ASA's THE CONTRACTOR'S Compass

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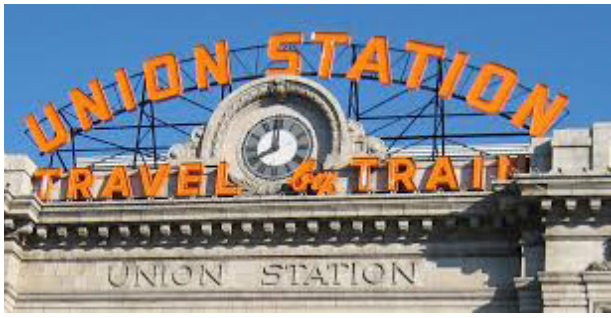

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EDITORIAL PURPOSE
The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to *The Contractor's Compass* do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

EDITORIAL STAFF
Editor-in-Chief, Marc Ramsey

MISSION
FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

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ABOUT ASA
ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@ASA-hq.com, or visit the ASA Web site, www.asaonline.com.

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Quick Reference

Foundation of ASA Updates *Lien & Bond Claims in the 50 States*

Construction subcontractors and suppliers rely on mechanic's lien and payment bonds to assure their payment. To help you learn your lien and bond rights in the states in which your company does business, the Foundation of ASA has updated its *Lien & Bond Claims in the 50 States*, a downloadable manual which outlines the lien and bond laws in each state and the District Columbia.

A mechanic's lien is a claim against property to secure a debt, such as a debt owned to a construction subcontractor for the value of work performed and materials furnished on a construction project. A payment bond, which is required on most public construction, assures the owner that the prime contractor will pay its subcontractors and suppliers.

The FASA manual provides a summary of the basic requirements of each state's lien and bond laws, including who is covered; critical deadlines for notices, claims and suits; filing procedures; and more. The summary of laws was prepared by Donald W. Gregory, Esq., and Eric B. Travers, Esq., Kegler, Brown, Hill & Ritter, Columbus, Ohio, ASA's general counsel, with input from attorneys from around the country.

Lien & Bond Claims in the 50 States (Item #3006) is $55 for ASA members and $80 for nonmembers.

'Unconditional Payment for Performance' Topic of New ASA White Paper

In ASA's most recent member needs assessment, subcontractors reported that egregious subcontract terms remain one of their most serious challenges, with predatory payment terms among the worse. ASA's new white paper, Strategies for Obtaining Unconditional Payment for Performance—available only to ASA members—is another tool to help members develop strategies for obtaining equitable payment terms. The white paper recommends that each subcontractor establish its own goals with respect to payment terms and then establish a system for contract review.

ASA Continues to Push for Curbs on Individual Sureties

At the request of ASA and other leading construction and surety associations, Rep. Nydia M. Velazquez (D-N.Y.), ranking member of the House Small Business Committee, called on the Office of Federal Procurement Policy to expeditiously publish regulations to curb the use of individual surety bonds on federal construction.

The National Defense Authorization Act for Fiscal Year 2016 included a provision that requires individual sureties to use only "eligible obligations" as collateral for their obligations to the federal agencies and to deposit such assets in the care and custody of the federal government. Although the law took effect on Nov. 30, 2016, a year after its enactment in 2015, the federal procurement agencies have yet to issue implementing regulations.

ASA was a strong advocate for the new law, arguing that construction subcontractors and suppliers need to be assured that the payment bonds that they rely on to safeguard their businesses are backed up by assets that are known and reliable.

ASA Voices Support for Quick Consideration of Regulatory Reform

In a letter sent to Speaker of the House Paul Ryan on Dec. 5, 2016, ASA joined nearly 400 associations in urging him to make consideration of the "Regulatory Accountability Act" an early priority for the 115th Congress, which convened in January 2017.

The groups wrote, "We believe that federal regulations should be narrowly tailored, supported by strong and credible data and evidence, and impose the least burden possible, while still implementing Congressional intent."

They explained, "The Regulatory Accountability Act builds on established principles of fair regulatory process and review that have been embodied in bipartisan executive orders dating to at least the Clinton administration."

The "Regulatory Accountability Act" would improve the transparency of regulations by requiring an agency to invest more effort earlier in the rulemaking process to gather data, evaluate alternatives, and receive public input about the costs and benefits of its rules.

New FASA Video Examines U.S. Election Outcome and Potential Impact on Subcontractors

Making predictions about how Congress or a state legislature will act is a perilous venture. ASA Chief Advocacy Officer E. Colette Nelson walks this tightrope as she reviews the results of the volatile 2016 federal and state elections and discusses how they may impact subcontractor issues in the complimentary video-on-demand, "U.S. Election Outcome & Potential Impact on Construction."

Nelson also discusses ASA priorities for the 2017 legislative sessions, provides a regulatory outlook, and answers questions about what lies ahead.

"U.S. Election Outcome & Potential Impact on Construction" (Item #8097) is free for ASA members and nonmembers. Order online.

Feds Issue New Rule on Subcontractor Payment

As of Jan. 19, federal prime contractors have increased responsibility to report late payments to subcontractors. A new rule, published by the Federal Acquisition Regulatory Council on Dec. 20, 2016, is required by an ASA-initiated provision in the Small Business Jobs Act of 2010. That law requires a federal contractor to notify the contracting officer in writing if the contractor pays a reduced price to a small business subcontractor or if the contractor's payment to a small business subcontractor is more than 90 days past due. Future federal contracts will include the following notice:

"The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after—

(1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and

(2) The Contractor—

(i) Made a reduced or untimely payment to the small business subcontractor; or

(ii) Failed to make payment, which is now untimely."

The contractor is required to include the reason(s) for making the reduced or untimely payment in any notice required under the clause. In addition, the rule requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity System. Because the rule is statutorily-required, it is unlikely to be subject to review and revocation by the Trump Administration.

OSHA Clarifies Employers' Record-Keeping Obligations

The U.S. Occupational Safety and Health Administration, on Dec. 19, 2016, issued its long-expected final rule clarifying that a covered employer has a continuing obligation to make and maintain an accurate record of each recordable injury and illness. OSHA's long-standing position has been that an employer's duty to record an injury or illness continues for the full five-year record-retention period.

In 2012, the D.C. Circuit Court issued a decision in *AKM LLC v. Secretary of Labor (Volks)* rejecting OSHA's position on the continuing nature of its prior record-keeping regulation. The new rule is intended to more clearly state employers' obligations and overrule the AKM decision. That is, the new rule clarifies that an employer's duty to record an injury or illness continue for as long as the employer must keep records of the recordable injury or illness; the duty does not expire just because the employer fails to create the necessary record when first required to do so. The new rule adds no new compliance obligations and does not require employers to make records of any injuries or illnesses for which records are not already required. The new rule took effect on Jan. 18.

ASA Chief Advocacy Officer E. Colette Nelson noted that even though the rule is eligible for consideration under the Congressional Review Act, she does not expect the 115th Congress to consider it. However, the new rule will be subject to review and revocation by the new Trump Administration.

Employers Must Meet New Transparency Requirements for Disability Claims

On Dec. 19, 2016, the U.S. Department of Labor's Employee Benefits Security Administration announced a final rule that requires plans, plan fiduciaries and insurance providers to comply with additional procedural protections when dealing with disability benefit claimants. The new rule is intended to ensure that a disability claimant receives a clear explanation of why a claim was denied, his/her rights to appeal a denial and to review and respond to new information developed by the plan during the course of an appeal.

The new rule took effect on Jan. 18. Improvements in the claims procedure process generally are applicable to disability benefit claims submitted on or after Jan. 1, 2018. For more information, see the ETA fact sheet on the new rule.

ASA Chief Advocacy Officer E. Colette Nelson noted that even though the rule is eligible for consideration under the Congressional Review Act, she does not expect the 115th Congress to consider it. However, the new rule will be subject to review and revocation by the new Trump Administration.

ASA Calls on Trump Administration to Delay Silica Rule

ASA called on the Trump Administration to delay implementation of OSHA's rule on crystalline silica, which is scheduled to go into effect on June 23, 2017. This will give the new Administration time to reopen

the rulemaking and to give the public additional time to comment on any proposed revisions.

In addition, ASA, in collaboration with 22 other construction associations, has initiated a lawsuit to prevent OSHA from implementing the rule. In its brief filed on Nov. 18, 2016, with the U.S. Court of Appeals for the District of Columbia, the Construction Industry Safety Coalition wrote, "OSHA's technological and economic feasibility finding is not based on substantial evidence in the rulemaking record."

OSHA's New Silica Rule's Exposure Assessment Requirements–Six Months and Counting

On June 23, 2017, construction employers will need to be in compliance with OSHA's new rule on crystalline silica. The new rule applies to all occupational exposures to respirable crystalline silica in construction work, except where employee exposure will remain below 25 micrograms per cubic meter of air (µg/m3), as an eight-hour time-weighted average under any foreseeable conditions.

OSHA assumes that most construction employers will choose to comply with the rule by following Table 1, which lists 18 common construction tasks. However, for tasks not listed in Table 1, or where an employer does not fully and properly implement the engineering controls, work practices and respiratory protection described in Table 1, the employer must ensure that no employee is exposed to an airborne concentration of respirable crystalline silica in excess of 50 µg/m3, calculated as an eight-hour TWA.

In addition, the employer must assess the exposure of each employee who is or may reasonably be expected to be exposed to respirable crystalline silica at or above the action level in accordance with either the performance option or the scheduled monitoring option. The employer must assess the eight-hour TWA exposure for each employee on the basis of any combination of air monitoring data or objective data sufficient to accurately characterize employee exposures to respirable crystalline silica. The employer must perform initial monitoring to assess the eight-hour TWA exposure for each employee on the basis of one or more personal breathing zone air samples that reflect the exposures of employees on each shift, for each job classification, in each work area. Where several employees perform the same tasks on the same shift and in the same work area, the employer may sample a representative fraction of these employees in order to meet this requirement. In representative sampling, the employer must sample the employee(s) who are expected to have the highest exposure to respirable crystalline silica.

To learn more about OSHA's silica rule, see the webinar prepared for the Construction Industry Safety Coalition. Access the webinar using the password: CSC4. A hard copy of the webinar slides is available on the ASA Web site. For more information, see the ASA Fact Sheet on OSHA's Rule on Respirable Crystalline Silica and the ASA Frequently Asked Questions on the OSHA Standard on Respirable Crystalline Silica.

ASA will also offer a complimentary webinar, "OSHA Silica Rule—Applications for Subcontractors," from noon to 1:30 p.m. Eastern time on March 1, 2017. Presenter Gary Visscher, Esq., Law Office of Adele L. Abrams, P.C., will examine the OSHA rule and explain what subcontractors need to know, including general information about performing construction work on silica containing materials, how the rule will affect the construction jobsite, and what is necessary to comply.

IRS Announces Standard Mileage Rates for 2017

The Internal Revenue Service announced that the 2017 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business will be 53.5 cents per mile for business miles driven. This is a decrease from 54 cents for 2016.

The standard mileage rate for business is based on an annual study of the fixed and variable costs of operating an automobile. Taxpayers always have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates. A taxpayer may not use the business standard mileage rate for a vehicle after using any depreciation method under the Modified Accelerated Cost Recovery System (MACRS) or after claiming a Section 179 deduction for that vehicle. In addition, the business standard mileage rate cannot be used for more than four vehicles used simultaneously. These and other requirements for a taxpayer to use a standard mileage rate to calculate the amount of a deductible business, moving, medical or charitable expense are in Rev. Proc. 2010-51. Notice 2016-79 contains the standard mileage rates, the amount a taxpayer must use in calculating reductions to

basis for depreciation taken under the business standard mileage rate, and the maximum standard automobile cost that a taxpayer may use in computing the allowance under a fixed and variable rate plan.

ASA Joins Industry in Concerns with OSHA-Proposed Simplification

ASA, in coalition with the Construction Industry Safety Coalition and the Coalition for Workplace Safety, filed comments on Jan. 4, to express concern with regulatory revisions proposed by the Occupational Safety and Health Administration.

On Oct. 4, 2016, OSHA proposed to remove or revise outdated, duplicative, unnecessary and inconsistent requirements in its health standards as part of its Standards Improvement Project. The OSHA proposal includes 18 revisions which cover not just construction but also changes to existing recordkeeping, general industry and maritime standards. While ASA does not oppose all of OSHA's proposed changes, the Association does have concerns about revisions that fundamentally alter the scope and requirements of the affected standards and thus are not in keeping with the spirit of the SIP process.

ASA Chief Advocacy Officer E. Colette Nelson said, "OSHA should not use the SIP process to backdoor substantive changes to its standards which would greatly affect construction employers."

ASA told OSHA that:

- Changing the recording of hearing loss cases will significantly increase employer recordkeeping.
- Requiring employers to ensure that personal protective equipment properly fits all affected employees in construction is a significant and burdensome new obligation.
- Deleting the phrase "that could pose a hazard" under the excavation standard fundamentally alters the scope of the standard.
- Eliminating "unexpected" from the lockout/tagout standard deviates from OSHA's long-standing policies and will impose significant burdens on employers.

ASA urged OSHA to reconsider these proposals and to withdraw them completely from the SIP process. In addition, ASA joined CISC in calling on OSHA to ensure that its policy on the use of employee social security numbers is consistent and applied uniformly across all standards.

DOL Provides New Web Site on Misclassification

The U.S. Department of Labor established a new Web site where employers and other interested parties can find information and resources about the misclassification of workers as independent contractors.

DOL says the Web site "offers information about how misclassification affects pay, unemployment insurance, safety and health protections, retirement and health benefits, and taxes." On the site's first page, DOL states that it supports the use of legitimate independent contractors, but when employers deliberately misclassify employees as independent contractors in an attempt to cut costs, everyone loses.

That page includes links to more information, including:

- Pay and Misclassification.
- Health and Safety Concerns on the Job.
- Unemployment Insurance and Misclassification.
- Anti-Retaliation/Anti-Discrimination Rights for Workers.
- Federal Taxes and Misclassification.
- Health Care and Retirement Benefits-Information on Employer-Sponsored Benefit Plans.
- Resources for State and Federal Governments.
- Other Resources/Information.

Learn About 'OSHA Illness/Injury Data Collection Requirements' with FASA Video-on-Demand

The Occupational Safety and Health Administration's final rule on injury/illness data collection requires employers in high-hazard industries, including the construction industry, to send injury and illness data to OSHA for posting on the agency's public Web site. In the complimentary video-on-demand from the Foundation of ASA, Jamie Hasty, SESCO Management Consultants, explains what subcontractors should be doing to be in compliance with the new requirements.

"OSHA Illness/Injury Data Collection Requirements" (Item #8094) is free for ASA members and nonmembers. Order online.

FEATURE

Subcontract Negotiations and the Savvy Sub

by Julianne C. Wheeler

Today, general contractors and subcontractors often negotiate deals as a part of a process known as "project buyout." At this stage, the general contract has been awarded, the bids are scrutinized, and one or more of each trade are selected to negotiate a final form of subcontract. Successful subcontractors view project buyout as much more than an opportunity to discuss subcontract terms. Instead, it is the time for a thoughtful and prepared presentation of the trade's bid and demonstration of the trade's project knowledge. In this context, the subcontractor may use project buyout negotiations to minimize risk and demonstrate project knowledge, set reasonable expectations and establish credibility.

Minimize the Risk and Know the Project

Contracting is inherently risk-oriented. The subcontractor is perhaps the biggest risk taker on the job; its bottom line is often dependent on a number of actors, such as lenders, owners, and consultants who the subcontractor never meets or may not even know about. The lender may shut the job down, the owner may decide to terminate for convenience, or the consultant may develop a testing methodology that finds its way into the project manager's iPad and onto the job, even without a specification. But, that's contracting and the savvy subcontractor finds ways of surviving even the unpredictable.

Minimizing risk is the most obvious of the goals of contract negotiation. This goal cannot be achieved unless the subcontractor first fully appreciates the risks of the project and the terms of the subcontract proposed by the general contractor that play into that risk. For example, some projects are particularly schedule sensitive, performed for difficult owners, highly dependent upon the performance of a particular trade, or located in either a bustling or remote area where labor and materials are in short supply. A sizeable change order on jobs like these, if governed by contract terms that limit change order pricing to conservative unit prices, may turn a profitable job into a colossal loser, particularly if the risks of the job were not appreciated by the estimating department.

The general conditions of the prime contract also define the subcontractor's risk and often define the parameters of the negotiations between the general contractor and subcontractor. If, for example, the prime contract obligates the general contractor to include specific terms in each subcontract (pay-if-paid language or indemnity language, for example), it is pointless to attempt to negotiate this language out of the subcontract. Even though the "flow down clause" in the subcontract incorporates these terms into the subcontract, general contractors are sometimes reluctant to provide the trades with copies of the prime contract for a number of reasons, one of which is the desire to keep the pricing information confidential. But prices can be electronically or manually blacked-out. The subcontractor cannot fully understand the project landscape without access to the project general conditions.

Once the risks are appreciated and the prime contract general conditions known, the terms of the proposed subcontract that are the most risk-sensitive should be identified. The concrete subcontractor that is using forms built by others needs to strike language about accepting surfaces and substrates. The underground utility subcontractor on an apartment job that is going "up" and "down" at the same time needs to be clear about where his work starts, where it goes from there and what happens if the building trades get in his way. The specialty subcontractor on a cleanroom job needs

to finesse the change order provisions to make it clear that changes requiring additional manpower may include subsistence and travel costs if labor has to be imported from another city or state. The electrical subcontractor on a solar project that is highly dependent on the general contractor's coordination efforts will want to "tweak" the subcontract language to make it clear that the general contractor, not the subcontractor, is responsible for coordinating the trades and keeping the project on schedule to enable the subcontractor to complete each phase of the work by a milestone date.

Subcontract edits must be clear, concise and agreed upon by signatures of initials of representatives who have the authority to make those changes. Remember that what seems straightforward to you in the rush of contract negotiations may be anything but at contract closeout. It is a good idea to send an email that explains the intent of the changes and, if the budget permits, to run the proposed changes by your attorney or trusted advisor.

Define and Set Reasonable Expectations

Defining and setting performance expectations on your "vanilla" construction project may not be an issue. For unique jobs, new relationships or problem jobs, contract negotiations may accomplish a lot more than anticipated. It is easy for the subcontractor to overlook a general contractor's unfamiliarity with the work and materials involved in that trade's scope of work. Particularly with general contractors that "broker" or subcontract out the full scope of work, the subcontractor's advice on long lead time items, work sequencing requirements and questionable drawings may prove to be very useful in identifying potential project issues and alerting the general contractor of performance- related limitations.

Establish Credibility with the General Contracting Team

A prior relationship with the general contractor does not necessarily define the way that the subcontractor and project management will communicate on the next project. Companies are bought, sold and merged. Project managers come and go, talk to other project managers and run their jobs very differently. Proven subcontractors have bad jobs and reputable general contractors sometimes hire poor project managers. Every job is different but all jobs start with a bid and a chance to negotiate a subcontract.

Project managers see a number of subcontracts attached to emails or stacked on the desk at the trailer. They may even read some of them. On the other hand, subcontractors sign pages and pages of documents that begin with "Subcontract Agreement" and, sometimes, they read them before signing, too. Other times, they do not or, maybe, they skim them, feel that there is no reason to negotiate terms that are certain to be crammed down their throats anyway, find the line for the signature and hope for the best. But subcontract negotiations, regardless of whether the general contractor actually "gives" on any of the terms, are an opportunity to show what the subcontractor knows and to talk about the best approach to the work.

Contracting is a relationship-based business. Any opportunity to get in front of the general contractor and meet a project manager is a marketing bonus. That means discussing prequalification statements, questions about specifications and, most certainly, conversations that demonstrate the subcontractor's level of sophistication about the project and its technical requirements. The subcontractor that proves itself to be a tough but fair negotiator is much more likely to be invited to bid the tricky and profitable work than is the subcontractor who rolls over on a one-sided contract and leaves a wad of money on the table doing it.

It is always surprising to see how very differently subcontractors negotiate contract terms. On one project, for example, a trade was able to negotiate away a pay-if-paid clause when none of the others even tried (yes, they are enforceable in Arizona). On another project, a subcontractor ran the indemnity provisions past its insurance agent and insisted upon a change to which the general contractor should have never agreed. A sizeable subcontractor on a Texas project agreed to litigate all of its disputes in Louisiana, where neither the general contractor nor subcontractor operated. Not surprisingly, that job did not go well, perhaps because the general contractor was far from impressed by the subcontractor's lack of attention to the terms.

The bottom line is that preparedness is vital to productive subcontract negotiations and what the general contractor is likely to be looking for during project buyout discussions. Risk minimization and pricing structure may even take a back seat to project knowledge, problem forecasting and team building in today's sophisticated project structures. Of course, negotiations following bid submissions are not the time for price shopping and margin increases. Instead, it is the optimal time to forge relationships, drill down on risk, set reasonable project goals and expectations, and move forward with a team approach to project delivery.

Julianne C. Wheeler is a partner at Jennings, Haug & Cunningham and has, since 1988, been a commercial litigator whose practice focuses primarily on commercial disputes, from dispute avoidance to dispute management, as well as commercial litigation, with an emphasis on construction-related issues, including bid protests, and extending to fidelity and surety law. From administrative licensing matters to complex litigation arising out of disputes over technical specifications, Wheeler has litigated in state and federal courts and represented national and Arizona contracting firms and a variety of other commercial enterprises ranging from national restaurant chains to local childcare facilities. A former chair of the Construction Law Section of the Arizona Bar Association and former member of the Arizona State Board of Technical Registration, Wheeler earned an AV Rating with Martindale Hubbell, served as a faculty member of the Arizona Trial College, is a Judge Pro Tem with the Maricopa County Superior Court, and ranked among The Best of Arizona Business (Commercial Litigation), Ranking Arizona. Wheeler is a member of the Board of Directors of ASA of Arizona and a member of the Arizona Builders Alliance, the Construction Financial Management Association, and the International Concrete Repair Institute. She can be reached at (602) 234-7826 or jcw@jhc-law.com.

FEATURE

Five Dream Clauses Worth Fighting for When Negotiating Subcontracts

by Daniel McLennon, Esq.

Subcontract forms come in various shapes and sizes, and some are more onerous and unfavorable to subcontractors than others. Wise subcontractors review all proposed subcontracts carefully and negotiate away unfavorable wording as best they can. To gain leverage in negotiations, wise subcontractors set the stage by telling the general contractor up front, in the subcontractor's bid or proposal, that the subcontractor expects to be treated fairly and to have certain terms be included in the subcontract to be entered. It should be standard operating procedure for all subcontractors not to issue a bid or proposal that does not include express conditions on the general contractor's right to accept the bid or proposal. In other words, all subcontractors' bids and proposals should list those terms that must be included in the subcontract before the general contractor will be entitled to receive the subcontractor's services and price.

The ASA Web site makes available to all members the *ASA Subcontractor Bid Proposal* (2017), as part of the *ASA Subcontract Documents Suite 2017*, which contains 12 paragraphs of terms to consider adding to your own bids and proposals. These cover over 30 different issues ranging bid shopping to termination, and everything in between. When the bid or proposal includes such terms and the general contractor asks the subcontractor to sign a subcontract that does not include them, the subcontractor may properly refuse to sign and instead request changes to the subcontract to conform with the requirements the subcontractor put forward in the bid or proposal. Then the general contractor and subcontractor may negotiate specific language that both can live with.

While subcontractors will want to negotiate many subcontract clauses, below are five groups of clauses subcontractors dream about having in their subcontracts, and you should negotiate to include them in yours. The *ASA Subcontract Addendum* (2017) ("Addendum"), also included in the *ASA Subcontract Documents Suite 2017*, contains 25 sample clauses favorable to subcontractors, and clauses from the Addendum are used as the starting point for discussions below. Other clauses, such as from the ConsensusDocs *750 Standard Agreement Between Constructor and Subcontractor*, are added as possible alternatives for consideration in negotiations. It is impactful in negotiations to mention that ConsensusDocs are endorsed by multiple construction trade associations, (42 at last count), including ASA and the Associated General Contractors of America. ConsensusDocs is a coalition of associations representing diverse interests in the design and construction industry that collaboratively develops and promotes standard form construction contract documents that advance the construction process. The ConsensusDocs coalition is committed to assuring that the contracts serve the best interests of the project and the industry.

Subcontractor's Right to Be Paid

Not receiving timely payment is the most often heard subcontractor complaint, and some jurisdictions allow subcontractor payment to be contingent upon receipt of payment by the general contractor from the owner—no owner payment to general contractor, no general contractor payment to subcontractor. However, the owner does not hire the subcontractor—the general contractor does—and only the general contractor is able to determine the owner's creditworthiness before entering the contract. The general contractor should be expected to pay for the work it receives, without regard to timing of payment by the owner. Paragraph 5 of the *Addendum* protects subcontractors this way:

> **5. Payment Terms.** The **ATTACHED** Schedule of Values shall be used to determine progress payments. All sums not paid when due shall bear interest at the rate of 1½% per month from due date until paid or the maximum rate permitted by law, whichever is less. Subcontractor does not accept the risk of Customer's receipt of payments from any source, and in no event will payments to Subcontractor be based upon, or subject to, Customer's receipt of payment for Subcontractor's work … Should Subcontractor's payment be delayed … for reasons not the fault of or directly related to Subcontractor's work, then Subcontractor may suspend work after giving at least seven (7) days written notice to Customer of the intent to suspend and the date of intended suspension. Should Subcontractor's work be thereafter suspended for at least twenty-one (21) days, Subcontractor may terminate this subcontract upon written notice of termination to Customer …

ConsensusDocs 750 protects subcontractors similarly:

> 8.2.5 TIME OF PAYMENT Progress payments to the Subcontractor for satisfactory performance of

the Subcontract Work shall be made no later than seven (7) Days after receipt by the Constructor of payment from the Owner for the Subcontract Work. If payment from the Owner for such Subcontract Work is not received by the Constructor, through no fault of the Subcontractor, the Constructor will make payment to the Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed.

8.2.6 PAYMENT DELAY If the Constructor has received payment from the Owner and if for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Constructor within seven (7) Days after the date such payment is due, as defined in the subsection immediately above, or, if the Constructor has failed to pay the Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed, the Subcontractor, upon giving seven (7) Days' written notice to the Constructor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. The Subcontract Amount and Time shall be adjusted by the amount of the Subcontractor's reasonable and verified cost of shutdown, delay, and startup, which shall be effected by an appropriate Subcontractor Change Order.

Subcontractor's Right to Control Schedule for Its Work

Subcontractors assume they will be allowed to work efficiently, and they base their estimates on this assumption. All profitability can be lost, and worse, if a general contractor mismanages the job and causes the subcontractor to work out of sequence, where trades are stacked, access is limited, and the like. *Addendum* Paragraph 8 would allow subcontractor to be paid for extra costs caused by such conditions.

8. Project Schedule. Subcontractor shall be entitled to equitable adjustments of the contract price, including but not limited to any increased costs of labor, supervision, equipment or materials, and reasonable overhead and profit, for any modification of the project schedule differing from the bid schedule, and for any other delays, acceleration, out-of-sequence work and schedule changes beyond Subcontractor's reasonable control … Should work be delayed by any of the aforementioned causes for a period exceeding ninety (90) days, Subcontractor shall be entitled to terminate the subcontract.

The ConsensusDocs 750, in addition to providing for extra pay for extra costs, would help the Subcontractor avoid such extra costs by giving the subcontractor a measure of control over the schedule:

5.2 SCHEDULE OBLIGATIONS … In consultation with the Subcontractor, the Constructor shall prepare the schedule for performance of the Work ("Progress Schedule") and shall revise and update such schedule, as necessary, as the Work progresses. Both the Constructor and the Subcontractor shall be bound by the Progress Schedule. The Progress Schedule and all subsequent changes and additional details shall be submitted to the Subcontractor promptly and reasonably in advance of the required performance. The Constructor shall have the right to determine and, if necessary, make reasonable changes to the time, order, and priority in which the various portions of the Work shall be performed and all other matters relative to the Subcontract Work. To the extent such changes increase the Subcontractor's time and costs, the Subcontract Amount and Subcontract Time shall be equitably adjusted.

Subcontractor Indemnifies only for Damage It Causes

Subcontractor risk and insurance costs go up if the subcontractor must indemnify and defend the contractor or others for their fault, as opposed to only the subcontractor's own fault. By statute in California subcontractors are protected against having to indemnify and defend others for their own fault (with limited exceptions), but other states provide no such protections. Subcontractors must therefore protect themselves. The Addendum does this simply:

13. Hold Harmless Restriction. Any indemnification or hold harmless obligation of Subcontractor extends only to claims relating to bodily injury and property damage (other than to the subcontractor's work), and then only to that part or proportion of any claim caused by the negligence or intentional act of Subcontractor, its sub-subcontractors, their employees, or others for whose acts they may be liable. Subcontractor shall not have a duty to defend …

Likewise, the ConsensusDocs 750 limits subcontractor's liability to loss that it causes:

9.1.1 INDEMNITY To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Constructor, the Design Professional, the Owner, and their agents, consultants, and employees (the Indemnitees) from all claims for bodily injury and property damage other than to the Work itself that may arise from the performance of the Subcontract Work, including reasonable attorneys' fees, costs, and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent acts or omissions of the Subcontractor … The Subcontractor

shall be entitled to reimbursement of any defense cost paid above the Subcontractor's percentage of liability for the underlying claim to the extent attributable to the negligent acts or omissions of the Indemnitees.

Subcontractor Insures Only Itself

As with indemnity, if the subcontractor's insurance must cover liability of persons other than the subcontractor for losses not caused by the subcontractor, the subcontractor's insurance costs will increase. Subcontractors need to protect themselves from the risk of such cost increases by refusing to provide insurance for persons other than the subcontractor itself. This is done in *Addendum* Paragraph 14:

> **14. Insurance Restriction.** Subcontractor is not required to name additional insureds to its general liability insurance policy, nor to waive subrogation for claims covered by workers' compensation or commercial general liability insurance. Subcontractor shall maintain insurance with coverage and limits only as provided by Subcontractor's existing insurance program as shown by its certificate of insurance available on request.

The ConsensusDocs 750 by default omits any coverage for others under the subcontractor's insurance, but it does provide additional insured coverage as an option, so the ConsensusDocs language is not particularly helpful here.

Subcontractor's Termination Protections

A subcontractor will suffer loss of income if terminated from a contract before completion, so the subcontractor's right to complete a contract must be protected. Further, although an owner may need the ability to terminate a contract for convenience, such as due to loss of financing, downturn in the economy, or changed needs, the subcontractor's right to income from the project should also be protected.

Good language protecting the right to income is found at Addendum Paragraph 21:

> **21. Termination of Subcontract.** In the event of any termination by the project owner or Customer which is not justified by a default of Subcontractor, or termination by Subcontractor, Subcontractor shall be entitled to payment from Customer for all costs incurred by Subcontractor for which Subcontractor has not received payment, plus reasonable overhead, profit, expenses, attorneys' fees, interest, and overhead and profit on unperformed work …

And the right to complete the work is protected by ConsensusDocs 750 section 10.1.1 (which gives subcontractor two "strikes" before being "out"):

> 10.1.1 NOTICE TO CURE A DEFAULT If the Subcontractor … is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement. If the Subcontractor fails within three (3) Business Days after written notification to commence and continue satisfactory correction of the default with diligence and promptness, then the Constructor shall give a second notice to the Subcontractor and surety, if any, to correct the default within a two (2) Business Day period. If the Subcontractor fails to promptly commence and continue satisfactory correction of the default following receipt of such second notice, the Constructor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:

Subcontractors' dreams may come true if they condition their bids and negotiate to include the foregoing protections in the subcontracts they enter.

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"Effective subcontractors read and understand each provision of their subcontracts. They also understand that when they sign on the dotted line they are committing to do what the agreement requires. In a world of increasingly unfair subcontracts, prudent subcontractors must strive to understand the most common risk-shifting clauses and how they impact their work. That knowledge can help you establish a framework within which you can negotiate key terms consistent with your priorities."

—Eric Travers, Esq., Kegler, Brown, Hill & Ritter, Columbus, Ohio

FEATURE

Using the ASA Subcontract Documents Suite

by Eric Travers, Esq.

One of the most valuable resources, of many, that ASA provides its members is the *ASA Subcontract Documents Suite 2017*. The suite is a quiver in the bow for subcontractors to resist unfair subcontract terms and rebalance their risk profile in a more balanced way.

As a general rule, a subcontractor's financial risks in any given project often undergo the most dramatic changes at the point they are given a subcontract to sign. If the subcontract is a ConsensusDocs or other form that mirrors your expectations and contains fair balances of risks and responsibilities, you are set.

But more commonly, you will be asked to sign a "proprietary" subcontract prepared by your customer's counsel. Such subcontracts often try to move risks and costs traditionally borne by the upper tier or others (on issues from payment, claims, indemnity, and insurance, etc.) Onto subcontractors. Many of these clauses are even more significant, because they transfer risks you as a subcontractor may not have accounted for when you priced the work for your bid.

The question for subcontractors becomes, "what can I do about this?"

Many subs are hesitant to stand up for themselves, fearing they may lose a job. But subcontractors must realize you have leverage, and that leverage gives you the ability to negotiate more favorable terms with your customers.

To help its members both (a) educate themselves on the most common risk shifting clauses in the subcontracting community and (b) negotiate better subcontracts, ASA has compiled a wealth of documents in the suite. These documents include:

- *ASA Subcontractor Bid Proposal*
- *ASA Subcontractor Addendum*
- *ASA Short-form Subcontract Addendum*
- *ASA Wrap-up Insurance Subcontractor Conditions*
- *ASA Wrap-up Insurance Bid Conditions*

This article focuses on the subcontract addenda, particularly the full form, to show how and why ASA's efforts in preparing these documents give its members a tremendous negotiation and risk management tool to strengthen your business and bottom line.

ASA Subcontract Addendum (Full- and Short-form)

The Suite includes both a *Short-form Subcontract Addendum* for smaller projects, and a full *Subcontract Addendum* that ASA members can use to modify the terms of a general contractor's subcontract to create more balanced contract language.

The subcontract addenda are drafted to rebalance the most common risk-shifting clauses to better reflect subcontractor's interests. To best use the addenda, subcontractors should begin by prioritizing their position on key issues. Doing this can help you create a negotiation hierarchy of the following: (1) "killer clauses" that are of most concern to you, (2) clauses that are important but may be negotiable, and (3) issues that are not applicable or important to your business.

To start this analysis you don't even need to have a subcontract in front of you because ASA has already ordered each paragraph of the subcontract addenda to address the key areas of importance. The *Subcontract Addendum* provides a roadmap to not only the most common clauses of concern, but also sample language you and your counsel can consider to reduce those risks.

Read Subcontract Addendum, Understand & Rank 'Killer Clauses'

In its *Subcontract Addendum*, ASA addresses 25 risk areas. All 25 of these areas can significantly increase the risk and cost of doing business, though their importance to your particular business may vary. Opposite, we review seven risks to illustrate how the *Addendum* can flag issues and prompt internal discussion for you and your counsel.

While not all of the 25 areas addressed in the *ASA Subcontract Addendum* will be "killers" to your business, the *Addendum* can help you identify issues that are important and must be considered when determining the following: (1) what clauses could unduly shift risks you did not expect or account for in your bid price and (2) what risks are unacceptable. In turn, this will help you identify how you will handle the clauses when (a) preparing your bid (e.g., bid conditions, considering risk acceptability/risk premiums, etc.) and (b) negotiating your contract if presented with a subcontract that contradicts bid expectations or conditions.

Effective subcontractors read and understand each provision of their subcontracts. They also understand that when they sign on the dotted line they are committing to do what the agreement requires. In a world of increasingly unfair subcontracts, prudent subcontractors must strive to understand the most common risk-shifting clauses and how they impact their work. That knowledge can help you establish a framework within which you can negotiate key terms consistent with your priorities.

The *ASA Subcontract Documents Suite 2017* contains many extremely valuable tools, of which the *Subcontract Addendum* is perhaps the single most important one. Though the suite does not replace the need for subs to independently review the clauses (including with construction counsel licensed in their state), it offers an excellent means through which ASA members can more efficiently review subcontracts, and set yourself up to more profitably manage your company's business.

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PAY-IF-PAID/CONTINGENT PAYMENT

Under general contract principles, a party cannot disclaim contractual responsibility on the basis of actions by a 3rd party. The risk of owner non-payment or insolvency belongs to the prime contractor.

Pay-if-paid (aka contingent payment) clauses shift that risk to the subcontractor by tying its right to work properly completed to the actions (and solvency) of the owner.

COMMENTARY / TIPS

- On public jobs or jobs with a reliable and financially stable owner, a pay-if-paid clause may be less of a concern or "deal killer" due to the lessened risk of owner nonpayment.
- In many states a "pay-if-paid" clause will not prohibit your ability to file/record a mechanic's lien. But even in those states it may affect your ability to foreclose a lien or bond claim. Consultation with a construction attorney in the state(s) where you work is advised to determine the level of risk you may face if you agree to these clauses.

ASA ADDENDA

§ 5 of the *ASA Addendum* provides a mechanism to determine when payments are due, and expressly disclaims the use of pay-if-paid clauses.

ADVANCE CONTRACTUAL WAIVER OF LIEN AND BOND RIGHTS

In many states lien rights can be waived in advance, before even setting foot on the project site. Subcontract clauses that contain "no lien" provisions may be enforceable in your state. If they are, you have lost valuable security for your work.

COMMENTARY / TIPS

- A waiver of lien rights may be less concerning if the owner or general contractor has a payment bond in place. But if not, the clause takes away one of the most important security tools a subcontractor has to ensure payment for its work.
- In some states contract provisions that purport to waive rights under a surety bond are void and unenforceable. But such provisions may be enforceable in other states.

ASA ADDENDA

Addendum §22 gives subs language that seeks to nullify any subcontract term that attempts to waive lien and bond rights.

NO DAMAGE FOR DELAY

A "no damage for delay" clause typically provides that if its work is delayed for a reason not its fault, it is entitled to a time extension but not additional compensation.

Some states enforce these clauses. Some prohibit them. Because time is money, if you are working in a state that enforces these clauses, you can suffer a severe financial blow if your time on the job is extended, even if the delay is not your fault.

COMMENTARY / TIPS

- Knowing whether your state enforces or prohibits no-damages-for-delay clauses is important. It could make the difference between this being a "killer clause" or a non-issue.
- But even states that enforce no-damages-for-delay clauses typically have a number of exceptions to enforceability. But it is better to simply avoid the clause than rely on an exception.

ASA ADDENDA

Addendum §8 deals with scheduling, and includes broad language designed to preserve your right to recover damages for delays.

UNCONDITIONAL LIEN WAIVERS BEFORE PAYMENT

Unconditional lien waivers may apply as soon as you sign the document, regardless of whether you received payment. If you are asked to sign an unconditional lien waiver before receiving payment, you could be found to have given up your right to a lien for that work even if the promised payment never comes.

COMMENTARY / TIPS

- Because of the harsh results, unless you have absolute confidence your customer will make the payment, unconditional waivers should be considered no different than advance waivers of liens.
- A reasonable compromise if asked to agree to this is to propose giving a conditional lien waiver in advance, followed by a "trailing" unconditional lien waiver the following pay period.

ASA ADDENDA

Addendum §22 is designed to preserve a sub's lien rights.

FLOW DOWN CLAUSES

A "flow down" provision in subcontracts incorporates into the prime contract terms into the subcontract to "flow down" the prime contractor's obligations to the owner and make those obligations "flow down" to bind the subcontractor to the prime contractor in the same way the prime contractor is bound to the owner.

COMMENTARY / TIPS

- This seemingly innocuous clause should be taken seriously. Though there are legitimate reasons for wanting to flow down certain prime contract provisions, a flow down clause can have grave consequences to subcontractors, particularly if the prime contract subrogates mechanic's lien rights and is interpreted to bind the subcontractor to whatever the prime contractor agreed to.
- If your subcontract has a flow down provision you MUST ask for and review all "upstream" documents incorporated into your agreement. You also need to ensure that your subcontract contains clear language establishing an order of precedence to apply to any Addendum that contains your key or non-negotiable contract terms.

ASA ADDENDA

Addendum § 1 clarifies the order of precedence regarding what terms prevail if there is a conflict.

Addendum §3 makes any flow down obligations mutual by binding the contractor to you to the same extent the owner would be bound to it under the prime contract.

OSHA FINES AND SAFETY

Some subcontracts, either directly or through a broad indemnification clause, may attempt to pass through the general contractor's safety responsibility on the subcontractor, including indemnity for fines from OSHA.

COMMENTARY / TIPS

- In an era of heightened OSHA enforcement and dramatically increased fines for OSHA violations, subcontractors must be aware of the risks of potentially agreeing to pay for their customers' prior history with OSHA and/or accepting responsibility for site safety that was the general contractor's responsibility.

ASA ADDENDA

Besides the indemnification limits in the *Addendum* (discussed below) §18 reasonably limits a sub's responsibility for safety to what it contractually agreed to, and gives an argument against paying enhanced penalties if assessed due to the upper tier's history.

DEFENSE, INDEMNITY, HOLD HARMLESS CLAUSES

Many proprietary form subcontracts include "indemnification" clauses providing that the sub must "defend," "indemnify" or otherwise "hold harmless" the upper tier for damages alleged to be caused by the sub.

Many states have "anti-indemnity" statutes that void broad-form indemnity provisions that purport to require a party to indemnify another for damages that arise out of the indemnified party's negligence.

COMMENTARY / TIPS

- If the indemnity clause you are asked to sign requires you to "defend" and indemnify your customer regardless of fault, even in states that otherwise void broad-form indemnity agreements you may still be found to have agreed to pay for your customers' legal and other defense costs before it is proven that you caused the damage. Though you may not be required to indemnify for a judgment for damages you didn't cause, paying the freight on the defense costs can hurt. Big time.
- Ensure that indemnity provisions you are signing are insurable by sending your insurance agent the actual indemnity provisions of the contract and ask your agent to affirm that the risk is insured.

ASA ADDENDA

Addendum §13 mirrors the insurable (and reasonable) indemnification language in the ConsensusDocs and AIA subcontract and restricts the subcontractor's liability to the risks in those widely accepted trade contracts.

FEATURE

ConsensusDocs Keeps You Ahead of the Curve

by Carrie L. Ciliberto, Esq. and Philip E. Beck, Esq.

Contracts are the foundation of every project, and ConsensusDocs' mission is to publish contracts that reflect and promote the objectives of all parties, versus individual stakeholders, to advance the best interests of the project. The ConsensusDocs coalition, an unprecedented coalition of 40 leading design and construction industry associations, including ASA, recently published comprehensive revisions to many of its prime and subcontract agreements. The revised contracts address changes and best practice industry developments, including design, construction, insurance, legal, technology and terminology.

"As the industry transitions, so must our documents," explained Philip E. Beck, partner, Smith, Currie & Hancock LLP, and former ConsensusDocs Content Advisory Council chair. "ConsensusDocs contracts facilitate more collaborative, integrated, sustainable, technology-driven project delivery approaches that build on lean, green and sustainable principles. The coalition is focused on more practical, shorter and succinct contracts that emphasize clarity and transparency."

That's why the Coalition has, and will continue, to publish new and revise existing ConsensusDocs contract forms so that industry stakeholders can be assured that their projects have the best foundation possible.

"While none of the revisions reflect a major shift in the philosophy or guiding principles behind ConsensusDocs, they do include revisions and improvements designed to keep pace with industry changes and best practices," said Carrie L. Ciliberto, Esq., deputy executive director and counsel for ConsensusDocs.

The revised documents clarify and expand on the following:

1. **Termination for Convenience:** Circumstances under which a termination for convenience is permitted, circumstances under which a termination for default can be converted to a termination for convenience, and the potential consequences of doing so, are revised.
2. **Schedule:** References are added to Critical Path Method Scheduling concepts and principles.
3. **Changes & Directives:** Accommodate changes with no time or cost impact and expands the term to encompass owners' written directives.
4. **Indemnification:** Requires indemnification for intentional acts and clarifies the definition of "Others."
5. **Insurance:** Default is for the constructor, rather than the owner, to purchase the builder's risk insurance policy.
6. **Bonding:** Bond penal sum will no longer automatically float with changes to the contract amount.
7. **Payment:** Revises "cost of the work" applicable to work performed on a cost-reimbursable basis, as well as changes concerning contingent payment.
8. **Dispute Resolution:** A check-the-box option is provided for parties to select who will administer any mediation.
9. **Owner/Design Professional Relationship:** Eliminates language which could have been interpreted to create a fiduciary relationship between the owner and its design professional.

Of particular interest to subcontractors, the updates include provisions where:

- Constructors will provide subcontractors with a copy of their Builder's Risk insurance policy and payment bond; and
- Constructors will indemnify subcontractors for tools and equipment use in termination situations.

Fair contracts benefit all project participants, and facilitate project success. Project success helps ensure future business.

The comprehensive revisions to various key ConsensusDocs forms represent the culmination of thousands of volunteer hours invested by the ConsensusDocs Content Advisory Council, the significant contributions and support of the 40-member organizations, as well as invaluable feedback of industry participants, attorneys, and other design, construction, insurance and surety professionals who use the ConsensusDocs family of documents.

Recently Published:

- ConsensusDocs 200 Owner & Constructor Agreement
- ConsensusDocs 205 Owner & Constructor Short Form Agreement
- ConsensusDocs 240 Owner & Design Professional Agreement
- ConsensusDocs 750 Constructor & Subcontractor Agreement
- ConsensusDocs 751 Constructor & Subcontractor Short Form Agreement

Coming in Early 2017:

- ConsensusDocs 235 Owner & Constructor Short Form Agreement (Cost of Work)

- ConsensusDocs 245 Owner & Design Professional Short Form Agreement
- ConsensusDocs 410 Owner & Design-Builder Agreement (Cost of Work Plus Fee with GMP)
- ConsensusDocs 415 Owner & Design-Builder Agreement (Lump Sum)
- ConsensusDocs 450 Design-Builder & Subcontractor Agreement
- ConsensusDocs 500 Owner & Construction Manager Agreement (GMP with Preconstruction Services Option)

The coalition, including ASA, will continue to release new and updated contract documents throughout 2017 and beyond to further its mission of helping the industry build a better way.

Carrie L. Ciliberto, Esq. is the senior director and counsel of Contracts and Construction Law, for The Associated General Contractors of America. Ciliberto also serves as the deputy executive director and counsel for ConsensusDocs, LLC. ConsensusDocs are the only standard contracts written by 40 design and construction industry associations, including ASA. By fairly allocating risk and incorporating best practices, ConsensusDocs help you save time and money by lessening adversarial negotiations and reducing costly disputes. Simply put, ConsensusDocs helps you keep ahead of the curve. Learn more at www.ConsensusDocs.org or contact ConsensusDocs at (866) 925-DOCS (3627) or support@consensusdocs.org. Prior to selling her law firm and moving to D.C., Ciliberto was the founder and principal of Ciliberto & Associates, LLC, a Colorado law firm emphasizing water, natural resources, environmental, real property and land use law. Ciliberto earned her J.D., cum laude, from Michigan State University with a concentration in international and environmental law. She is licensed to practice in the U.S. Court of Federal Claims, U.S. Court of Appeals for the Federal Circuit, U.S. District Court for the District of Colorado, State of Colorado, District of Columbia, and U.S. Supreme Court. Ciliberto has authored numerous articles, and she speaks frequently at industry events around the nation. She can be reached at (703) 837-5367 or cilibertoc@agc.org. Philip E. Beck is a partner in the Atlanta, Ga., office of Smith, Currie & Hancock LLP, a nationally-recognized construction law firm, where he has practiced since 1981. Beck has experience with a broad range of construction issues, claims, problems and disputes, as well as a wide variety of construction projects, both public and private, throughout the United States. He has drafted, reviewed and negotiated thousands of design and construction contracts. He is a past chair of the ConsensusDocs Content Advisory Council, the drafters of the ConsensusDocs family of design and construction contract documents. He can be reached at (404) 582-8028 or pebeck@smithcurrie.com.

ASA Updates Subcontract Documents Suite to Reflect Revised ConsensusDocs Documents *by American Subcontractors Association*

ASA has updated its *Subcontract Documents Suite* to reflect the improvements made in recent revisions to the ConsensusDocs standard subcontract documents. In late 2016, ConsensusDocs revised its documents to reflect evolving technology and insurance products and to assure consistency and clarity among all the documents in the ConsensusDocs portfolio.

The *ASA Subcontractor Bid Proposal* (2017) offers a subcontractor and its client an opportunity to establish the standard terms of the ASA-endorsed ConsensusDocs 750, *Standard Agreement Between Constructor and Subcontractor* as the basis for their subcontract. If a client accepts the subcontractor's bid that has been properly conditioned with this form, a binding contract exists based on the terms of the ConsensusDocs Form 750.

Other documents in the *ASA Subcontract Documents Suite 2017* help subcontractors deal with complicated issues like payment, indemnity, extra work and claims that force them to shoulder the risks best borne by others. If not already obligated to sign a particular subcontract, a subcontractor can use the updated *ASA Subcontract Addendum* to ask a client to modify its proposed subcontract to eliminate a wide range of potentially harmful provisions.

In more limited negotiations, a subcontractor can use the updated *ASA Short-Form Subcontract Addendum*, which would modify the client's subcontract in four key areas: hold harmless, insurance, payment, and changes and claims. Both the bid proposal and subcontract addenda state that the subcontractor will not participate in a wrap-up insurance program. For projects that require wrap-up insurance, the *ASA Subcontract Documents Suite* includes *Wrap-up Insurance Bid Conditions* and *Wrap-up Insurance Subcontract Conditions*. These tools give subcontractors the right to supplement the insurance provided by the wrap-up; limit their own insurance to not apply to the work covered by the wrap-up; limit their contractual indemnity to the coverage and limits provided by the wrap-up; indemnify against paying wrap-up deductibles; and procure replacement insurance or terminate the subcontract agreement at the client's cost if the wrap-up insurance is discontinued.

ASA members can access the *ASA Subcontract Documents Suite 2017* for free under "Contracts & Project Management Documents" in the Member Resources section of the ASA Web site.

FEATURE

Why It Is Wise to Review Your Company's Contracts?

by Scirocco Group

Contracts contain terms that can impact your company's bottom line. Reviewing them carefully prior to signing is indispensable, and can save you time and money.

When it comes to contractual matters, even quality workmanship is not immune to potential claims of property damage or bodily injury. All operations carry the risk that injury or damage may occur as a result of the work, leading to costly lawsuits. Considering the complicated mix of contractors and subcontractors that contributes to each project, who is liable for this risk?

Examine the definition of services or goods to be provided to ensure the language is clear enough for an unrelated third party to understand the scope. The contract should also include a time frame for delivery of goods or completion of services, etc. The rights and obligations of both parties should be clearly outlined. Any mechanism for changing the scope of the contract, as well as any of the terms, if allowed, should also be outlined within the contract.

In insurance terms, "your work" as used in an insurance policy is a broadly defined term that includes operations performed by the policyholder or on the policyholder's behalf, including material, parts or equipment in connection with the operations. Operations or work performed on behalf of the policyholder means work done by a subcontractor is considered the contractor's work. Therefore, faulty electrical work performed by an electrician that causes a fire or other damage could be considered the contractor's liability, but would be covered under a standard commercial general liability (CGL) policy

Because a contractor or other involved party could be held liable for defects in a subcontractor's work years after it has been completed, and filing the claim under the contractor's CGL policy could cause the premium to rise, many construction contracts require subcontractors to provide insurance coverage for claims resulting from their completed work for a finite period of time, typically the one- to five-year range. Typical contracts also require that the subcontractor name the owner, the architect, the general contractor and other third parties as "additional insured" parties, entitled to coverage under the insured subcontractor's CGL policy. Naming additional insured parties requires a separate endorsement to that policy.

Terms of payment should be clearly listed within the contract so that the expectations of both parties are clear.

As a subcontractor, you can be held liable for claims of property damage or bodily injury resulting from a defect in your work. It is also critical to maintain this coverage into the future; failure to do so could lead to a breach-of-contract lawsuit brought by the contractor or other party.

It is important to understand this commitment when signing the contract—the insurance commitment doesn't end with the project. Furthermore, in the event of a large claim, the subcontractor could be faced with a substantial increase in premiums on the policy.

To avoid litigation, it is crucial to know local regulations and adequately document proper performance. Know your company's documentation practices relative to each subcontract, and carefully keep records of all processes.

It is crucial for subcontractors to respect this requirement if included in the contract. Failure to do so could result in breach-of-contract lawsuits. Naming additional insured parties can be complicated, and it is very important to ensure that your contractual obligations are satisfied.

There are two types of warranty provisions: express and implied. Both types are assurances regarding particular issues, such as performance.

Express warranties are those that are defined specifically in the contract. Implied warranties are based in statutory and/or common law, depending upon your jurisdiction. They are two-fold: a warranty of merchantability, which requires that goods/services must reasonably conform to an ordinary buyer's standards, and a warranty of fitness for a particular purpose, which states that if a seller knows the intended purpose for the product or service, the act of selling the product to that customer implies that it is fit for that purpose.

Be aware of warranty disclaimers and understand how the disclaimer limits your statutory rights. If it disclaims all

warranties, express and implied, then you will likely be limited to the remedies in the contract for issues related to things like performance. You should also examine any disclaimer in the context of the contract. While it may require you to disclaim your statutory rights, other contract language may give you adequate rights and remedies regarding the points about which you are most concerned.

Damages, limits of liability and indemnification are often in close proximity to one another in a contract, as they are interrelated. Damages may be defined as certain types of losses that could create liability under the contract. A limit on liability would restrict the amount of damages that a party would be required to pay if found liable for such damages. Sometimes this may also include a limit for indemnification.

Indemnification provisions allocate risk and cost between the parties. It is important to examine whether the party assuming the risk is the party with the most control over that risk. For instance, when a company's employees are required to work at a customer's location, the company is often asked to release the customer from all liability relating to the employees presence at the customer's location. In some cases, indemnification is limited to negligence or to a specific dollar amount, under a heading of "limits of liability."

Some contracts will contain minimum insurance coverage amounts that the party must possess and also may require that the customer is added as an additional insured on those coverages.

Prior to consenting to any contract, it is prudent to examine insurance coverage against the amount of liability exposure in a particular contract.

- Governing Law & Jurisdiction—Look at the governing law provision to make sure that you are comfortable with the implications of the state law chosen by the drafter. This can impact the interpretation of the contract from warranties to indemnification. Additionally, when specific statutes or regulations are referenced in the body of a contract, it is as though that statute or regulation is wholly contained within the contract itself. It is vital to read and understand that language prior to giving your consent. This happens regularly in government contracting situations.
- Dispute Resolution—This is another clause with which you must be comfortable with the laws of the state or forum chosen by the drafter. The rules chosen to govern dispute resolution can impact the outcome. Additionally, you should consider whether dispute resolution is right for your situation.
- Intellectual Property—When you are disclosing and/or licensing your company's intellectual property, be it trademarks, copyrights or patents, it is important to include a clause that recognizes the owner of such intellectual property and affirmatively states that the agreement does not transfer any rights.
- Standard of Care—A standard of care clause may appear in certain types of contracts. The standard of care that is provided by the law should provide the minimum standard of care for the provision of services under the contract.
- Term or Termination—The contract should provide both parties with the right to terminate the contract. The situations in which termination is allowed will vary from contract to contract. Some contracts will allow the right to terminate in cases of dissatisfaction; others will allow it with a specific notice, for no cause. It is important that you contemplate in what cases you would want the right to terminate the contract. There should also be language defining the term of the contract. Does it have a finite term? Does it automatically renew each period?
- Right to Cure—Related to termination, some contracts will contain a right to cure clause. This would give the defaulting party notice of a breach and a finite period of time in which to remedy such breach.

Company employees should be aware of general terms to watch for in a contract to allow them to assist in issue spotting. Nonetheless, either licensed inside or outside counsel should review contracts prior to signing.

Scirocco Group is a best practices insurance agency specializing in risk management for contractors. For more information, contact Fran Lusardi at flusardi@sciroccogroup.com or Bill Bilinkas at wbilinkas@sciroccogroup.com.

LEGALLY SPEAKING

Avoid Those Same Old Disputes by Making a Good, Clear Contract Before You Bid Your Next Project

by James "Jay" Morris and Adam Breeze

Andie MacDowell (Rita): "Do you ever have déjà vu?"

Bill Murray (Phil Connors): "Didn't you just ask me that?"

In the 1993 film "Groundhog Day," Phil Connors wakes up every morning to the same radio broadcast, the same breakfast, the same day—Groundhog Day—over and over and over. Many subcontractors often feel they too are either having déjà vu or are reliving the same circumstances over and over again when they encounter the same disputes, problems and issues in their business. The best way to avoid that feeling is to take steps at the outset of a project, before work begins, to make the agreement with the general contractor clear and certain so that the parties know what to expect and how to proceed.

On large commercial projects, subcontractors often have little to no room to negotiate a standardized form contract passed down from the owner. On other projects, the agreement may be based upon a quote, maybe some specifications, or it may even be completely oral. Whatever the project size, taking care to make a clear agreement will go a long way toward eliminating confusion, minimizing risk and maximizing profits.

Contract Documents—More Than What You Read and Sign

Attorneys spend significant time ensuring that the documents they have been asked to review are complete. Contracts commonly reference and incorporate other documents. A contract may incorporate "by reference" the plans and specifications for the project, or applicable building codes, or even the terms of a separate "General Contract." The incorporated documents may in turn incorporate yet additional documents.

The law in many states allows for contracts to incorporate other documents "by reference," even if the referenced document is not attached, so long as the incorporated document is clearly identified. As a result many subcontractors are asked to sign incomplete contracts that reference and incorporate documents that are not provided or readily accessible to the subcontractor. In such cases, it is wise to review any contract with an eye toward highlighting the incorporated or referenced documents and insisting on at least the opportunity to review them before signing anything.

Of course, it is difficult to know what you are bidding on without reviewing the documents that define the full scope of the job. Likewise, where a contract you are signing incorporates the terms and conditions of another contract, your actual obligations may be vastly different than the words on the page in front of you. For example, in *Metro Demolition and Excavating Company v. H.B.D. Contracting, Inc.*, 37 S.W. 3d 843 (Mo. E.D. 2001), the general contractor sought to force a payment dispute into arbitration by enforcing the terms of the prime contract that had been incorporated by reference into the subcontract.

The very basic contract you are signing for a small job may incorporate by reference a complex AIA agreement that contains indemnity provisions, insurance requirements, choice of law provisions and a host of other onerous requirements that might make the job seem far less favorable from a business perspective. Look for a contract term that lists the "Contract

Documents" that make up the entire contract so that you can be sure you know what the contract says before you sign.

Also look for a provision known as a "merger clause" or an "entire agreement" provision, which specifies that the contract represents the entire agreement between the parties. Generally, oral agreements cannot be used to alter a written agreement, so don't rely on a handshake promise not to enforce unfavorable terms.

Similarly, be sure you understand what codes will apply to the work you are bidding. Generally, building codes and local ordinances will trump job specifications. Any contract you sign should allow for change orders and additional payments to cover changes in the scope of work caused by the requirements of applicable building codes. However, contracts often saddle the subcontractor with the burden of alerting the general contractor to conflicts between building codes and contract specifications. Such contracts could make the subcontractor responsible for the cost of performing remedial work necessitated by code violations. Be sure your contract allows you a reasonable opportunity to discover conflicts and potential violations like these and to incorporate needed changes before you find yourself under water fixing errors the general contractor or architect should have foreseen when the project was designed.

Payment and Change Orders

Never agree to so-called "contingent payment" terms, also called *"pay-if-paid,"* in any contract you sign. These provisions only require the general contractor to pay its sub *if* it gets paid by the owner. Agreeing to be paid if the GC gets paid could legally preclude you from collecting payment from the GC. While still undesirable, "pay-when-paid" terms allow collection even if the GC has not been paid.

Ideally, every contract should provide for progress payments made at the completion of each stage of the project and should identify how it will be decided that each progress point has been reached. Waiting until completion of the project to get paid provides the GC undue leverage and could negatively impact your decisions on how to staff and complete the project.

Contractors commonly require applications for payment to be submitted for each progress payment, after which the contractor or a designated "examiner" will inspect the work to determine whether it has been completed in accordance with the subcontract. If you can negotiate it, it is ideal to set the milestones for payment in step with required city or governing authority inspections so that passage of the inspection automatically deems the work compliant, and your invoices payable.

The subcontract should require all change orders to be in writing and signed by the parties, identifying the specific work and the price, as well as reflecting a change in the payment schedule so it is clearly understood when the extra payment will be made. You should never perform extra work without a written change order.

The parties to any subcontract should be aware, however, that a court may find a contractor has waived the requirement of a written change order under circumstances demonstrating a habitual acceptance of work completed upon oral change orders, or where the parties agree to the changes and the changes are subsequently completed. Because each case must be analyzed on its own facts and circumstances, your stringent documentation and memorialization of all interactions with the contractor, and retention of all records relating to your work on the project, may protect your right to payment where you fail to comply with a written change order requirement.

Dispute Resolution Procedures

Despite the best laid plans, the parties may still disagree. To keep the disagreement small (and less costly), the parties should agree at the outset on how to resolve disputes by including a dispute resolution provision in your written contract. Such provisions should set

forth the framework for resolving disagreements on all contractual provisions after its execution.

Formal dispute resolution is largely limited to litigation or mediation/arbitration. Contractors generally prefer mediation and arbitration to litigation. Many industry form contracts suggest disputes are first and best resolved by direct discussions of the parties, then mediation, and finally if all else fails, binding arbitration. Generally, such contracts provide that mediation and arbitration will be governed by the Arbitration Rules and Mediation Procedures published by the American Arbitration Association. Should the parties believe litigation to be the best route to resolution, they should identify and agree upon what law applies, where suit will be brought and who will be responsible for the costs (and under what circumstances). It has been popular in recent years to make the losing party in any litigation responsible for the prevailing party's attorney fees and litigation costs. This may not be a good idea for a subcontractor dealing with a party known to be litigious.

For mediation and arbitration, the AAA rules total more than 50 pages and contain specific guidelines for the parties to follow. While the AAA charges $250 and a minor hourly surcharge for *mediation* (with the costs of the mediator paid separately), the fees for the *arbitration* process can range from $1,500 to $25,000 depending on the amount in dispute and complexity of the claim. These fees do not include costs for legal counsel necessary to navigate and assist with the dispute. Nonetheless, the arbitration process can provide a cheaper and speedier resolution than litigation. However, while potentially more expensive, many believe only the procedural and legal structure of a lawsuit can ensure a fair outcome that is derived from a decision based upon both the facts and the applicable law.

Regardless of the dispute resolution path chosen, you should always carefully review and understand the procedures required for the notice of any claim to other parties prior to the initiation of the formal dispute process. Generally, the dispute resolution provisions should also specify requirements for work continuation and payment for that work while a dispute is pending.

Delay

To the extent possible, the contract should specifically spell out the responsibilities of the parties in the event of delay, as well as how responsibility for delay is determined. Delay can involve anything from performance to payment. A good subcontract agreement will allow the parties to plan for inevitable contingencies. Delays, such as those caused by weather, are common in construction projects, so you should negotiate favorable terms relating to delay or early finish.

Generally speaking, if a delay in performance is beyond a party's control or is not caused in whole by its own fault or negligence, an allowance for additional time for performance should be incorporated in the contract terms. You should also negotiate away any provision that might assess against you a proportional share of delay damages sustained by the owner due to your work, or at least cap or minimize the potential for such damages.

Indemnification

It is advisable to negotiate an indemnification clause to protect you from potential liability for damages caused by another party at the construction site, most commonly from personal injury or property damage caused by accidents. The agreement, whether derived from an owner's form or from the subcontract, should always require mutual indemnification (if it can be negotiated) and should never require you to indemnify another party for something you had no fault in causing.

Despite the language agreed upon, indemnity clauses, absent ambiguity in their language, are generally enforced by the courts (so one could also expect enforcement by an arbitrator).

Warranties

Warranties are promises the subcontractor makes concerning the quality of the workmanship and materials used. Even in the absence of a written contract, the law generally provides for implied warranties such as (1) materials will be new and of good quality, (2) the work will be performed in a workmanlike manner and be free from defects; and (3) the work and materials will conform to the requirements of the contract documents and project specifications, and if any errors, defects or inconsistencies, the subcontractor will correct them.

You should seek to limit, rather than to expand, such warranties through a written warranty in the subcontract. The warranty language should track the implied warranties listed above, but should also place a time and circumstance limitation for discovery of defects. Specifically, the warranty provision of the contract should limit the application of any and all warranties, express or implied, to a specific period (commonly one year). Including language that requires the acknowledgement of the contractor of the opportunity to inspect the work throughout the project will help avoid claims years later that defects could not be discovered at the time of installation or construction.

A *"warranty"* may be contained in a provision titled "Special Condition," or "Supplementary Condition," and may read something like this: *"Contractor warrants the Project will be constructed in a good and workmanlike manner and free from defects in material and workmanship for a period of one year following the date of Substantial Completion."* While the inclusion of a one-year warranty cannot prevent a claim from being made down the road, it can limit the claims available to the customer or make proving such claims against you more difficult.

Making your written contract a priority at the outset of every project and taking the time to negotiate carefully the best and most favorable terms for you can save you from

reliving the same old headaches that can sap your profits (and energy). The first time you find yourself protected from one of these common disputes by wise contract negotiation at the beginning, you may feel like Phil Connors when he finally woke up—to the day after Groundhog Day: *"Today is tomorrow. It happened."*

James "Jay" Morris is a director at Galloway Johnson, a regional litigation firm with over 100 attorneys in 11 offices throughout Missouri, Texas, Louisiana, Georgia, Alabama, Mississippi, and Florida. Galloway Johnson aggressively represent the interests of businesses, insurers, and individuals in thousands of cases and dozens of industries worldwide and has been Top 10-rated for insurance defense by Martindale-Hubbell, rated an Index Value 5 of 5 by the Association of Corporate Counsel, and is included among A.M. Best's Recommended Insurance Attorneys. Morris defends individuals and businesses against liability claims and guides small and medium-sized businesses in the transactions and legal considerations inherent in business. He defends complex coverage claims made against casualty and liability insurers and handles catastrophic injury, wrongful death, premises, property, products liability, construction defect and workers' compensation claims as well as general commercial litigation matters. He can be reached at (314) 725-0525 or jmorris@gallowayjohnson.com. Adam Breeze is an associate at Galloway Johnson. Breeze is an experienced litigator in the United States Bankruptcy Court who focuses his practice on representing individual debtors, creditors, and trustees in all chapters of filings and litigation related thereto. In addition, Breeze services a multitude of other issues related to civil litigation such as personal injury, contract litigation, landlord/tenant issues, real estate, family law, and probate. He can be reached at (314) 725-0525 or abreeze@gallowayjohnson.com.

ASA/FASA Calendar

March 2017

1 – Webinar: OSHA Silica Rule—Applications for Subcontractors *(Complimentary)*

15-18 – SUBExcel 2017, Denver, Colo.

28 – Chapter Leadership Webinar: Selling the ASA Value Proposition *(Complimentary)*

April 2017

11 – Webinar: Incentive Compensation Plan Best Practices

25 – Webinar: Most Popular Benefits Employees Are Purchasing Without Employer Contribution

May 2017

9 – Webinar: Prompt Payment and How/When to Suspend Work

23 – Webinar: Technology and Transparency

June 2017

13 – Webinar: Killer Contract Clauses

Contact information for all ASA and FASA events/programs:
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Coming Up
in the March 2017 Issue of ASA's

THE CONTRACTOR'S Compass

THEME: Payment

- *What Subcontractors Need to Know About Getting Paid on P3 Projects*
- *Payment Issues and Public-Private Partnerships*
- *Contingent Payment Clauses*
- *Right to Stop Work*
- *Legally Speaking: Collecting from the Contractor's Surety Despite a Pay-If-Paid Clause*

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