

COLLECTION TIP

Overcharging and Kickbacks

By Adam Whiteman, Commercial Collection Attorney

In today's economic environment, contractors are sometimes looking for any way possible to increase their bottom line. One such way can be described as overcharging or as a kickback.

Overcharging or a kickback may occur when the building owner pays out a false or inflated invoice that is submitted by the contractor for a subcontractor's work. The subcontractor, happy to have obtained the job, kicks the extra profit back up to the contractor. In this way, the contractor is able to recover more than its contract price. Owners can be knowingly complicit in this arrangement, but more often than not, they are completely unaware that profits are being shuffled around.

If you are a subcontractor and are asked by a contractor to participate in such a scenario, you should decline.

Say you had submitted a subcontract with an inflated price but then didn't get paid and want to file a lien. If part of your lien is based on a commission back up to the contractor, it might invalidate your claim. This is because your contract price does not reflect the actual value of your improvements. It has been inflated by the value of a kickback.

Also, if the contractor's contract with the owner is based on cost plus profit and overhead, then the contractor is defrauding the owner not only by not reporting profit he is getting as a kickback, but he is also charging profit on top of that profit (i.e. profit is being charged on top of the inflated subcontractor's contract price). As a subcontractor, you do not want to be complicit in defrauding the owner.

Sometimes these arrangements are innocently characterized as "rebates". You should closely examine such situations and make sure they are legitimate. The owner's contract with the general contractor might expressly prohibit such rebates. If the owner is approving subcontractors recommended by the contractor, then all such monetary arrangements should be fully disclosed to the owner.

Be aware that Section 720 ILCS 5/33E-7 dictates that it can be a Class 4 felony to be involved in kickback schemes relating to a public contract with State or local government. The criminality of such conduct in the public sector is a good indicator that such conduct presents similar dangers in the private sector as well.

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