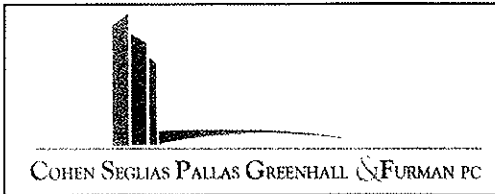




# Ask An Attorney



The Legal Rights Committee expresses its appreciation to **Timothy Woolford, Esq. of Cohen, Seglias, Pallas, Greenhall & Furman P.C., Philadelphia.**

**Q: What types of documents should be maintained in order to give me the best chance to recover on my claim?**

**A:** Because they are in the business to build and not to litigate, most contractors do not like to think about construction claims. However, contractors are well-advised to carefully document project events and conditions in case their project is one in which litigation becomes necessary. Judges and arbitrators attach great significance to the documents on a project and they often take the view that unless something is in writing, it probably did not happen. Good project documentation also saves legal costs because the attorney handling the claim is likely to spend less time learning the issues and putting the claim together. Below is a checklist of the basic documents that should be maintained by contractors and subcontractors on a project in order to give them the best chance to succeed on their claim.

1. *Project Estimate.* Your estimate should include as many details as possible regarding the costs for each activity and separately indicate the estimate for labor, materials, equipment and subcontractor costs.

2. *Change Order Log.* Record when each change order was submitted and when it was approved or rejected, as well as additional information that was requested. Change orders should be processed promptly because belated processing can lead to delays, inefficiencies and other impacts.

3. *RFI Log.* Delays in the architect's response to RFI's are often the cause of substantial project delays and other impacts. Keep a record of when each RFI was submitted and when the response was received and not the turnaround time.

4. *Shop Drawing and Submittal Log.* Record when each was submitted and returned and note any relevant

comments. Delays in responding to shop drawings and submittals can be a major problem on a project.

5. *Daily Reports/Log.* Daily reports can constitute written notice of claims, so it is important to thoroughly and neatly record daily events, manpower, areas of work and work activities. Also, daily reports should describe problems and delays, note important material deliveries and record important conversations, and they should describe any extra or changed work being performed.

6. *Correspondence such as Letters, E-Mails and Faxes.* Correspondence need not be adversarial to be effective. The object is to notify the other party of a problem or condition so they can address it promptly. Be sure to answer every letter in writing and defend your position with facts.

7. *Meeting Minutes.* Review all minutes promptly, and if there are inaccuracies or misrepresentations, send a letter or e-mail correcting the misinformation.

8. *Photographs.* These are ideal tools to show the progress of the work, whether the work was defective or not and to support the claim. Label and date all photos and briefly describe what is depicted in each photograph.

9. *Daily Time Sheet/Payroll Records.* If possible, code each employee's daily time sheet to a particular work activity that ties in with the estimate. This helps identify activities that were affected by an event or condition.

10. *Cost Records.* It is very important to accurately document all of your costs on a project in as much detail as possible. This will allow any person reviewing your claim to quickly determine where your additional costs were incurred.

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11. *Payment Applications.* Submit accurate requests or applications for payment that identify the progress of the work. These documents will help to quickly identify periods of increased costs and activities affected by problems.

**Q:** After a project is complete, how much time do contractors and subcontractors have to file a claim for added costs?

**A:** On a private project in Pennsylvania, a subcontractor has four years to file a lawsuit to recover additional costs caused by a breach of contract. However, it is important to note that although the lawsuit may be timely filed, the claim which is the basis for the lawsuit must also be timely submitted in order for the lawsuit to have potential merit. In order to determine whether the claim was timely submitted, one must determine what the contract requires for making claims. As a general rule, in order for the claim to have been timely submitted, notice of the claim must have been given within the time period required by the contract. If the contractor properly gave written notice within that time period, he or she can file a breach of contract action seeking payment on his claim anytime within four years.

However, courts and arbitrators do not always require strict compliance with the contract's notice provision and sometimes find that the provision was waived. For example, a waiver may be found where claims were previously paid even though the notice provisions were not followed. It may also be found where the contractor was verbally directed to perform the work that is the subject of the claim, or where the other party had actual notice of the condition giving rise to the claim. In such cases, the contractor may be allowed to recover added costs even though he or she did not give notice within the required time frame. Nevertheless, contractors should not assume that the waiver argument will prevail, and they should attempt to follow the requirements of the contract.

On projects administered by the Department of General Services (DGS), the four-year rule described above does not apply, and claims for additional compensation must be brought earlier. All claims must be filed with DGS within six months after the claim accrues. Therefore, contractors must file their claims with DGS's Contracting Officer no later than six months after Final Inspection. Subcontractors that do not have direct contracts with DGS, but who are acting as subcontractors to parties that do, must submit their claims to the other party within six months to enable that party to submit any pass-through claims to DGS within the required time period.

**Q:** With many owners requiring a waiver of liens to be executed as part of the contract, how can I protect my right to be paid?

**A:** Interim and final lien releases are powerful tools used by owners to attempt to preclude contractors from subsequently asserting claims. Contractors should make every effort to resolve disputed claims before signing a lien release. If claims cannot be resolved, an attempt should be made to place a statement on the release referring to the claim(s) stating that the signer does not intend to release all claims. If the other party forbids this, the contractor or subcontractor should write a separate letter explaining that by signing the release, he or she does not intend to waive his right to file a lien or to otherwise pursue the claim. Some courts and arbitrators have found under these circumstances that the contractor did not waive the claim or the right to file a lien despite signing the release.

Where a contract provision prohibits the filing of liens, contractors and subcontractors can request that a joint check agreement be made part of the subcontract. If the contractor agrees to it, the owner will issue separate checks to the general contractor made jointly payable to the con-

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tractor and the subcontractor. This will help ensure that the subcontractor is paid once the general contractor receives payment from the owner.

Another protection of the right to be paid is the Pennsylvania Contractor and Subcontractor Payment Act (Payment Act), which is designed to penalize owners and general contractors that improperly withhold payments. Enforcement of the Payment Act requires a determination by a court or arbitrator that the Act has been violated. Under the Payment Act, the owner must pay for work within 20 days after the receipt of an invoice or the end of a billing cycle, whichever is later. It also provides that a contractor must pay its subcontractors, and subcontractors must pay their sub-subcontractors, within 14 days after receipt of payment from the owner. If payment is improperly withheld, a penalty equal to one percent of the amount improperly withheld accrues every month thereafter.

The Payment Act also requires an owner to pay retainage to the contractor within 30 days of the completion of the work. In turn, the contractor must pay the subcontractor's retainage within 14 days thereafter. If retainage is unreasonably withheld, interest of one percent per month is assessed to the amount improperly withheld.

Perhaps the most powerful aspect of the Payment Act is that if a Payment Act violation is found by a court or arbitrator, the party that unreasonably withheld payment must pay the attorney's fees and costs of the prevailing party.

A related issue is whether the acceptance of final payment constitutes a waiver of all claims. Many contracts state that acceptance of final payment operates as a waiver of any and all claims. Many contractors that have unresolved claims need to collect their contract balance without waiting until all claims are resolved, but they do not want to waive all claims in order to do so. In this situation, contractors should withhold a small amount from their final payment application, such as \$50 or \$100. They should also notify the other party in writing that they are not billing the entire contract or subcontract balance, and do not intend to waive all claims.

Contractors and subcontractors should make sure that they have submitted written claim notices for all claims that they wish to preserve. Courts have held that despite a contract provision to the contrary, acceptance of final payment does not constitute a waiver of unresolved claims for which prior written notice was given.