

International Association of Geosynthetic Installers

# IAGI Newsletter

## A Note from IAGI's President - Dennis W. O'Brien

IAGI has successfully awarded the Approved Installation Contractor status to a total of six companies to date. All six companies are listed on the back page of this newsletter as well as located on the IAGI website at [www.iagi.org](http://www.iagi.org).

The success of this program will be dependent on the installer helping to market this program to the engineers and specifiers they work with.

To make it easier for engineers and specifiers to include this information into any job specification, IAGI suggests the following wording:

*The Geomembrane Installer shall have current AIC status issued by the International Association of Geosynthetic Installers.*

It is likely the engineering firms or owners will have internal company policies that will specify additional requirements on the Geomembrane Installer and they should be added to the specification.

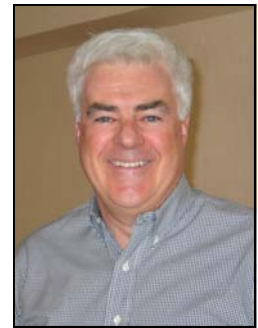
*These requirements may include:*

*—The Geomembrane Installer shall have a minimum of (your company requirement) square feet (square meters) of successful geomembrane installation experience.*

*—The Geomembrane Installer shall document the ability to provide a performance and payment bond in the amount of (your company's requirement).*

*—The Geomembrane Installer shall carry insurance coverage in the following minimum limits (list project requirements).*

If you have any questions



**Dennis W. O'Brien, IAGI President**

about the AIC program, please contact Laurie Honnigford at [iagi@iagi.org](mailto:iagi@iagi.org).

IAGI is proud to work diligently with its members to continue the growth of our industry and this profession. We wish all of you a successful construction season.

*Dennis W. O'Brien*



### Inside this issue:

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## Debunking the Top 10 Payment Myths

By Donald Gregory, Esq.

Payment is the lifeblood of any subcontractor or supplier. Yet many myths adversely affect the ability to secure timely payment. Here are my personal top 10.

1. "Don't worry about it, we can always lien."

While lien rights are important, they are not a substitute for good credit practices. Lien rights attach only to the equity in the property, which can often be a problem on a troubled project. In addition, legal fees must be paid to foreclose or otherwise turn the lien into cash, and fre-

quency are not recoverable.

2. "We don't care about anyone on the project other than the customer."

Big mistake, particularly if your customer needs cash flow on the job to pay your bill. Even if you negotiate good contract language with

## Debunking the Top 10 Payment Myths—continued

an honest and solid customer, you still may not be timely paid if your customer is not paid by others further up the “construction food chain” on the project. Consider the project’s financing and reputation of others who control cash flow.

**3. “We’ll worry about payment terms after we get the job.”**  
Wrong. Once your company is awarded the job, you lose leverage to walk away from unfair payment terms, particularly if the contractor has relied upon your bid in securing the job. It is much better to condition your bid upon acceptable contract language so you maintain leverage to secure fair payment terms, or if that fails, to walk away to a safer job.

**4. “Don’t rock the boat until the job is done.”**  
Many in the construction industry fear disrupting relationships on the *job and the flow of payment* so much that they consciously avoid any notice of, or discussions of, problems until after the job is virtually finished. This inevitable leads to shouts of protest that “we should have known sooner” and bad blood that often results in litigation that could have been avoided if the problem had been addressed timely.

**5. “It is a bonded job, so no worries.”**  
While the security provided by a bond can be advantageous, a bond claim does not automatically equate with timely payment. Bonding companies are notorious for inaction and often require legal prodding to satisfy their obligations, which requires time and expense—and erodes the bottom line.

**6. “Don’t offend the customer by asking for a personal guarantee”**

While no customer wants to be asked for a personal guarantee, suppliers that insist upon guarantees from owners of marginally capitalized companies are much more likely to be paid even if the company buying the materials encounters financial difficulty.

**7. “There is no real difference between ‘pay-when-paid’ and ‘pay-if-paid,’ is there?”**  
There sure is. “Pay-when-paid” in many jurisdictions means that while timing of payment may be delayed, there still is an obligation to pay within a reasonable period of time. In contrast, “pay-if-paid” (using words like “if” and “condition precedent”) means that not only timing but also entitlement to payment can be derailed if payment is not received by the contractor from the owner. This difference can be the difference between eventually receiving payment or nothing at all.

**8. “Waiving lien rights without consideration is unenforceable, right?”**  
Wrong, at least in many states. Contrary to well-accepted construction folklore, lien rights can be waived up-front in a contract without additional consideration in many jurisdictions. So don’t do it. If someone wants you to waive lien rights before you even step on the job, there is probably a reason for it.

**9. “A bad contract is better than no contract at all.”**

If you provide labor or material, you have a contract with your customer, either oral or written. While a written con-

tract eliminates many uncertainties about the terms, many written contracts shift risk to those downstream and take away legal rights. Therefore often a handshake deal or a simple purchase order is better than a one-sided written subcontract.

**10. “Let’s wait as long as possible before we have to incur legal fees.”**

No subcontractor wants to incur legal fees, particularly if not absolutely necessary. As a result, many wait longer than is prudent to get legal advice or take legal action. This approach often is “penny wise and pound foolish” in that the earlier a legal problem is addressed and solved, the fewer resources are expended, and often with more productive results. Typically in payment disputes, “the squeaky wheel gets the grease” and “the early bird gets the worm” of payment before others. Once a payment problem develops, it typically gets only worse over time. Subcontractors and suppliers that do not fall prey to these payment myths will be more profitable as collection rates increase as part of a solid credit strategy.

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## Industry News

### IAGI updates the HDPE Specification on IAGI website

IAGI has updated the HDPE (High Density Polyethylene) Geomembrane Installation Specification. The updated specification also references LLDPE (Linear Low Density Polyethylene). This specification includes furnishing and installation HDPE and LLDPE geomembranes with a formulated sheet density of 0.940 g/cm or greater. If you would like to review the specification please visit IAGI's website at [www.iagi.org](http://www.iagi.org), select publication, and choose specifications. If you have additional questions regarding the specification or receiving it another format please contact Jilien Harvey at [Jilien@honnigford.com](mailto:Jilien@honnigford.com)

### New Members

#### National Lining Systems, Inc.

Joe Irwin, President  
16970-3 San Carlos Blvd  
#191  
Fort Myers, FL 33908  
Phone: +1-863 248-0850  
Fax: +1-863 248-0851  
[jirwin@nationalliningsystems.com](mailto:jirwin@nationalliningsystems.com)  
[www.nationalliningsystems.com](http://www.nationalliningsystems.com)

Full service lining company, specializing in many types of lining applications throughout the U.S.

### IAGI Presents Solid Waste & Recycling Conference

IAGI Board Member Anne Steacy, Steacy Environmental, Houston Texas presented *IAGI's Approved Installation Contractor Program— One Year Later* at the Solid Waste Associations Federation of New York May 6-9, 2007. This presentation was made by Steacy during the Landfill Permitting Requirement session. The presentation covered information regarding the IAGI based Approved Installation Contractor (AIC) Program and the process throughout the past year.

#### USA Lining Inc.

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914 SW 5<sup>th</sup> Street  
Oklahoma City, OK 73109  
Phone: +1-405-235-2900  
Fax: +1-405-235-2901  
[sales@usalining.com](mailto:sales@usalining.com)  
[www.lining.com](http://www.lining.com)

USA Lining Inc. are the suppliers and installers of Geomembrane Liner and Geotextiles.

### Scales Joins DEMTECH

Demtech Services, Inc. is pleased to welcome Greg Scales to their sales and marketing team. Greg brings with him a wealth of knowledge in all aspects of the geosynthetics industry. His location in Ashville, North Carolina, and his many years of experience will be a valuable tool in helping DEMTECH's Eastern US customers with all of their installation equipment needs. To contact Greg: +1-530-621-3200 or via email at



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## Overcoming the Waiting Game for Final Payment

By: Larry Logsdon, Esq.

Disputes about final payment can make or break a project. To ensure the project leans toward the former, it is important to give the financial aspect the attention it deserves—before the work begins.

### Define the Type: Progress vs. Final

Payment for construction projects consists of two main categories, progress and final. The first, progress payments, are made during construction and in contemplation of further work. The second type, “final payment,” involves, as the name suggests, the payment of the remaining amounts owed at the end of a contractor’s or subcontractor’s work. A survey conducted by the American Subcontractors Association (ASA) revealed that issues regarding “slow final payment” rank as subcontractors’ most serious concern impacting the success of their businesses. There is good reason for that concern. The timing as to when and how much of final payment is made can mean the difference between whether a project is profitable and successful or unprofitable and not worthwhile.

### Review the Subcontract Language

Like many other issues faced in a construction project, the framework establishing when final payment is made begins with the language of the subcontract. It allows the parties to quantify their expectations and literally shows the subcontractor and contractor where they are headed. As explained by the notable contractor (or perhaps it was Yankees’ catcher?) Yogi Berra, “You

have to be very careful if you don’t now where you are going because you might not get there.” Because the subcontract language is so important, a subcontractor should closely review its terms and negotiate equitable provisions addressing final payment to try to head off disputes early that may cause the all-important final check to be late. may cause the all-important final check to be late.

Needless to say, the higher the percentage of retainage, the more important “final payment” issues become. During contract negotiation, subcontractors may argue that retainage should be reduced as the project moves closer to completion since the premise behind holding retainage—security for completion of work—has largely been met. Less retainage will reduce the potential for disputes over final payment. The parties may also agree on a provision allowing for retainage to be held in an interest-bearing account. The Associated General Contractors of America (AGC)/ASA/Associated Specialty Contractors (ASC) joining “Guideline on Retainage” states: “Where retainage is used, retained amounts should be deposited in an escrow account accruing interest to the contractor and the subcontractor in their respective share.”<sup>1</sup> The rationale behind such a provision is that, once earned, the retainage should benefit the party that earned it.”

The parties should be sure to set out objective standards and finite provisions in the subcontract as to what needs to be accomplished for final payment. Contractual provisions that clearly address the parties’ expectations as to what needs to be done to achieve final payment can best be handled during the contract negotiation stage

as opposed to the often stress-filled end of the project. Subjective, broad or one-sided contract provisions that allow for final payment to be withheld until, for example, “when the owner or contractor in their own opinion believes that all work is completely done to their own satisfaction,” create a situation that leaves the subcontractor that is working to achieve completion virtually unable to determine exactly what needs to be done to get paid.

### Avoid Incomplete Punch Lists

Perhaps the most common excuse for not making final payment is the claim that punch list items are incomplete. The subcontractor should seek to have terms that allow for final payment upon “substantial” completion as opposed to absolute completion of all work. Providing for “final” completion of all work as the trigger for the last payment can allow an argument for payment to be delayed when inconsequential issues remain with the work. Also, the contractor can delay final payment by creating rolling or unending punch lists that are constantly expanded or revamped or that contain the inevitable few items that are disputed. Next, allowing several parties, such as the architect, construction manager, owner and even end-user occupants the opportunity to develop separate punch lists can contribute to an unending “final” completion.

Issues with regard to punch lists arise because a contractor wants its subcontractor to be motivated to complete outstanding items. A subcontractor, however, wants any amount withheld to be rationally related to the value of outstanding

items. This balance of interests often is achieved by delaying payment until disputed items, punch lists, or minimal and inexpensive fixes remain outstanding. From the subcontractor's perspective, any restrictions on final payment that are tied to outstanding repairs at substantial completion should be in line with the amount of the repairs. Common contract clauses allow for an amount to be withheld that is sufficient to cover the costs to complete the punch list of omissions or deficiencies.

### Stay in Control

Final payment should not be conditioned on occurrences that are outside of the control of the party seeking final payment. For instance, a subcontractor does not want final payment tethered to matters such as requiring that the certificate of occupancy be issued or that the building be fully occupied by tenants. Delays by the owner or contractor, or another third party's failure to perform certain duties, might postpone payment that otherwise would be due.

### Shorten the 'Laundry List'

Moreover, the subcontractor should resist agreeing to any excessive laundry list of requirements that must be met before final payment is made. The types of restrictions on final payment that would be considered problematic vary depending on the nature of the project and the type of work involved. One of the more commonly seen requirements is to condition final payment on a subcontractor providing lien waivers from, among others, every one of its suppliers. If a subcontractor has no suppliers, the job is easy. However, such a requirement can be unworkable if a project involves secondary suppliers that are

unlikely to provide lien waivers. In any case, a subcontractor should evaluate the list of requirements for final payment and determine up-front if they are achievable.

### Pay Attention to Paperwork

Early in the project, a subcontractor should be mindful of necessary closeout documents and begin to gather them as soon as possible instead of waiting until just before preparing the final payment application. For instance, if a subcontractor knows that certain documents will be needed (e.g. invoices, as-built plans, or warranty documents), this paperwork should be addressed in the planning stage. Along this line, a subcontractor should resist agreeing to vague provisions such as one that attempts to condition final payment upon providing an unspecified and unnamed list of "any and all documents requested by the contractor." The party seeking payment should seek the earliest possible confirmation that it has provided all required closeout documents and paperwork so that it can handle any noted deficiencies and not contribute to delayed final payment. To this end, it can send correspondence with the final payment application that includes language such as: "Enclosed is our final payment application and all necessary documents. If you have any questions or believe that we are lacking any documentation, other information, or anything else that would prevent timely final payment, please let us know."

### Be Specific on Application

While it is important to request final payment promptly, anyone submitting a final payment application should remember to

include all items for which payments are due in the request. For example, a subcontractor owed for amounts not yet quantified such as delay damages or unresolved change orders should at least note those issues on the final payment application. This is particularly true where the payment application contains broad waiver language which says that the application covers any and all amounts owed on the project and states that all other claims are waived. Similarly, a contractor making final payment to a subcontractor can argue that the subcontractor's act of accepting final payment constitutes a waiver of all other payments by the subcontractor. For example, the standard owner-contractor document published by the Construction Management Association of America expressly provides that acceptance of final payment constitutes a "waiver of all claims by the Contractor against the Owner."<sup>2</sup> Likewise, AGC's 650 subcontract form states, "Final payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontract Work."<sup>3</sup>

### Follow Up Promptly

After submitting a complete final payment application, the subcontractor should immediately follow up if timely payment is not made. A contractor may receive several requests for payment from various subcontractors or suppliers but not be in a position to be able to pay all of them. In these circumstances, remember the theory of project management that "[t]he wheel that squeaks the loudest is the one that gets the grease."<sup>4</sup> If payment does not come when it should, the party seeking pay-

## Overcoming the Waiting Game for Final Payment (cont.)

ment should follow up in writing. As with any written communication, remember that whatever is written may one day be enlarged as an exhibit in a mediation, trial or arbitration. As such, be cordial and polite. Also, nice letters are more likely to get the desired results as “[t]he squeaky wheel gets the grease, the quacking duck gets shot.”<sup>5</sup>

### Address Tardiness

In negotiating to obtain final payment, a subcontractor should consider that a contractor may be less likely to withhold final payment if the contractor recognizes that, if it pays late, then the subcontractor may be entitled to interest and possibly attorney’s fees. Therefore, the subcontractor may contractually provide for interest to be added to late payments and to allow for the prevailing party in a dispute to recover attorney fees.

Depending on the type of work, federal and state prompt pay laws can help subcontractors seeking interest on late payments, and with other aspects of final payment, such as recovery of attorney fees in disputes over payment of retainage.

Disputes about final payment can make or break a project from the subcontractor’s point of view. Giving this issue the attention it is due means considering and clearly defining final payment terms before work begins. As a project progresses, a subcontractor should carefully handle all administrative responsibilities and requirements, beyond just doing the work properly, to try to ensure prompt final payment. Then, if final payment is not made when it is due, the subcontractor should quickly and firmly, but respectfully

and politely, follow up and take steps to get payment.

*Larry S. Logsdon is an attorney and member of the firm of Wallace, Jordan, Ratliff, & Brandt, L.L.C., Birmingham, Ala. He can be reached at ll@wallacejordan.com*

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*Guidelines for a Successful Construction Project (AGC/ASA/ASC), 2003.*

<sup>2</sup> CMAA Document A-3 (2002) at ¶ 11.13.1.3.

<sup>3</sup> AGC 650 (1998) at ¶ 8.3.5.

<sup>4</sup> Henry Wheeler Shaw, *Farmer’s Allminax* [sic] (1869-80).

<sup>5</sup> Author Unknown.

## Welders Obtain IAGI Certification



Congratulations to **Environmental Fabrics Inc.** and **Geo-Synthetics, Inc.** who sponsored Certified Welding Technician testing of their welding technicians in their employment.

Environmental Fabrics Inc. have 17 new CWTs on their staff and Geo-Synthetics, Inc. have eight new CWTs.

Congratulations to all the welders who passed this test.



**Greg Yaple**  
*President*

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## Geomembrane CQA—Let's poke some holes: Installment Four

by Glenn T. Darilek, P.E.

We continue with this series of hopefully thought-provoking maxims related to geomembrane CQA with the invitation to poke holes in these "pincushions."

**Pincushion 9** - CQA measures should not just maximize any particular quality parameter simply because it is attainable (at a cost). Quality assurance measures must be selected to only verify the proper performance of the installation at an economical cost.

**Jack McHugh** - CQA should fit the project. I would never have a cap closure electronic leak tested, but I expect it for heap leach pads and landfill cells, since they both have pipes and cover sand placed on the synthetic liner. Liner conformance and seam testing are very important on above grade lined berm retention basins and on floating covers. Overheated seams can turn to zippers, and the repairs are hard to make. The cost of the tests should be weighed not by a percent of the project cost, but by the cost of the impact of a failure of the type of installation.

**Ron Frobel, P.E.** – Lets not forget the basic definition of CQA – "A planned system of activities that provide the owner and permitting agency assurance that the facility was constructed as specified in the design" (USEPA, 1993). In this regard, CQA documents contractor compliance with plans and specifications. Thus CQA measures should not maximize only specific parameters but

rather follow all of the contractor's QC operations. The economics of CQC and CQA should be associated more with the critical nature of the installation (i.e., hazardous waste double-lined vs. single-lined animal waste). We should keep in mind that there is a direct correlation between level of CQA and leakage rates in lined systems.

**Mark Cadwallader** - True. But why are military personnel expected to keep their boots shined? "Shininess" has nothing to do with a soldier's ability to fight. Except that shining the boots to the highest degree is part of a philosophy and discipline of total quality to prevent the contagion of sloppy work.

**Pincushion 10** - Like most other engineering designs, seam strength requirements should be based on an analysis of the worst case stresses for a seam and add a safety factor. If these levels are very easily attainable, the strength requirement can be increased to a higher value that is practically always attainable.

**Jack McHugh** - Seam strength requirements should be industry standard, even if the worst case stresses and safety factor are less than industry standard. One reason is most liner installers are creatures of habit and expect the same standards from job to job. The second reason is legal liability. If for any reason there is a failure, even slightly related to seam strength, a lawyer will exploit the lower than industry standard requirement.

**Ron Frobel, P.E.** – Seam strength requirements should only be associated with struc-

tural components (i.e. geogrids). In practice, seams associated with geomembranes in design should not be subjected to excessive stress as the geomembrane is not a structural component. Thus seam strength requirements should be used to evaluate the weld and not reflect "attainable strength" across the weld. In fact, measured strength values are of less importance than the mode of failure of the sheet material adjacent to the weld (locus of yield, adequate elongation vs. brittle failure)

**Mark Cadwallader** - Synthetic liners are meant for long-term fluid containment, not structural support. And long-term stress can lead to stress cracking or other fatigue related failure. Therefore, seam strengths should not normally be a part of design, only a quality issue (e.g., the old slogan "the seam is as strong as the strong as the sheet itself"). sheet itself").

Thank you to the responders. Now here is a new pincushion that is suggested by Ron Frobel's response above and a previous suggestion by Richard Thiel:

**Pincushion 11** – Destructive seam testing should be used to evaluate the weld quality, not seam strength. The mode of failure of the sheet (ductile vs. brittle failure adjacent to the seam) is more important than the strength measurement.

*Please provide your very brief responses to [glenn@llsi.com](mailto:glenn@llsi.com). Responses will remain anonymous if requested.*

## Six IAGI Member Companies have achieved AIC status



Installation companies are applying for what will become an engineer specified designation, AIC, can find complete program details, and a submittal form online at [www.iagi.org](http://www.iagi.org).

**American Environmental Group LTD**  
Richfield, OH

**Atlantic Poly Liners, Inc.**  
Fall River, Nova Scotia

**Clean and Water Systems, LLC**  
Dousman, WI

**Colorado Lining International**  
Parker, CO

**Layfield Environmental Systems LTD**  
Edmonton, Alberta

**Taylor Geosynthetics Inc.**  
Danville, IN

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### **AIC Mission Statement**

*To establish criteria for recognizing the geosynthetic installation companies that meet a minimum level of professionalism, experience and business practices. The program's goal is to promote growth in the geomembrane installation industry and promote better quality workmanship.*



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