or white, but rather in shades of gray. The contractor and its counsel must carefully identify, judge, and weigh all the risks. If you have questions or need assistance, contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.