



KNOWLEDGE IS POWER: UNDERSTANDING THE 60 DAY COMPENSATION WINDOW

The Forestry Service Providers Compensation Fund, created to financially support a contractor when a licensee is insolvent and unable to pay its bills, can only pay the contractor for a maximum of 60 days of unpaid work. Critically, the contractor doesn't choose which 60 days. There is a special formula within the Fund rules which dictates when the 60 days begins. All contractors need to know how this rule works and how it should affect their actions toward a licensee that pays late or only makes partial payments.

Here's the formula. To begin, one needs to identify the first date of non-payment to the contractor. In a typical case, a contractor may have a two week delivery window that ends in a cut-off, and payment is to be made one week later. If payment is not made, then the first date of nonpayment is established. From there, the contractor reaches back to that first day in the delivery window, and that establishes the start date for compensation. Then, one counts forward up to a maximum of 60 days.

The concept is that immediately on non-payment the contractor should get a bit of time to catch his breath, and then he should be moving towards an orderly shutdown of operations with this licensee.

Experience tells me that the situation is rarely cut and dried. Consider these two real life scenarios.

Scenario One

In this first scenario, the contractor started off performing road work as promised and then began some harvesting and delivery of timber. When his first cheque was due, only a part payment was made along with a promise of a catch-up when cash flow improved. The contractor continued and more partial payments were made. This cycle repeated itself for a few months, until the licensee became insolvent and the contractor stopped working. In this scenario, the first date of non-payment was

established early on, as was the start date for calculating the claim. For the 60 days of work following that start date, the contractor had actually been paid. He had been paid in bits and pieces and almost always late, but he had been paid for the 60 days of work. He was ineligible for compensation for his later work, because that first day of non-payment was then months old.

Scenario Two

In my second scenario, a contractor was directed to send some timber into the sort yard of a small licensee, where it was to be held for export to China. Other timber was directed to a local sawmill and other timber was directed to a nearby pulp mill. The contractor received direct payment from the sawmill and direct payment from the pulp mill, but he received only a promise of later payment for the export timber. The contractor continued working on this basis for 120 days. Then he was left with a big receivable for the timber in the sortyard.

He applied to the Fund and was initially told, "Your first date of non-payment was long ago and we will calculate your 60 day eligibility window from then. The direct payments that you received from the sawmill and the pulp mill—including those for deliveries in the final months—will be first applied against the earliest work that you performed. You have been fully paid for your first 60 days of work, and you are entitled to nothing from the Fund."

(Fortunately, the Fund changed its position. In this case, the contractor was only about 15 per cent unpaid when his first payment was expected, and the Fund accepted that the contractor was acting reasonably in not immediately shutting down. Partial compensation was received from the Fund.)

These two scenarios highlight one of the vaguer points within the Fund's application rules: there is uncertainty over the meaning of the words "the first non-pay-

ment of an invoice." Is that the first ever failure of the licensee to pay on time, even if late payment is ultimately made? Or, is it the oldest unpaid invoice when the application to the Fund is made?

Further still, if a contractor pursues his legal remedies under the statute and manages to collect some money, is all of that money going to pay the oldest invoices, leaving the latest invoices unpaid? If that's the case, then all of this effort will lessen the contractor's compensation claim.

A contractor faced with a non-paying or late-paying licensee needs to make a calculated decision on whether to continue onward, or to slow down, or to stop. The contractor also needs to decide whether to exercise his lien rights under the statute. There are many business factors coming into play in making these decisions, only one of which is the likelihood of licensee insolvency and a possible application to the Fund.

Contractors need to be aware that when it comes to an application to the Fund, the contractor doesn't select the 60 day period of compensation that best suits his needs. That 60 days has already been determined by the rules of the Fund. Not only that, the more that the contractor continues to work after the first non-payment, with more late and partial payments coming in, the more the contractor is jeopardizing his entitlement to compensation from the Fund.▲

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