

Attorney Demand Letter (Subcontractor to Prime Contractor)

--Instructions--

Introduction. This is a letter to be used by a subcontractor to demand payment from the general contractor for unpaid invoices on a construction project. Use it after repeated demands have been made and ignored. Typically, it is sent out right before the filing of a mechanic's lien.

Fully Editable. Since it is in Word format, it is fully editable and can be used over and over again for subsequent projects. This template contains more than a demand for payment. In most cases the other side claims, although erroneously, there have been deficiencies in performance which is an excuse for nonpayment. For this reason, the template contains counter-arguments to most of those common excuses, including defective work, untimely performance, failing to abide by schedules, punch lists, and an array of other excuses. Simply pick the ones that apply and delete the others. For example, if it is not a fast track Project, you would delete the section of "Fast Track Project".

Fill in the information in the parenthesis that applies to your situation. When you are done, delete the parentheses. For example, you would change: "Our work was scheduled to begin on (Date)" to "Our work was scheduled to begin on July 15, 2012."

Two Forms Included. This small kit includes two documents: 1) a demand in letter format and 2) a standard fill-in-the-blank form ("Collection Letter—Notice Assessing Finance Charges." You can use either one.

Can't find a paragraph that applies to your situation? Call us. We will send the wording for free. **(800) 995-9434.**

FINAL COLLECTION LETTER
ASSESSING INTEREST, FINANCE CHARGES, CONSEQUENTIAL DAMAGES, COURT
COSTS, AND ATTORNEY'S FEES
(Sub or Supplier)

Via Certified Mail

<p>TO OWNER:</p> <p>_____</p> <p>(name(s))</p> <p>_____</p> <p>(address--no. and street)</p> <p>_____</p> <p>(address--city, state, zip)</p>	<p>TO GENERAL CONTRACTOR:</p> <p>_____</p> <p>(name(s))</p> <p>_____</p> <p>(address--no. and street)</p> <p>_____</p> <p>(address--city, state, zip)</p>
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<p>FROM SUBCONTRACTOR / SUPPLIER:</p> <p>_____</p> <p>(individual/company name)</p> <p>_____</p> <p>(address—no. and street)</p> <p>_____</p> <p>(address—city, state, zip)</p> <p>_____</p> <p>(phone/fax))</p> <p>_____</p> <p>(email)</p> <p>Attention: _____</p>	<p>CLAIMANT HAS A CONTRACT WITH:</p> <p>_____</p> <p>(name(s))</p> <p>_____</p> <p>(address--no. and street)</p> <p>_____</p> <p>(address--city, state, zip)</p>
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PLEASE TAKE NOTICE that as of this date, the following principal and additional charges are due the potential lien claimant. This is based upon the non-payment of previously billed construction services in the form of labor, services, materials, and/or equipment conferred upon the below-described construction project. Notwithstanding the billing for such services, payment has not been made.

Project name:

Property subject to a lien (common street address or other description):

General description of construction services furnished by lien claimant:

Invoice(s) attached. See the attached for more detail.

(Choose one of the two finance charge options below. Then delete the other. Option one is if you have a signed purchase order or contract specifying a finance charge. Option two is if you do not):

Finance charge. Based on the contract signed between the lien claimant and general contractor, a finance charge of ____ % per month on unpaid principal is due from the 30th day after initial invoice date.

Unpaid principal \$ _____
Finance charge beginning date: _____
Finance charges due this date \$ _____
Total principal and finance charges due this date \$ _____

OR

Finance charge. There is assessed a finance charge of ____ % per month on unpaid principal due from the 30th day after initial invoice date.

Unpaid principal \$ _____
Finance charge beginning date: _____
Finance charges due this date \$ _____
Total Principal and finance charges due this date \$ _____

(Regardless of what option you choose above, keep the following five provisions):

Interest. Owed at the legal rate of 10% per annum from and after the date of receipt of the attached invoice(s). Under state law, a lien claimant is not allowed both a finance charge and interest. Accordingly, Lien claimant elects to receive the above finance charge as opposed to the interest. However, if the finance charge is not enforced for any reason, interest will be claimed. This will accrue daily until payment of principal and accrued interest is made in full.

Unpaid principal \$ _____
Interest beginning date: _____
Interest due this date \$ _____
Total principal and interest due this date \$ _____

Consequential damages. Notice is hereby given that lien claimant reserves its rights to any and all consequential damages as a result of nonpayment. This includes, but is not limited to: extended overhead; damages for delay of job; damages for downtime and idle time; loss of use of equipment and manpower; loss of productivity and efficiency; lost investment opportunities including the inability to put unpaid monies to productive use; lost profit and overhead; and loss of the ability to bid upon and complete other jobs.

Mechanic's lien. The recording of a mechanic's lien against the owner's property. This will affect credit, and impede the ability to sell or refinance.

Lawsuit to foreclose mechanic's lien. If payment is still not forthcoming, the law requires the institution of a lawsuit to foreclose and enforce the mechanic's lien, which proceeding is reserved by lien claimant.

Attorneys' fees. As the prevailing party in any action or proceeding to collect money due, an award of reasonable attorney's fees shall be requested.

Court and recording costs. All out-of-pocket court fees and recording costs.

Dated: _____

(Name and Title)

(Signature)

Cc: Attorney

(Your Company Name)

(Address 1)

(Address 2)

(Phone; Fax; email)

(Date)

(John Smith
ABC, Inc.
12345 Main Street
Anytown, CA 94111)

VIA FAX: (925) 899-8888

DEMAND FOR PAYMENT

Regarding Project: (Describe)

Dear (Mr. Smith):

We write you because of a seriously delinquent invoice for services performed. Although repeated demands have been made, payment has not been forthcoming. As described in more detail below, this failure constitutes a material breach of contract and we have no alternative but to enforce our legal rights. Although we would much rather resolve this matter amicably, you have forced us to take such steps. As one last attempt at reconciliation, please contact us immediately to make arrangements for payment.

A copy of unpaid invoices are again attached. Demand is hereby made that these amounts be paid within (for example five) days or further legal action will be taken.

Summary of the Work Performed

We believe it would be instructive to summarize our performance to date, so there can be no doubts and to ensure we are on the "same page". As you know, our work was essentially to do the following (briefly describe):

From the start, the following were exclusions under the contract:

1. (Describe)
2. (Describe)
3. (Describe)

Further, there were special circumstances understood in the beginning. This consisted of (Describe).

There was also an agreement between the parties, after various meetings, that we (Things expected to do or not to do).

All worked has been performed under the contract documents (including plans, drawings, the contract, and specifications), save and except the following minor items:

1. (Describe)
2. (Describe)
3. (Describe)

As a result, the labor, materials, equipment, and services performed have been conferred in good faith with the reasonable expectation of timely payment. In fact, we took on this job with that rational assumption and would not have done so otherwise.

Timeliness

Our work was scheduled to begin on (Date) and we complied with that commencement date. We have prosecuted our portion of the work with due diligence. Further, we have complied with all scheduling requests.

(If a fast track project) We have also been mindful that this project has been designated fast track and have instructed and followed through with our crew to perform the work expeditiously. Throughout this time frame, we made sure our activities were duly coordinated with the other specialty trades/subs so the overall job performance would be timely.

Nevertheless, you claim the project has been delayed because of our non-performance. Specifically, you state (Describe their position briefly). However this is not the case. To the contrary (Describe your position).

Fast Track Project

(If applicable) As this has been designated a fast track project, we have done everything within our power to: a) start immediately after being directed to commence, b) accelerate the work throughout the project, c) start the next phase immediately after completion of the former, d) consult before and during construction as to our activities with all design professionals, and e) performed overlapping and concurrent work with the other trades.

Notwithstanding, it is apparently your position that work was not completed on time due to our fault. This is not the case. (Describe why. For example: “The original plan was to do the construction while the owners were still in occupancy. In other words, allow the owners to continue active operations as a veterinary hospital. We did our best to accommodate this demand by working in certain areas while relocating them to others. Unfortunate, this caused a nightmare of scheduling, since most of our crew and sub-subcontractors wished to do their work all at once as opposed to mobilization and de-mobilization. Because of the inherent scheduling difficulties, it was decided by all that operations be moved into a modular facility on site. However, delays had already been occasioned prior to that temporary move.”)

Regular Scheduling

We have been mindful throughout this project with required scheduling. Meeting with your offices and those of the design professionals, we have complied with all the sequencing and scheduling we were told to perform. Specifically as to our work, we have made sure the following occurred (State briefly what your activities were in relationship to the overall construction and how you complied).

Notwithstanding, you claim the overall project has been delayed because of our performance. This is simply not the case. Specifically, you should bear in mind the fact that (Describe your position).

Critical Path Method of Scheduling—CPM

From the beginning we were aware of the necessity of CPM scheduling. We have complied with all those requirements, including the following: a) abiding by all CPM diagrams and charts, b) before beginning, furnishing a list of our activities and the time to complete each component, c) cognizable of those activities deemed “critical”, d) bearing in mind the time to complete each component, e) updating the responsible parties with our progress, f) completing all work in compliance with the construction documents, and g) in general, implementing as best as possible under the circumstances the concept of “early finish--early start”.

Change Orders

(Verbal extra-all terms agreed upon). We wish to call to your attention that on July 15, 2012 at the project site, (Name of person) directed our job foreman to perform the following extras that were beyond the scope of the base contract: (Describe. For example: "The drawings provided as to the ceiling, except for the waiting room and reception room, for an exposed sprinkler system, ducting for the HVAC, and electrical. Ceilings would be covered with Armstrong tile. As a result of ongoing discussions, it was decided an extra would be implemented in the form of a T Bar ceiling which would be installed instead cover up those features."). It was agreed we would receive additional compensation for (Either a lump sum of \$ _____ or Cost-plus 15% or T and M at \$55/hr). Payment would be made (Example: upon receipt of an invoice or within a reasonable time after the work was performed). It is reasonable to assume this work would extend the completion date for our portion of the work by (State time period, for example: one week).

(Extras directed, but written change order not signed as required under contract) We wish to call to your attention that on July 15, 2012 at the project site, (Name of person) directed our job foreman to perform the following extras that were beyond the scope of the base contract: (Describe). We perform them as requested and in a timely manner. Thereafter, we submitted a written change order for signature, but after repeated demands, it is not been forthcoming. It was agreed we would receive additional compensation for (Either a lump sum of \$ _____ or Cost-plus 15% or T and M at \$55/hr). Payment would be made (Example: upon receipt of an invoice or within a reasonable time after the work was performed). It is reasonable to assume this work would extend the completion date for our portion of the work by (State time period, for example: one week). Because of the failure to sign the written change order, our attorney informs us that under the principles of unjust enrichment and estoppel, you and the owner have waived the right to insist upon a signed change order and we are entitled to the extra compensation. The amount owned is (Either state the amount or refer to an attached invoice). Demand is also made that this be paid within five days.

(Work under protest. Extras were directed, but the claim was made that it was part of the base contract and that extra compensation would not be paid) We wish to call to your attention that on July 15, 2012 at the project site, (Name of person) directed our job foreman to perform the following extras that were beyond the scope of the base contract: (Describe). You have taken the erroneous position that such work is included within the base contract and that additional compensation will not be paid. We disagree wholeheartedly. Nevertheless, so as not to impede the overall project, we agreed to perform the extra work under protest, and did so. The amount of owned is (Either state the amount or refer to an attached invoice). Demand is also made that this be paid within five days. This is based upon cost-plus basis.

Overtime

Our crew has also performed work on a rush/over time basis. On (Date), we were told by (Name and title) that work must be done for the weekend/holiday of (Describe dates). Work consisted of (Briefly describe. For example: "We were told to proceed even though the basic drawings had not been approved by the City of Oakland. There had been no approval of electrical, mechanical, plumbing, or structural plans. Nevertheless, we called in on an overtime basis, with the costs out-of-pocket, a personal structural engineer to prepare the calculations over the weekend, delivering the schedule plans that next morning for immediate approval by the City, which is essentially unheard of. Then we had our crew and sub-subcontractors work overtime, including evenings and weekends."). We complied, a crew was dispatched, and the work completed. As this was clearly outside of the original scope, we have reasonably assessed extra compensation. As a consequence we are owed (State amount or attach an invoice).

Supplier Costs

As you can also imagine, we have incurred substantial costs in ordering materials/equipment from a number of supply houses. They are not always as patient as we are in receiving payment. After procuring this material, we are billed on a net 30 day basis and these monies are now overdue. We are incurring late fees/finance charges. This can also interfere with our credit limits. Needless to say, we are unable to make payments until our billing from you is paid. This amounts to an out-of-pocket loss.

Alleged Defective Work—Punch Lists

We have been informed it is your position some of our work is deficient. We disagree. Here is a summary of that disputed work and our respective positions:

1. Brief description or work in dispute: (For example: Re-painting and re-texturing of both offices within the warehouse.").

Your Position: (Example: "All interior walls must be stripped down and completely re- textured and re-painted.")

Our Position: (Example: "This is completely unjustified and is an example of why the estimates received are so high. Apparently it is based on the allegation there are multiple textures and paint types on the walls. This is not true. A light knockdown texture was called out. Texturing, which was initially the consistency of pancake batter, is sprayed and splattered on the walls. It is then finished off with a flat trowel. Only one such process was used. The only exception would be the hand texturing in the stairwell after railings were removed. Further, the interior was flat latex with the

exception of semi-gloss on the door casing. Flat and semi-gloss were not mixed for the same surfaces.”)

2. (Brief description or work in dispute. For example: _____).

Your Position:

Our Position:

3. (Brief description or work in dispute. For example: _____).

Your Position:

Our Position:

4. (Brief description or work in dispute. For example: _____).

Your Position:

Our Position:

5. Etc.

Substantial Performance

After discussion with our attorney, it is apparent you are not aware of the law as to what is expected in the performance of a construction project. There are some that erroneously believe all work must be done to some standard of absolute perfection. This has never been the law in any type of construction project. Courts are well aware of this misconception and have developed the undisputed rule that a contractor is entitled to the full contract price and is not deemed in breach of the contract, if there has been performance of the essential elements of the contract in good faith (without willful or intentional deviation from contract documents). Stated another way, the contractor gets paid if the work is

performed substantially (“mostly” or ‘predominantly’) the same as complete performance. Once this occurs, which has happened here, there can only be a deduction for the actual cost to repair defects clearly the responsibility of the contractor.

This is known as the well recognized doctrine of “substantial performance”. This means any deduction can only be for the exact amounts to repair--under no circumstances may there be a withholding of all monies due. Further, the contractor is not relegated to the lesser remedy of only receiving the reasonable value of labor and materials conferred (common counts) or some arbitrarily imposed hourly rate or bare material cost—full compensation delineated in the contract is to be paid. The only exception is if the alleged deficiencies are so great as to severely impair the very purpose of the underlying contract, which is hardly the case here. This is so ingrained in the law as to be applicable in every state.

In this particular case, we disagree with your assessment of deficiencies, but even if an arbitrator were to so find, they are minor and technical in nature which can easily be rectified.

If you do persist in making deductions, demand is made that you give evidence of the actual cost as follows:

1. A definitive list of all deficiencies.
2. Complete details of those defects.
3. The actual cost to repair in the form of either: a) a written estimate, b) a paid invoice of remedial work done, or c) receipts of labor, materials, or equipment furnished to rectify. Mere estimates or ballpark figures are not sufficient.
4. If there is a back charge contractor, a copy of that person’s contract and invoices.
5. Other backup documentation that makes it clear what was done and how much.

Most importantly, we expect to receive within five days the balance of monies due after such deductions. We can then meet informally to discuss how those withheld monies will be paid and what further work, if any, may be necessary to rectify such a punch list.

Differing Site Conditions

One of the issues in our dispute is after commencing performance, we were met with unforeseen and differing site conditions. Prior to entering into the contract, we visited the site and carefully reviewed all contract documents and made sure we were aware of existing conditions. However, the following (Choose one or

more of the following) was not accessible, available to view, was concealed, or not readily apparent from a reasonably diligent inspection: (Describe).

As such, demand is made for the extra costs incurred as follows: (Describe)

Interference by other Trades

One of the problems we encountered was the fact that (Describe the trade or company) trade has interfered with our performance. As our attorney describes to us, this constitutes an excuse for any alleged nonperformers on our part. Although we have brought this to your attention, nothing was done to correct the situation. In particular, what occurred was that (Describe in summary form).

Material Unavailability

As you know, the contract provides for the following special order material: (Describe). We exercised due diligence in ordering this material on or about (Date). The order was placed with (Name of company). Notwithstanding, (Choose one of the following) the manufacturer/supplier has indicated the material is unavailable; the manufacturer/supplier delayed shipping the material until (Date); the manufacturer/supplier increased the pricing to \$(Amount). This is an unforeseen circumstance of which we are not liable. Notwithstanding, so that the project could be completed, we took the following steps: (Describe).

Substitutions

There has also been an issue as to necessary substitutions. Specifically, this relates to (Describe in summary the substituted materials. For example: "Distressed and re-claimed barn hardwood flooring in the family room and kitchen."). In this regard, the contract specifies (Describe the material specifications. For example: "Heart pine boards from old barns in New England). Contrary to your assertions, strict compliance was not possible because (for example, material unavailable, delay in shipment, increased pricing, etc.). When determined, this was brought to the attention of (for example, the owner, general contractor, project engineer, project architect, or construction manager) with the furnishing of a description of the material, specifications, and product brochure.

As a result, we had no alternative but to provide substitute material in the form of (Describe). Therefore, it is our position that full compensation should be paid because (State the reason).

In summary, the following applies: a) the substituted material is equal or superior, b) the same warranty will be in effect, c) there are no adverse affects on other trades and it will not affect or delay performance, and d) there is no substantial effect on functional performance values.

Matching Materials

For anyone experienced in the construction trades, it is well known that matching existing materials is difficult. Quite frankly, there are inherent limitations in that matching process which cause discrepancies, even by the most prudent contractor. Especially difficult is matching colors and texture. Exact duplication is simply not possible.

An example in our project is (Describe the problem with an existing condition, for example stucco, tile, flooring, stone and brick work, etc. Example: "The family room addition to this 50 year old Spanish style stucco home required matching of that stucco work by way of both texture and color."). Before starting work, we brought this to the attention of (Name of person and title) on (Date).

Notwithstanding, we have done our best to make the material match. Yes, there are some variations, but they are within industry tolerances and should be considered acceptable.

(If applicable) To try to remedy this situation, we went the extra mile and re-did the portions consisting of (Describe). We believe this is more than satisfactory.

Retention

(If your work has been completed) As you know, our contract also provides for a 10% retention to be paid upon completion of our work. The same rules described above as to substantial performance apply in this situation. All retention, in the sum of \$ (Amount) is to be paid after completion, less only the actual cost to repair alleged deficiencies. Demand is also to be made that those monies be paid within five working days.

Temporary De-Mobilization

Payment has been overdue for over (Number) days. If we do not receive full payment within (For example five) working days from the date of this letter, we will have no alternative but to:

1. Temporarily cease further work. This shall constitute temporary de-mobilization only. Once paid, we have taken the steps necessary to re-mobilize and re-commence performance within (For example five) days thereafter. We can no longer commit our crew and resources if there is no likelihood of payment.
2. Elect to treat this failure to pay as a material breach of contract.
3. Record, without further notice, a mechanic's lien.
4. Directly contact the owner.

5. Assess interest and/or finance charges.
6. Claim direct and consequential damages, including but not limited to lost profit and overhead; impacted damages in the nature of lack of productivity; extended overhead; damages for idle time; loss of investment opportunities in not being able to use the monies owed; and the inability to take on or complete other jobs for lack of working capital.
7. Other remedies at law or equity to be reserved.

Attorneys fees

(If you have in a signed attorney's fees clause) Our contract has an attorney's fees clause to the effect that the prevailing party in any action or proceeding to enforce the terms of our contract shall be entitled to reasonable attorney's fees. You are put on formal notice that we claim these fees and all such costs incurred by our attorney will be assessed against you.

Court Costs

The law is clear that the prevailing party in any court action or arbitration is entitled to recover costs incurred for filing fees and arbitration fees and costs incurred. You are put on formal notice that we reserve the right to claim these expenses because of your breach of contract.

Conclusion

For the foregoing reasons, it is believed we have amply demonstrated entitlement to receive payment on the enclosed invoices. We encourage you to contact us immediately to make appropriate arrangements. Again, if payment is not received within five working days, we will have no alternative but to take legal action, without further notice, in the recording of a mechanic's lien.

Sincerely,

(Your name and title)

Cc: Owner
Cc: Our attorney