How to Stop Working If You're Not Getting Paid

*By **Alex Barthet, Principal of The Barthet Firm***

You're doing work on a project but aren't getting paid. You think about just picking up and leaving the job. So do many clients who come to us, believing they have the ultimate and unilateral right to stop working if they are not getting paid. Most are shocked to hear this may not be the case. Actually, you don't have the unfettered right to stop working, so you may want to consider the following five steps first.

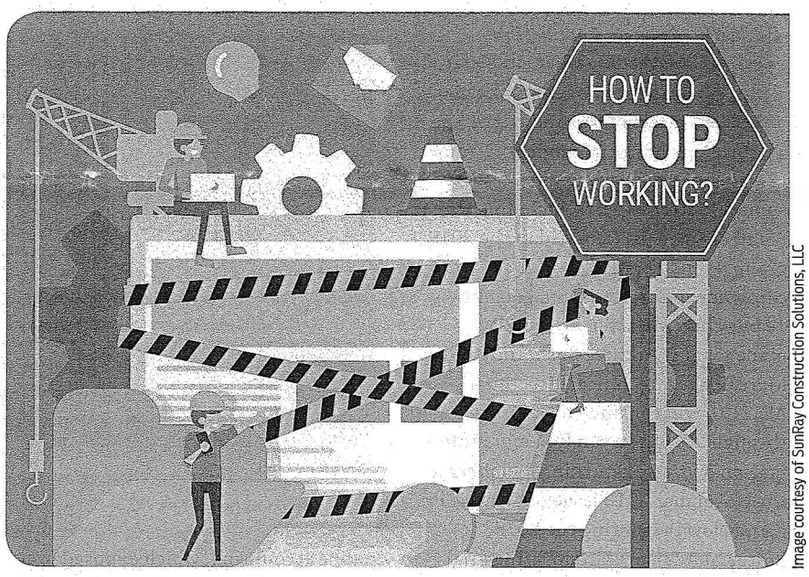


Image courtesy of SunRay Construction Solutions, LLC

1. Look at Your Contract Terms

You first need to look carefully at what you agreed to when you signed that coatings contract. What does it say specifically about your right to stop working? Does it include a provision that reads similar to the following?

"Subcontractor shall diligently proceed with the work during any dispute even as it relates to payment or changes. The existence of a dispute shall not be grounds for any failure to perform by subcontractor."

If you see this type of language in the contract, it means that you must continue working throughout the course of a dispute and that you must follow the dispute resolution process called for in the contract — even if you're not getting paid or if your change orders are not being executed and funded. You have to keep working, keep paying your employees, and keep paying your vendors to have materials delivered to the jobsite, all while you pursue your rights under the dispute process outlined in your contract.

Another problematic provision is a pay-when-paid clause. When this is present in a contract, the contractor you're subbing for is technically not in breach of the contract when he/she doesn't pay you. If you've signed a contract that says that the contractor doesn't have to pay you until he/she has been paid by the owner, you're out of luck. If the contractor hasn't been paid, then he/she is not in breach of the contract with you.

Courts have found pay-when-paid provisions — when written the following ways — to be enforceable:

"Payment from the owner is a condition precedent to payment to subcontractor."

"Payment to subcontractor is contingent upon contractor's receipt of payment from owner."

Pro Tip: Include an affirmative right to stop working in your contract if you're not being paid. Here is a sample:

"Subcontractor can slow or stop work without liability or penalty if it has not been paid its draw request within 30 days of submission."

If you can't get an owner or general contractor to agree to terms such as this, consider tweaking it a bit. Try 45 or 90 days instead of 30 days. Having the right to stop working if you're not getting paid is very important because it reduces your risk on a job. It may not get you paid, but it at least stops the bleeding.

What if your contract says

Pro Tip: Include an affirmative right to stop working in your contract if you're not being paid.

nothing on this subject? What if it's a simple purchase order and it doesn't say that you have to keep working or, conversely, it doesn't say that you have the right to stop working? Generally, in that situation, the law would suggest that if you've agreed to provide materials or labor to a jobsite in exchange for payment on specific payment terms and you are not getting paid in accordance with those payment terms, then you do have the right to stop working. This is because the other party has materially breached the contract. That's why looking at the terms of your contract is the most critical first step to take.

2. Secure Your Lien and Bond Rights

If you are going to make a move to stop working because you're owed money, then you need to make sure that your right to get paid is secured, and to do so, you must do the following:

- Serve a notice to the owner within the prescribed timeframe — 45 days from your first work or delivery of materials on the project's site in many jurisdictions. You generally don't need to serve your notice to the owner if you have a direct contract with him or her, but we still recommend it.
- Record your claim of lien or serve your notice of non-payment, generally no later than 90 days from your last work or delivery of materials to the project. When applicable, this 90-day period is not three months. You need to count the actual number of days. The 90-day period includes weekends and holidays except where the 90th day falls on a weekend or a holiday in which your clerk's office is closed — usually a federal holiday. Then, in this case, it will be rolled to the next working day.

  What is "last work" under the lien law? Last work includes an approved change order, but it doesn't include a punch list or warranty work.

  You can generally record your lien or serve your notice of non-payment before the prescribed period. It doesn't have to be on that last day, and it can be while you're still doing work. We've seen clients who want to exert a little more pressure on the owner or the contractor. So, during the course of the job, they serve a notice of non-payment or record a lien.
- Serve a contractor's final affidavit before the lawsuit to foreclose on the claim of lien. You need to take this additional step only if you have

Writing an Effective Scope of Work Is Smart Business

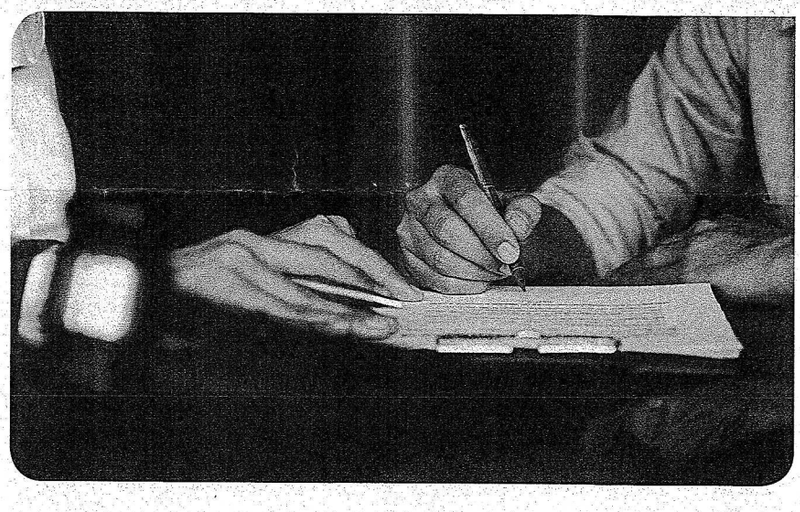
*By **Russ Brown, Sales Director — Strategic Alliances for Polygon US***

An effective scope of work (SOW) is often the sole document that helps prevent issues that can wreak havoc on a project. Lost time, replacement costs, scope creep, and myriad other issues can compound themselves until the contractor, owner, and vendor are conflicted on the schedule and costs. In the end, costly litigation might be the only way to deal with the matter.

The SOW helps define the expectations of a contract. It is a formal document that describes components such as work activities, deliverables, timelines and milestones, and reporting practices. It is the vital first step to building a beneficial collaboration between a vendor and a customer. Having a solid understanding of the SOW helps all parties involved avoid issues from unplanned circumstances that may negatively affect the project.

A SOW differs from a specification. For coating projects, the specification identifies the end result, while the SOW outlines the means for achieving that end result. A standard SOW typically contains the following four elements:

1. Deliverables. Whether it's a product or a service being delivered, you need to have each item clearly identified.
2. Timeline. This section delineates the major phases across the project's duration, marks points when your deliverables are ready, and highlights the overall plan of the project.
3. Milestones. Projects are broken down into tasks. Larger phases are marked by milestones. By incorporating milestones in the SOW, such as project kickoffs, meetings, and handoffs, you can make sure the project is adhering to the schedule.
4. Reports. Reports are a formal record of your progress and a means of communication as to whether the project is on schedule or not. By customizing the reports, there's a wealth of data that can serve a number of different audiences.



Professional Approach

Writing a sound, effective scope of work can be difficult. The following items can make the process much easier and lead to a more professional document:

1. Be specific when you're defining terms and individual responsibilities, so that everyone has a clear and common understanding.
2. Be clear and concise regarding what to expect once the scope of work is implemented. What will it look like in the end? Use visual examples to help eliminate misinterpretations.
3. Get sign-offs on the SOW. Ensure that authorized approvers sign off on your SOW, and have the client sign off at critical milestones and deliverables. This way, all parties will be held accountable throughout the project.

Meeting the Challenges

Here are some challenges you may encounter when writing your SOW:

1. Complexity. The SOW will require a complete understanding of the project's unique requirements and the type and duration of work involved. Don't just complete the formalities to get the project started.
2. Risks. Project risks — financial implications, penalties, legal concerns, violation of agreement, and risk to an organization's reputation — can become apparent because of a poorly written SOW.
3. Expertise. Enlist quality writers who also have in-depth knowledge of the processes, operations, and financial requirements of the project.
4. Time. Companies just don't want to spend the time or resources on writing a sound SOW agreement.

A proficient SOW is designed to get the maximum out of a contract, helps establish good customer relations, and is essential in today's market. Here are a few guidelines:

- Understand client requirements, change management procedures, the escalation process, and payment methods.
  Ex. Contractors need to complete Occupational Safety and Health Administration (OSHA) 30 class prior to being qualified for work.
- Describe each function or process.
  Ex. The contractor will provide necessary equipment to meet the controls listed in Specification, Section 3a, Environmental Conditions and Controls.
- State assumptions clearly, define the governance structure, and give a complete outline of the project management procedures.
  Ex. The contractor will be responsible for changing filters once per week or when air flow appears to be blocked due to heavy debris.
- Set realistic and specific objectives and timelines.
  Ex. Phase 1 of the blasting will be completed 30 days from start date.
- Mention warranty terms, maintenance agreements, service levels, and other important terms and conditions, if applicable.
  Ex. The climate control equipment will be able to hold the blast during specified weather conditions for at least 30 days.
- Adopt straightforward language that eliminates ambiguities.
  Ex. Contractor to supply one 4,500-cfm (127.4 m^3/min.) desiccant dehumidifier on tank 3-C.

Specifying how communications will be established, handled, and maintained might be the most important aspect to ensuring success on the project. Make sure the chain of command is clear. Be sure there is accountability and a sound process in place to take corrective action, when needed. Make sure the team provides accurate results and detailed backup reports. Share your results with all parties involved with the project. Using these guidelines, you should be able to achieve the desired results and retain a professional workflow. **CP**

Russ Brown is the sales director — strategic alliances for Polygon. He has worked in the coatings industry for the past 35 years. Brown was active on the Board of Governors for the Society for Protective Coatings (SSPC) and served as its president in 2011. For more information, contact: Polygon, www.polygongroup.com