

Watch Your Back Charges

Yes, every concrete contractor has felt the dreaded pain of back charges. Concrete contractors can face back charges that are unfair, including:

- No prior notice of defective work
- No time to investigate whether the work is defective
- No time allowed to fix the work
- No documentation that the cost of the back charges are appropriate and due to the defective work
- No payment of other money until back charges are accepted

There are not a lot of court decisions with respect to back charges, but there are some notable rulings i.e., *Great Western Drywall v. Role Construction-2008*. First, the court upheld the general contractor's right to assess cleanup costs against a subcontractor. However, the court ruled the costs could not be pro-rated back to each subcontractor, but had to be specific to each contractor's responsibility for cleanup costs. Second, the court ruled that the general contractor could not construe silence by the subcontractor as agreement to the back charges that were announced at a weekly meeting. Third, the court ruled the general contractor had to establish the fact that the subcontractor's defective work was indeed tied to the back charge. These court rulings help to set up a process to consider a reasonable back charge.

Unfortunately, construction subcontract documents typically scatter terms allowing for back charges throughout the document, so that even if you successfully delete one unfair term, others still lurk in the final agreement. Each holds the potential to wipe out anticipated profits, or even to turn a project into a loss.

The American Institute of Architects (AIA) and American Subcontractors Association (ASA) have subcontract forms with language on back charges. As anticipated, the ASA recommendations, shown below, are the most favorable to subcontractors:

“Back charge claims. No back charge or claim of customer for services shall be valid except by an agreement in writing by subcontractor before the work is executed, except in the case of subcontractor's failure to meet any requirement of the subcontract. In such event, customer shall notify subcontractor of such default, in writing, and allow subcontractor reasonable time to correct any deficiency before incurring any costs chargeable to subcontractor. No back charge shall be valid unless billing is rendered no later than the 15th day of the month following the charge being incurred. Furthermore, any payments withheld under a claim of subcontractor default shall be reasonably calculated to cover the anticipated liability and all remaining payment amounts not in dispute shall be promptly paid.”

Consider using this as the basis for negotiating subcontract language. And as always, watch your back (charges).