The viability of every construction-industry company, whether it provides construction management or building services, sitework, architectural and interior design services, rental equipment or decorative specialty sheet metal, depends on getting paid for the work it performs and the materials it supplies. While payment may come after performance, don’t let payment be an afterthought. Be aware of issues affecting payment from the beginning of your project and put into place these best practices for getting paid for the work you do on private commercial construction projects.

Gone are the days where a deal was done on a handshake. Although not all commercial construction contracts are required to be in writing, having a written contract is virtually essential for protecting the parties and resolving disputes that may arise regarding the terms of the project. At a minimum, a contract should identify the parties to the contract, the scope of the work to be performed, price, schedule of the work and payment schedule.

Beyond the minimum contract terms, contracts for private construction projects can contain nearly any other term that the parties wish to include. You should take note of terms that may affect your ability to get paid. Know the timing and process for requesting payment, and promptly comply with them. Having the necessary requisitions forms, certifications, signatures or other contractual requirements satisfied the first time can avoid the delay that will occur if you are required to resubmit your payment request. Does the contract require alternative dispute resolution (ADR), such as mediation and arbitration, rather than resolving a dispute in court? This may impact the timing for resolving a payment dispute and dictate whether you will have access to preliminary remedies available only in court. Can you recover your legal fees if a dispute arises regarding payment for your work? Although the law varies state by state on whether a prevailing party in court will automatically be granted its attorney’s fees, the parties can make certain that a prevailing party is entitled to recover attorney’s fees if it is a term of the parties’ contract.

Regardless of what specific terms are contained in the contract, the contract should be clearly written and easily understandable. The contract language does not need to be elaborate or written in “legalese.” Borrowing language from another contract (from a friend or found online) may leave you with a contract that looks official and impressive, but may omit important terms, contain terms you don’t understand or include terms that are not applicable to your project. Read and make sure that you understand the language in all of the contract documents. This includes any documents incorporated by reference to a contract. Documents frequently incorporated by reference include quotes/bids, purchase orders, specifications, plans or contracts between other parties on the project (i.e., the prime contact between the owner and the general contractor). Incorporated documents may contain their own payment terms that may become part of the parties’ contract once incorporated.

Each party’s obligations should be expressly identified in terms of the contract document. While course of dealing between the parties and trade usage can affect the interpretation of contract language and modify a party’s obligation, it can be difficult and costly to prove unwritten terms of a contract. The better practice is to identify all of the parties’ obligations, including ones that are commonly understood in the industry, in writing. A third party (such as an arbitrator, judge or jury) should also be able to identify the parties’ obligations from the contract documents alone. After all, if you are seeking payment for your work, you need to establish that you have satisfied the contractual obligations that entitle you to payment.

If any contract language is unclear, unfavorable or irrelevant, request changes before executing the contract. You should not rely on a verbal representation that a particular term will not be enforced. In general, the law treats a party as if it understood the document that it signed and will hold a party to the terms of a signed contract as written.

After you have expended the effort to draft and understand the terms of the contract, make sure that both parties sign the contract so it is binding. Without a binding contract, a party can be limited to recovering the fair value of work performed or materials supplied (not necessarily the contract rate) and in some states, interest rates on un-
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Paid balances, late fees and attorney’s fees are reduced or eliminated. Nearly all states have adopted the Uniform Electronic Transactions Act that recognizes the validity of electronic signatures and records of parties that agree to use them. So sign the contract and exchange it electronically in a few short minutes, then get to work on completing the project.

Once you have started work on the project, it is a good practice to periodically review the contract for scope of work and performance terms. This will be the standard you are measured against when you request payment, and failing to meet the contract requirements is the most frequently cited reason for non-payment. If an issue arises with performance on a project, respond to the issue promptly, document what occurred and how the parties agreed to deal with it. A contemporaneous email is a quick and effective way to do that.

If you cannot satisfactorily resolve an issue that arises during the course of performance, you should carefully evaluate whether it constitutes a material breach of the contract by the other party. Especially if the issue is non-payment of progress payments, consider whether you stand to gain in the end by committing further resources to the project notwithstanding the present failure to pay. Under most states’ laws, a material breach of the terms of a contract will generally excuse the other party from its obligations under the contract. That means that if you are not getting paid in accordance with the contract, you do not need to perform further. However, the risk of misjudging this is that if you improperly fail to perform, the other party is not obligated to pay you and it may expose you to liability for the costs to complete the work to the contractual standards by a third party.

Payment issues may not arise until after performance is complete. It may be difficult months later to remember how many men worked on a particular day or why there was a delay in completing a project. These may be crucial issues when defending your performance and having a good record can make a significant difference in getting paid promptly. Retain all agreements, notes, calendars and emails related to a project at least until the job is fully paid, or longer as your state’s records law requires.

Finally, the best way to get paid for your work or materials is to act promptly if the invoice is past due. Follow up if you are not being paid within terms. If payment is withheld without justification or excuse, explore whether options such as a payment bond or mechanic’s lien are available to you. A formal demand for payment or initiating suit are other options to pursue a past due balance. Acting quickly can give you the best opportunity to get paid in full for your work, especially if you suspect financial distress is the real cause of nonpayment. After all, viability in business depends on getting paid for the work you do.

Contract and collections laws vary state to state. The best person to advise you of the laws relevant to your project is a local attorney.

For questions or assistance with Massachusetts construction projects, contact Jessica Murphy or the Construction Law Group at Mirick O’Connell. Murphy is a senior commercial litigation attorney at Mirick O’Connell DeMallie & Lougee, LLP specializing in matters related to the construction industry. Her construction law practice involves representing clients in litigation and ADR, advising clients on risk management, contract preparation and negotiations, and providing general business advice. Murphy has been a member of NAWIC Greater Worcester Chapter 241 since 2012 and became Vice President of Chapter 241 in 2013.