

## **Sense vs. cents: What answer is the right answer?**

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It's natural for contractors and real estate developers operating in survival mode to want to fight tooth and nail for every penny they are owed. But a guns-a-blazing strategy may backfire. Short-term solutions designed only to preserve "cents" in a constricted construction market could very well destroy long-term strategic considerations that make business "sense."

Even under normal economic conditions, smart construction companies and real estate developers act as though every dollar may be the difference between staying afloat and going under. This approach intensifies greatly when the economy shrinks and potential new projects become scarce. But a myopic business strategy fixated solely on A/R collections can result in damaged relationships and lost opportunities which are critical to sustained economic growth. So too, a blinders-on approach invariably impacts important legal decisions and strategies, often at great financial risk to the business.

For example, let's say you are a general contractor about to finish your first job for an important new client - a restaurant with plans to develop dozens of similar spaces statewide. You submit your final payment application to the owner.

In response, the owner conveys his concern that your HVAC subcontractor hasn't paid one of its equipment suppliers. He then drops this bombshell: He won't make any more payments without lien waivers from all of your subs, as well as from their subs and suppliers. He also states that any further payments will be made by joint checks. Oh, and you know that retainage-reduction provision? Forget about that.

Needless to say, you're steamed and rightfully so. You've moved heaven and earth to get this job done on time and within budget. You deserve every penny of that requisition and you're not about to get stiffed.

You look over your contract, which does not require lien waivers from lower-tier subs, nor does it give the owner the right to issue joint checks. Moreover, you're entitled to half of the held-retainage at this stage of the job.

You call your attorney and instruct him to draft a lawsuit, pepper it with his usual fire and brimstone and include claims for triple damages.

Here's what your attorney says: "Great idea. You have the stronger legal argument under the contract. Let's lien the job and threaten suit, and we can file a separate case against that rouge HVAC sub unless it pays its supplier."

Sounds and feels good. You'll show the owner he can't change the rules midstream, and you'll browbeat the HVAC sub back into paying its supplier.

But what your lawyer didn't tell you was that you can kiss your chances of ever seeing any further jobs from this owner goodbye - not to mention a dime of your retainage. And even if you do ultimately get paid, that money would likely be offset by court costs, bond premiums and attorneys'

fees.

Here's what your attorney should have said: "Okay, this sounds serious, and I understand how important it is for you to get paid. But the contract requires you to bond off any liens on the project within five days. That means if your HVAC sub isn't paying its suppliers who lien the job as a result, you'll have to pay for a lien bond to clear title. Lately, sureties are requiring 100% cash collateral to issue those bonds.

"Before we do anything, let's assess what your exposure is to these suppliers and subs. Then, let's quickly set up a meeting with the owner to hammer out a process for project closeout that will calm his concerns about potential liens, while still getting you and your subs paid."

Your attorney also reminds you that you're not exactly turning away jobs recently, and that how you handle this situation with the owner may well translate into a consistent flow of work over the next few years.

It is perfectly natural to act on emotion when you are fighting for your company's survival. But finding the right answer often requires an emotional detachment from the problem.

Likewise, just because you have a strong legal position does not mean that you should assert it in every instance, especially where doing so may upset business relationships with potential long-term benefits.

It is critical for a construction company or developer facing these difficult issues to get sound legal and business advice, which, while mindful of near term risks, helps maintain the focus on long-term growth and success.

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