

Public sector subcontractors back timely payment bill

BY BRIAN JOHNSON
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Donna Gulden isn't chasing work on public sector projects in Minnesota anymore.

The reason: She's tired of waiting for that check in the mail to be paid in full. In one case, Gulden said, it took five years to be fully paid for a public sector project completed by her business, Blaine-based Homeco Insulation. She declined to go into detail about the project or the client for fear of retribution.

"I want to do this work. I am not trying to limit what we can do," said Gulden, president of Homeco Insulation. "But when I have to wait five years ... I am not going to bid it anymore."

Gulden isn't alone in waiting to get paid, according to the Minnesota Subcontractors Association.

The MSA says subcontractors sometimes have to wait months or even years to be paid in full for their work on public contracts, and that's a big problem for the companies, many of which are many small or disadvantaged businesses.

At issue is a Minnesota law that allows owners to withhold 5 percent of each payment to subcontractors. The idea is to ensure the project will be completed properly. But the law doesn't specify when that final payment, known as "retainage," has to be paid.

The MSA and other industry groups are backing a bill that would require owners to pay subcontractors and general contractors within 30 days after their work is successfully completed. The bill is expected to be introduced later this week.

In addition, the bill requires any retainage to be held in a trust account, and it specifies that any disputes with regard to the retainage payment must be documented and shared with the parties involved, according to the MSA.

"The legislation is about basic fairness and paying people in a reasonable time for the work they successfully performed," said Nick McNeely, a lobbyist for the MSA.

A fall 2017 survey of MSA members shows that subcontractors waited more than 290 days on average to be fully compensated for work completed for owners ranging from cities and school districts to the state of Minnesota.



Tim Worke

5
PERCENT
Maximum amount that can be withheld from a subcontractor's payment

"This creates a significant cash flow problem for all subcontracting businesses in Minnesota and is particularly difficult on small and emerging businesses," said David Bruneau, executive director of the MSA.

The MSA survey reviewed billing dates, payment dates and retainage amounts on more than 90 public sector projects. The combined value of the work performed was \$23.4 million, including \$1.35 million worth of retainage.

In one case, a subcontractor had to wait 650 days to be paid in full on a Metropolitan Airports Commission project, according to the MSA survey. The total invoice was \$208,000 and the amount retained was \$10,400, the survey said.

Richard Biddle, contracts and grants manager for the MAC, said that existing contract documents used by the MAC and other public entities already include "prompt payment" provisions and that he's not aware of anyone having to wait months or years for payment on a MAC project.

"I don't have anything in my box that even approaches that time frame, and we monitor those regularly," said Biddle, who added that the MAC works with its project managers and design teams to figure out what's holding things up in the event of a late payment.

The League of Minnesota Cities wants to stay engaged with stakeholders on the retainage issue and "looks forward to being contacted by the proponents of the bill this year," said Irene Kao, lobbyist for the league.

In a statement, the Minnesota Department of Administration said payment for services and goods is "a key part of a responsible public procurement program as well as being essential to our efforts in encouraging greater supplier diversity and

small business participation."

"The Department of Administration pays 98 percent of invoices for products and completed services within 30 days. Equally as important is the department's obligation to protect taxpayer investments by ensuring that projects are done correctly and completely. Retainage is an essential tool needed to meet that obligation," the department said.

Tim Worke, CEO of the Associated General Contractors of Minnesota, said retainage is a complex issue that affects everyone in the construction chain, from owners to ancillary partners.

Worke referred to a bill approved in 2016 that caps retainage at 5 percent.

"We feel that good progress was made on this just two years ago," said Worke.

Even so, at least some subcontractors say more progress is needed.

Anecdotal information from subcontractors suggests that the payment issue ties in with another industry concern: lack of bidding on public-sector projects.

At the 2019 Minnesota Construction Summit in Minneapolis, representatives of the Department of Administration, the Minnesota State Colleges and Universities system, and others said they have struggled to attract bidders for their projects.

Among the headwinds cited by speakers at the event are the shortage of skilled construction workers, competition from other projects amid a robust construction economy, and onerous paperwork requirements tied to public sector work.

But for at least some subcontractors, the waiting is the hardest part.

Gulden, whose family-owned company was founded in 1986, said it's an issue that stunts the growth of small companies and affects their ability to invest in equipment and hire new workers.

She said the retainage issue is an especially big challenge for emerging businesses — the very same businesses that state, local and regional entities are trying to recruit to meet diversity goals applicable to their projects.

Owners, prime contractors and subcontractors need to work together to ensure that everyone on a project is paid within a reasonable time, Gulden said.

"Five years is not reasonable," she added.