



YOUR 50 STATE PARTNER®

14 Contract Terms You Should Look for in Every Contract Before You Bid (Or Sign)

So That You Can Avoid Saying, "I've Got a Bad Feeling About This!"

Angela M. Richie
Denise M. Motta
March 2, 2021

Questions?

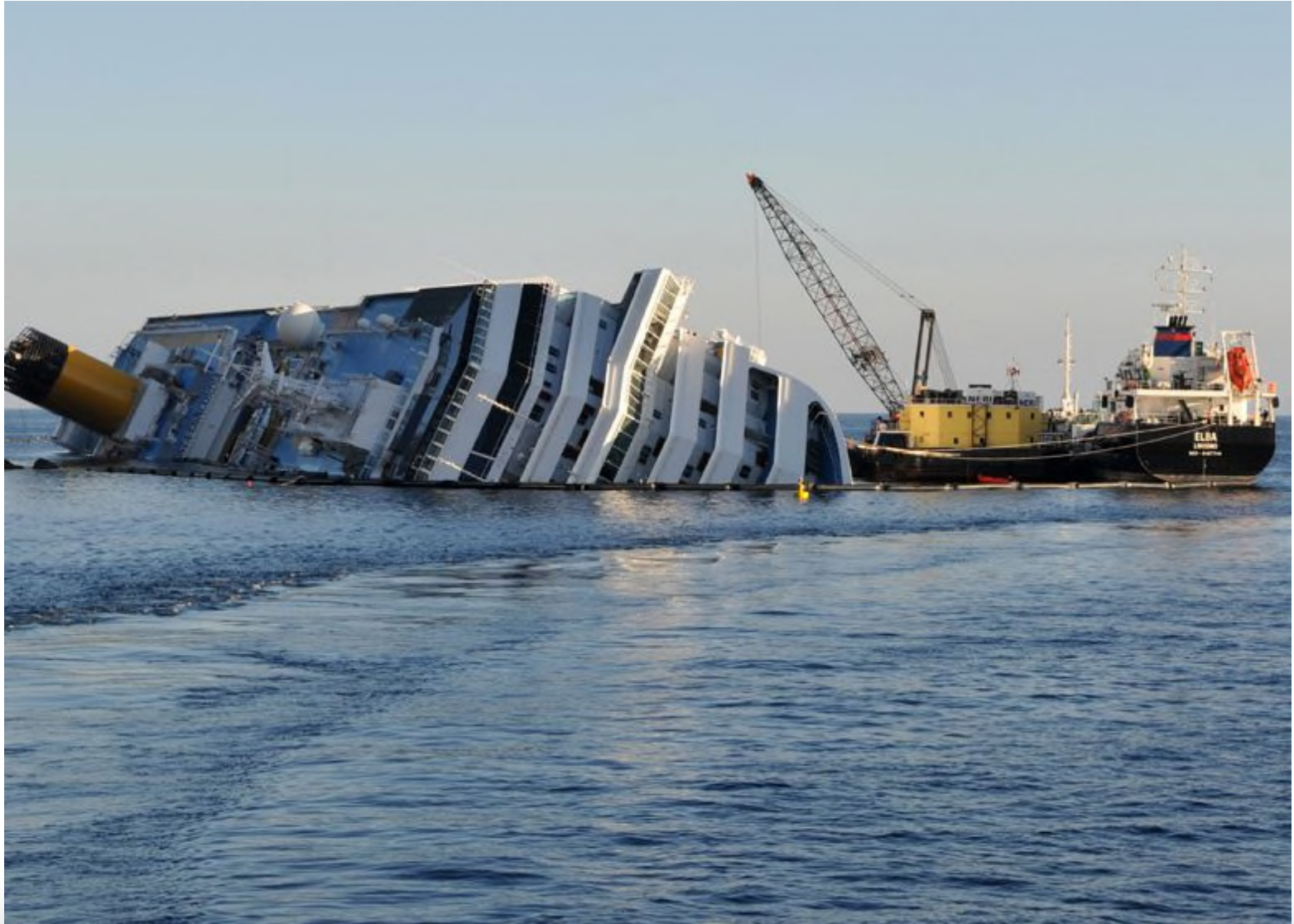
Send an email to dmotta@grsm.com or
arichie@grsm.com

We will issue a copy of the PowerPoint to you after
the webinar ends.

Overview

1. Why are contract terms so important?
2. What Due Diligence should you undertake prior to bidding?
3. When is a Contract Formed?
4. If I have limited time, what are the Top 14 Contract Terms to should search for?
5. What happens if you have a Claim?

When We Typically Get a Call . . .



Conduct your Due Diligence Before You Bid

- Quality of Participants

Do you want to work with these people?

- Have you OR other fabricators worked with:

- This owner
- This engineer
- This prime contractor or construction manager
- This broker
- This erector
- This detailer

- Do they pay on time?
- Do they issue change orders when due?
- Do they make the fabricator the scape goat?



Quality of Project Participants

- GOOGLE
- Company's website
- Licensing Board
- Secretary of State



- Court records
- Experience with Project of same size?
- Who is running the company?
- A parent corporation?
- Shell company?
- Inexperienced manager?

The Essentials of Contract Formation

1. Offer = Your Proposal
2. Acceptance = Your awarded job
3. Notice to Proceed
4. Beneficial reliance = You order material or start shop drawings

= a valid contract *But What are the terms?*



It can be verbal, but this is not preferred.

The Essentials of Contract Formation

Contract in the RFP:

1. Performance of work = acceptance?
2. Qualify your Proposal:
 - “This Proposal is based on the negotiation of mutually acceptable contract terms; hence, Fabricator does not agree to be bound by all terms in the Agreement included with the RFP.”

The Essentials of Contract Formation

No Contract Created by the RFP:

1. Example 1
 1. Proposal
 2. You proceed to work
 3. Then GC sends the agreement

2. Example 2
 1. Proposal
 2. Contract
 3. You proceed to work

Proposal Terms - Fab. v. Sub

- Upon release by customer to proceed to [purchase raw materials/ begin detailing or design services], this proposal becomes a binding agreement.
- Should any conflict arise between the terms of this proposal and any subsequent contract or terms submitted by customer, the terms of this proposal shall govern and take precedence over conflicting terms.

Proposal Terms - Fab v. Sub

- **MANNER OF ACCEPTANCE – KEY**
- The Proposal constitutes an offer which may be accepted by Contractor issuing a notice to proceed or request that asks Subcontractor to make preparations to begin performing the work.

Key Proposal Terms

Payment Terms – Timing; Interest; Attorneys' Fees

Dispute Resolution – Mediation and Arbitration

Schedule Terms & Durations

Starting Work Without a Formal Contract

“Dear Joe,

This will confirm the directions that you gave me today to order material and begin detailing.”

* * *

“... We are proceeding in reliance on your notice to proceed, the terms of the original request for proposal, and our bid. ”

If You sign a Written Agreement, is Your Proposal Part of the Contract?

- Must be specifically incorporated by reference in the contract.
- Merger Clause:
 - The contract constitutes the entire agreement
 - All prior communications are superseded by the express terms of the contract
 - Parties agree they have not relied on any representations except those in the Agreement
- LESSON: If you want it in the contract it has to be **specifically stated or incorporated.**

What ARE the Contract Documents?

- Look for what is incorporated by reference?
- Limit your scope to that shown in structural design drawings and specifications.
 - If all drawings are incorporated as “Contract Documents”, provide the following: “Notwithstanding the definition of Contract Documents incorporates all drawings listed on the drawing index, Contractor and Subcontract agree that Subcontractors Scope of Work is **limited to the structural steel and miscellaneous metals shown or noted on the structural design drawings only.**”

Is the Prime Contract Incorporated?

- Keep an eye out for this language.
- Don't accept Subcontract terms until you have been provided the Prime Contract and have had a chance to review with your attorneys.





**Read and Object to Terms
BEFORE YOU BID**

WORD SEARCH ****Angela's Top 14****

1. Design
2. Engineer*
3. Coordinat*
4. Code
5. Survey
6. Payment
7. Bond
8. Lien
9. Waive*
10. Notice (or day* or writ*)
11. Proceed
12. Indemnif*
13. Work for Hire
14. Actual Cost*

(1) Design & (2) Engineering Calculations

Specifically limit your Work "but only to the extent Connection Design is expressly included in Subcontractor's Work)"

(1) Design & (2) Engineering Calculations

Another option to protect you:

“However, nothing in this agreement shall be construed to require Subcontractor to provide professional engineering or design services unless connection design is expressly incorporated into the Work and then such connection design shall comply with the AISC Code of Standard Practice”.

AISC Code of Standard Practice

Make sure to include this in contracts:

“AISC Code of Standard Practice. Subcontractor and Contractor agree that the Work shall be performed in accordance with the terms of this Agreement and the American Institute of Steel Construction Code of Standard Practice for Buildings and Bridges, in the addition specified in the Contract Documents, and if none is specified, the current edition of the Code of Standard Practice.”

Design-Assist

The Fabricator's Contract Sum and Contract Time will not be established until all information set forth in Section 3.1 of the COSP is provided.

Design-Assist

The Subcontract Time and Price are based upon the assumption that the Structural Engineer of Record has provided a **suitable structural steel design** that complies with the building code. If the structural steel design is changed in order to provide a suitable structural steel design which complies with the building code, Subcontractor may seek a change to the Contract Price and/or Time order in accordance with this Agreement. **Subcontractor shall submit all approval drawings to the Engineer of Record, who shall have responsibility for the suitability, adequacy, and building-code conformance of the overall design.**

(3) Duty to Coordinate

Subcontractor shall provide information to Contractor such that **Contractor can coordinate Subcontractor's Work** with the Contractor and work of other subcontractors.

In no event shall Subcontractor be responsible to coordinate the design provided by others.

(4) Compliance with “codes”

Nothing contained in this Agreement shall require Subcontractor to conduct a peer review of the design to ensure its suitability, adequacy, or building code conformance.



(5) Survey v. Field Verify

Duty to survey? Or just field verify?

Change field verification prior to the start of the work – your shop drawings and fabrication already started before you can field verify

Limit Field Verification

Include language such as:

“Nothing in this Agreement shall be construed to require Subcontractor to wait to commence fabrication until the field verification of foundations (including anchor bolts) has been completed and all necessary submittals provided to Subcontractor; prior to erection, should Subcontractor discover the field conditions of foundations vary from the structural drawings, Subcontractor shall promptly provide notice to Contractor prior to commencing erection at those locations, and Subcontractor may seek a change to the Contract Sum or Contract Time for such Work.

(6) Payment Terms & (7) Bond

Payment

- Pay cycle: 60-90 days
- Raw/Stored Materials
 - Make sure “delivery to jobsite” is not required.
- If they insist, **KEEP YOUR lien and bond rights.**



Pay-if-Paid Options

1) “...to the extent payment is not made from the Owner to Buyer within 60 days of Seller’s invoice, due to no fault of the Seller, **Buyer shall make payment to seller within 75 days** of Seller’s Invoice.”

Pay-if-Paid Options

Option 2 – make it a **CONDITION PRECEDENT**:

“...Provided, however, that if Owner fails to pay one of Contractor's progress payment applications that includes amounts for Subcontractor's Work, for more than sixty (60) days after such payment becomes due under the terms of the Prime Contract, and such failure is based solely on reasons entirely unrelated to Subcontractor or Subcontractor's fault or negligence, then that progress payment will be made within 10 days by Contractor after written demand by Subcontractor...”

(6) Payment Considerations – COVID-19

- The Coronavirus (COVID-19) has resulted in a declaration of a state of emergency and closures in various cities, particularly related to large gatherings of people. Construction projects are being impacted either by shutdowns, worker illnesses, or employees who are unable to report due to other impacts such as a sick family member or school closure.
- **Submit Payment Applications immediately to help ensure cash flow in the event projects are shutdown.**

ESCALATION CLAUSES

- These help compensate you in the event of cost/material increases...
- Language re: material prices “... **based on current prices at the time of the Proposal.**”
- If there are significant increases, provide the same “... **shall cause the Subcontract price to be equitably adjusted by an amount reasonably necessary to cover any increase.**”
- Further, if materials are unavailable, prove that “...**an acceptable substitute shall be found and an adjustment in the contract price shall be made accordingly.** Subcontractor shall be entitled to an extension of time for any delay in obtaining delivery of the item necessary for completion of the Work.”

(8) Lien Waivers



Lien Waivers - 2 Types

1. Advanced Waiver in Subcontract

1. “Subcontractor shall not file any lien”
2. Is it enforceable?
3. Modify it – waive to extent paid
4. Ask for Bond – will not waive right to make claim against bond

2. Lien Waivers for Progress Payments

1. Waive ALL CLAIMS (including pending CO claims) through date

Lien Release

In consideration of \$____, which represents the full, complete, and final payment for the Work, Subcontractor releases the GC and Owner from

- All claims, demand and causes of action; and
- All liens

(Insert Name and Location of Job)


NOW, THEREFORE, in consideration of \$ _____ * which represents the full, complete and final payment for the Work, the Subcontractor/Supplier does hereby:

1. Release, remise, relinquish and forever discharge _____ and the Owner of the Premises of their successors or assigns, from any and all claims, demands and causes of action which the Subcontractor/Supplier has, might have or could have against _____ or Owner by reason of, or arising out of, the Work.
2. Waive and release any and all liens or right to lien against the Premises on account of labor and/or materials furnished by the Subcontractor/Supplier, which the Subcontractor/Supplier has under the law and statutes relating to Mechanic's Liens of the State in which the Premises are located.

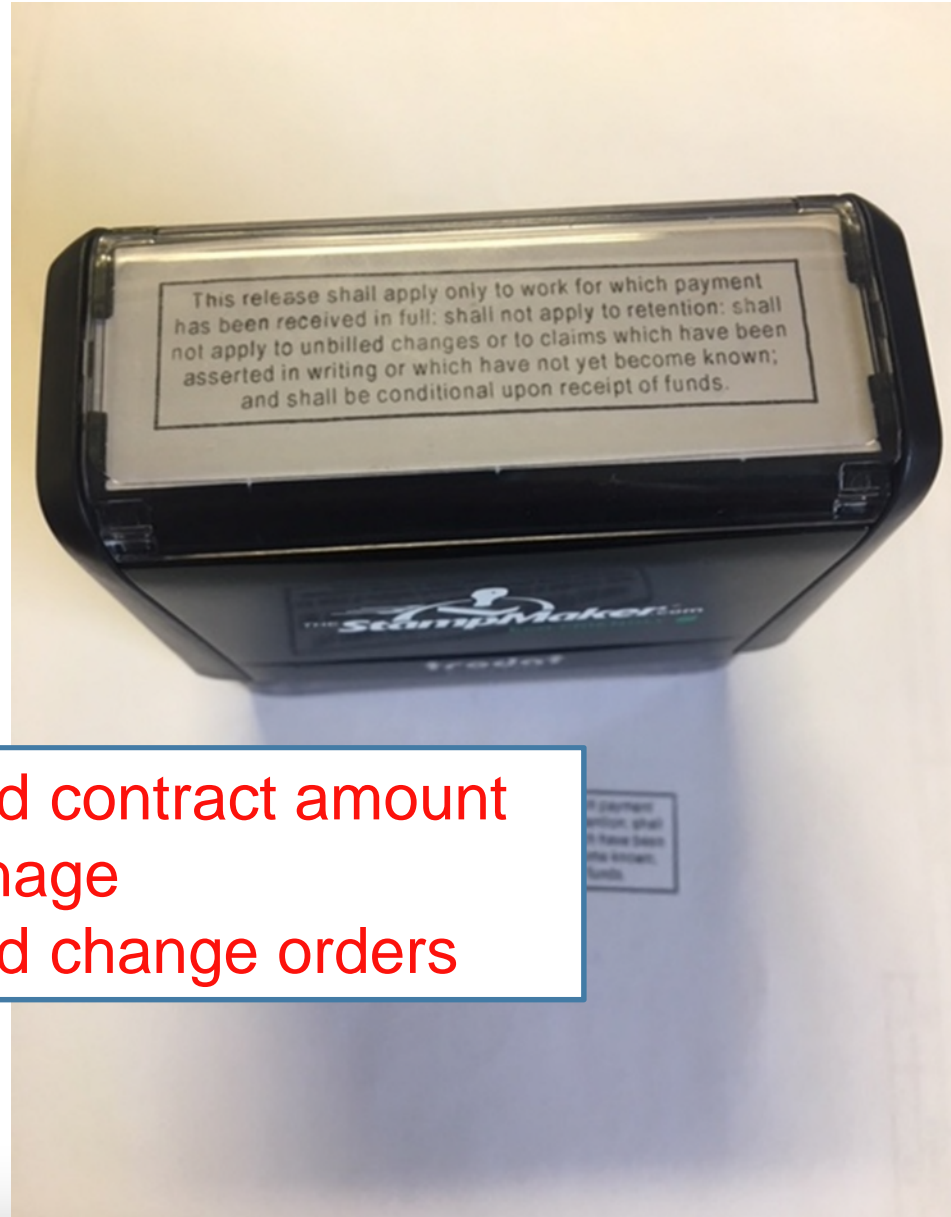
_____ and _____ hereby release _____ and the Owner of the Premises on account of any liens, demands, as

SUBCONTRACTOR/SUPPLIER
CONDITIONAL WAIVER OF LIEN AND CERTIFICATION OF PAYMENT
FOR LABOR, MATERIALS, EQUIPMENT AND SUBCONTRACTORS

NOW THEREFORE, conditioned upon actual receipt of One Hundred Eighteen Six Hundred Ninety Five Dollars and Fifty Cents (\$118,695.50) ("Payment") the undersigned shall provide the FINAL RELEASE AND WAIVER OF LIEN ("Release") for the amount of the Payment actually received. The Release shall be in the form of the attached **Exhibit 1** and shall be provided within five (5) business days from the day the Payment check clears.



conditioned upon actual receipt of C



1. Unpaid contract amount
2. Retainage
3. Unpaid change orders

RETAINAGE

- Example Clause:
- “Retainage shall be reduced to 5% of the total contract amount after 50% completion of subcontractor’s Work, and retainage shall be paid in full within thirty (30) days after final completion of Subcontractor’s Work.”

(9) Waive*

What Does Acceptance of Payment Mean?

= Waiver of \$\$\$

- Confirm language on all progress payments and Final Payment docs before accepting payment!



(10) Change Orders – Notice

- Notice: Time (5 days?)
 - How given - certified mail return receipt
 - To whom?
 - What must be included?
- Who can authorize a CO?
- Keep track of the Notice requirements!



(10) Change Orders – Notice

- Important: **Develop a policy!**
- No work performed without a signed CO.
- BE SURE to **request extensions of time whenever warranted.**

Please Notice This



“Changes to Work Sequence”

- Consider adding in specific language like:
- “Subcontractor shall be entitled to **an equitable adjustment resulting from any change of schedule which results in acceleration or out of sequence work** caused by others for whom Subcontractor is not responsible.”

How much will the change cost?

- Lump Sum Price
- Unit Price
- IF NO AGREEMENT -T&M or TBD. . .



Example Valuation Provision:

- Actual Cost is bad...
- Example: Subcontractor shall submit change order requests on either a lump sum, unit price, or T&M basis depending upon the type of change presented. **Contractor recognizes that changes to structural steel fabrication (change in weld size or number of bolts) cannot be tracked on an actual cost basis, and, therefore, the cost of certain changes must be estimated.**

Change Order Pricing

Pricing without an agreement (A201 Article 7.3.6)

- Contractor must keep and present itemized accounting of all costs.
- **Labor costs**
- **Material costs** (including transportation)
- **Rental costs** (exclusive of hand tools)
- Bond and insurance premiums
- Sales or use taxes
- Additional supervision and field costs directly attributable to the change

Additional Considerations for Notice and Changes in the Wake of COVID-19

- Examine all subcontracts for the applicable **Force Majeure** provision, give appropriate notice, and request time extensions. Look for a clause like this:

§ 8.3.3 Any failure or omission by Owner or Contractor in performance of its obligation shall not be deemed a breach or create any liability for damages or other relief (other than additional time) **if it arises from any cause beyond the reasonable control of such party**, including, without limitation, **acts of God**, floods, fire, explosions, storms, earthquakes, acts of public enemy, war, terrorism, rebellion, insurrection, riot, sabotage, invasion, **epidemic, quarantine**, strikes, lockouts, labor disputes or **other industrial disturbances**, or **any order or action by any governmental agency**, or **causes of similar nature**.

Additional Considerations for Notice and Changes in the Wake of COVID-19

- If your contract does not contain specific requirements of what must be included in the notice, the following Example notice language may be used:

At this time, _____ (“Steel Fabricator”) is being delayed by the Coronavirus pandemic, which is outside of Steel Fabricator’s control and constitutes a force majeure event. While the information from the CDC, World Health Organization and Federal, State and local government authorities is changing almost hourly, Steel Fabricator has been impacted by the present COVID-19 health emergency. Among other impacts, we continue to face impacts to our labor force and disruptions to the delivery of material and detailing services.

It is impossible to notify you of the full impact that the COVID-19 will have on the costs and schedule; however, we hereby request a day-for-day extension while the National Emergency for Coronavirus is in effect-and notify you that Steel Fabricator will submit its costs associated with this impact upon the conclusion of this national emergency along with documentation of the schedule impacts. Steel Fabricator reserves all rights that it has under the Subcontract and applicable law to an extension of time for any delay and costs that result from this force majeure event.

Additional Considerations for Notice and Changes in the Wake of COVID-19

- Check all contracts for clauses relating to compensation in the event of a shutdown or delay. Is there a No Damages for Delay Clause? **Look for a clause like this:**

No claim for damages. . .other than for an extension of time shall be made or asserted against the owner for any reason whatsoever. The contractor shall not be entitled to an increase in the contract sum or payment or compensation of any kind from the owner for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to costs of acceleration or inefficiency, arising because of delay, disruption, interference from any cause whatsoever.

- If you have an enforceable No Damages for Delay Clause, begin considering mitigation options that will reduce your job site overhead and General Conditions, such as the ability to return rented equipment during any project suspension.

Additional Considerations for Notice and Changes in the Wake of COVID-19

- Provide proper notice to all subcontractors as required by your subcontracts regarding any termination or project suspensions. Require and confirm that all subcontractors provide proper notice to their subs.
- Provide notice of withholding if payment is withheld due to project shutdown or delays. Require and confirm that all subcontractors provide proper notice to their subs.
- Comply with OSHA requirements – OSHA has issued a directive making COVID-19 a recordable illness when a worker is infected on the job site.
- Comply with state workers' compensation requirements for reporting illnesses.
- Keep meticulous records of all damages arising from any delay and increased expenses and provide supporting documentation as required to obtain payment.

(11) Limitation to Recovery from Owner

Option 1: "Nothing in this agreement shall be construed to limit Subcontractor's right to seek a change order from Contractor **to the extent such change is attributable to Contractor** and not attributable to Subcontractor, Owner-Directed Changes, or Differing Conditions."

Limitation to Recovery from Owner

Option 2: "Except where such extra work is caused by Contractor or its subcontractors, Contractor's receipt of compensation from Owner for extra work, changed work or changed circumstance shall be a condition precedent to Subcontractor's right to payment for the same."

(12) Duty to Proceed with Disputed Changes

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, **the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.**



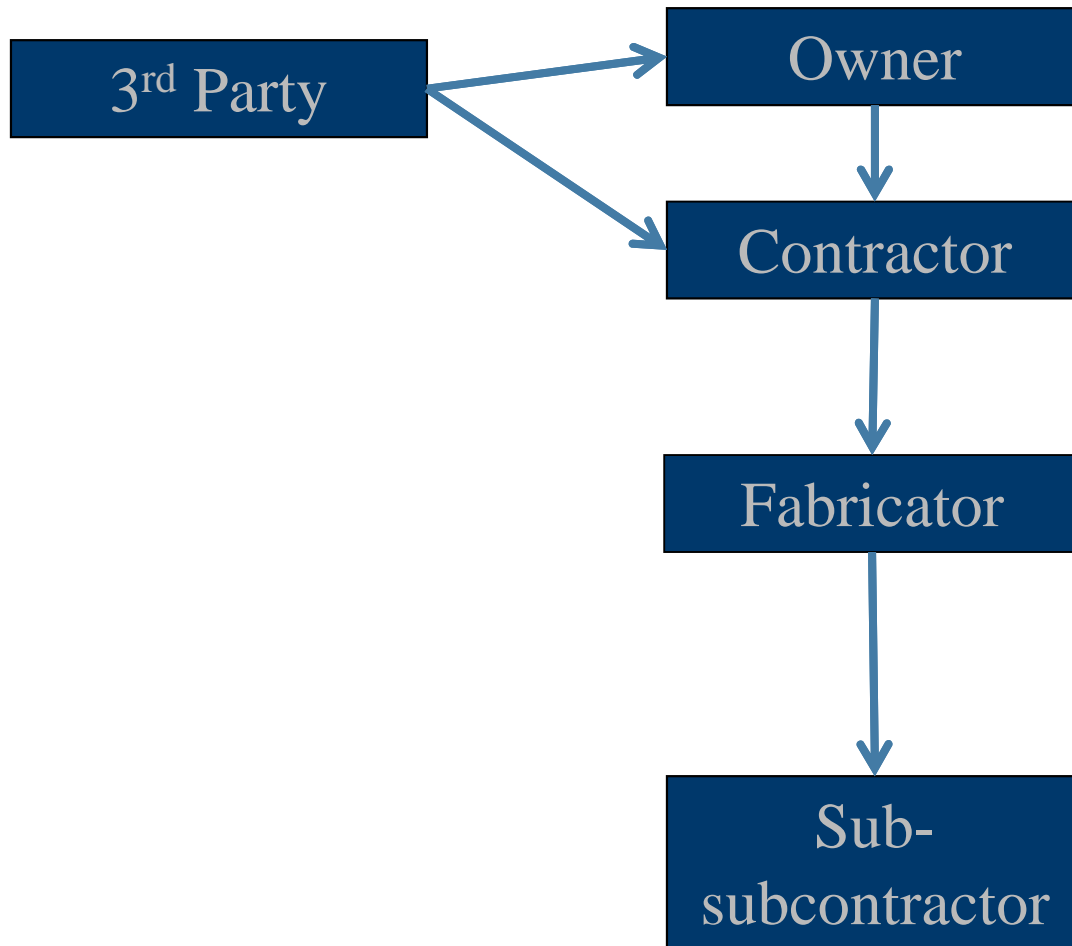
Exceptions to Duty to Proceed

1. Contractor cannot proceed with work **until owner responds** to a requested clarification.
2. Specifications are so defective that the **purpose of the contract will fail** if the contractor proceeds.
3. Owner is in **material breach** of the contract.
4. The change is of such magnitude that it constitutes an entirely different undertaking: A **“Cardinal Change.”**

KEY CO Clause – “Duty to Proceed”

- **PLEASE USE...**
- “**Seller shall suspend performance of any Change**, whether directed by Buyer or suggested by Seller, **unless the following conditions precedent are satisfied:**
 - (1) Seller is thereafter released in writing by Buyer to perform said Change,
 - (2) Buyer and Seller shall mutually agree in writing upon an equitable adjustment in the price and/or delivery date to reflect the effect of such Change,
 - (3) **Buyer has timely paid all amounts owed under the original scope of Work in accordance with the Contract,**
 - (4) to the extent Buyer has included a pay-if-paid or pay-when-paid clause in the Contract, Buyer has passed along all Seller Applications for Payment, and has taken steps to demand and ensure timely and prompt payment to the Seller,
 - (5) **Buyer has reviewed and paid for all Buyer caused Changes within thirty (30) days of issuance of such Change Order Request,**
 - (6) for Owner-caused Changes, it must be established that within 14 days of receipt from Seller, Buyer has submitted and requested timely payment of all applicable Change Order Requests, and
 - (7) **Buyer shall continue to make payments in accordance with the Contract Documents** ("Conditions Precedent to Performance of Change Order Work").

Defense v. (12) Indemnification



AIA Indemnity Provision

§ 4.6 INDEMNIFICATION

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect . . . from and against claims . . . **arising out of or resulting from performance of the Subcontractor's Work** under this Subcontract, provided that any such claim . . . is attributable to bodily injury . . . or to injury to or destruction of tangible property (other than the Work itself), but **only to the extent caused by the negligent acts or omissions of the Subcontractor**

§ 4.6.2 . . . Section 4.6.1 shall not be limited by a limitation on the amount or type of damages . . . , compensation or benefits payable by . . . under workers' compensation acts, disability benefit acts or other employee benefit acts.

(13) Work for Hire

Who owns the shop drawings?

Who owns the detailer's work?

Work for Hire

Work for Hire. Detailer acknowledges and agrees that any product, ideas, drawings, plans, specifications, renderings, models, BIM Models, computer files, or other electronically generated Construction Documents, or other work provided as part of the Services (“Work Product”) for Steel Fabricator are commissioned works for which Steel Fabricator alone shall be vested of any and all ownership rights, . . .

(14) Actual Costs

Termination

- Base Comp on % Complete –NOT “actual costs” (14)
- Have detailing line item in SOV

Change Orders

Termination & Actual Costs

Watch for a limitation to reasonable or actual costs plus overhead and profit as this converts payment to a T&M contract. Payment. **Subcontractor shall be compensated based upon the percentage of Work completed** (as percentage of the Subcontract Price or unit prices).

Claims

1. WATCH THE LIEN WAIVERS!

2. Demand for Payment with simplified spreadsheet of claims:
 - a. Original Contract Sum
 - b. Undisputed /Executed Cos
 - c. Full list of Disputed Cos (can be below)
 - d. (Amount Paid)
 - e. Total Owed
 - f. Undisputed Amount Owed = \$\$

Notice of Your Claims

- i. Violation of Prompt Pay Act
- ii. Lien on Funds
- iii. Mechanic's Lien
 - 1. Last Day of Work; Last Unpaid Invoice
- iv. Claim on Payment Bond
 - 1. Adequate Assurances Memo
 - 2. Getting GCs to process changes - what happens when they sit on the change
 - 3. Lien rights on changes - unapproved change orders and lien rights

Final Notes and Suggestions

- Acceptance of Contract Terms:
 - Watch for “commencing work” representing acceptance of contract.
- Fitness for Particular Purpose:
 - **DO NOT ALLOW** warranties of merchantability, habitability, fitness for particular purpose, etc.
 - **Only the EOR can guarantee these items.**
 - Limit warranties to labor and materials provided by Subcontractor.
- Notice & Opportunity to Cure:
 - “If the Subcontractor fails within five working days after receipt of written notice from the Contractor to commence and continue correction of work not in accordance with this Agreement, the Contractor may make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor. **Failure to provide Subcontractor with such notice and an opportunity to cure such alleged deficiencies shall constitute a waiver of such claims.**”

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER®

www.grsm.com