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Check the drafting of that joint check agreement

Many people in the construction industry are familiar with the joint check. They know a joint check agreement allows a contractor to pay a subcontractor and a lower-tier party (a sub-subcontractor or material supplier) with the same check. And people in the construction industry also know when to use a joint check: when they want to make sure lower-tier subcontractors, material suppliers or employees get paid.

But what many industry people don't know is that joint check agreements – if they aren't drafted properly – have the potential to create more problems than they solve.

Advantages

Generally, a contractor cannot make direct payments to lower-tier parties without risking that it will have to pay for the same work twice. A joint check agreement helps solve this problem by enabling the contractor to make payments to both its subcontractor and the subcontractor's subcontractor or material supplier. Accordingly, with a joint check agreement, a contractor is able to minimize the risk that its subcontractor will not pay lower-tier parties.

CONSTRUCTIVE ADVICE

Sean Gay

Disadvantages

Although a joint check agreement may solve the payment problem, it can give rise to several other problems.

First, a joint check agreement creates a direct contractual relationship between the contractor and a lower-tier party. In addition to subjecting the contractor to contractual liability on the joint check agreement, this direct relationship has the potential to affect lien and bond notice requirements – often to the contractor's detriment.

Second, this direct relationship between a contractor and sub-subcontractor can lead to other unintended consequences. For example, if the joint check agreement doesn't cap the amount of the contractor's payment obligation, it's possible the contractor could end up paying the sub-subcontractor more than it expected. In other words, if the joint check agreement doesn't limit the amount the contractor will pay, there may be no limit.

Third, a lower-tier party's construction lien or bond rights can be affected by accepting joint check payments. This situation arises when a contractor pays a subcontractor and sub-subcontractor by joint check and the amount of the joint check exceeds that which is owed to the sub-subcontractor. By prior arrangement, the sub-subcontractor pays the unearned portion of the payment to the subcontractor. In a later construction lien or bond foreclosure suit the contractor – unaware of this arrangement – may successfully argue the sub-subcontractor received the full amount of the payment and therefore waived its lien or bond rights for that amount.

A joint check agreement provides a simple way to minimize the risk of lower-tier parties not receiving the money they're owed. It also can create a host of problems for all parties involved. However, a carefully drafted joint check agreement can help avoid many of these potential problems and ensure the parties get what they expect when they use joint checks.

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