



YOUR 50 STATE PARTNER®

“Every Rose Has Its Thorn” It’s Time to Take Another Look at Your Subcontracts

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Subcontract Risks- Do You Need a Subcontract?

1. Erector
 1. Delays
 2. Walks Off Project
 3. Fatality – OSHA Citations
2. Sub-Fabricator
 1. Delays
 2. Defective Work
3. Detailer or Engineer
 1. Delays
 2. Errors

Yes – You Need a Contract



In the event that **Subcontractor is given a notice to proceed**, directed to purchase material, or otherwise directed by Contractor to commence any of the Work contemplated by this Subcontract

prior to the Subcontractor signing this Subcontract,

Subcontractor upon commencement of such work shall be deemed to have accepted all of the Terms and Conditions of this Subcontract as set forth herein.

No amendment or modification of any provision of these Terms and Conditions shall be binding unless the same is in writing, signed by the party to be bound, and is specifically described as an amendment or modification of these Terms and Conditions.

Flow Down Provisions



Key Flow Down Terms

- Contract Docs
- Warranties
- Payment Terms
- Schedule
- Changes
- Insurance
- Delays and Damages
- Dispute Resolution
- Immigration



Incorporation of Contract Terms

Incorporate

Steel Fabricator Agreement

Prime Contract

Incorporation of Contract Terms



“The vendor shall **assume toward the Steel Fabricator all obligations which Steel Fabricator has assumed towards the Contractor,** including, without limitation, all requirements relating to the

scope,	quality,	quantity,
timeliness,	warranties,	safety,
inspections,	confidentiality,	indemnity,
change orders,	claims,	lien rights,
insurance,	compliance with laws,	clean-up,
intellectual property.		

Bind Sub-Subcontractors to Terms



- » “The Subcontractor shall not enter into any agreements with the Owner, Contractor, or Architect with respect to the Project without first obtaining the Steel Fabricator’s written consent. **Subcontractor agrees to bind all sub-subcontractors to the same terms and conditions as those set forth in this Agreement.**”

Include AISC Code in Contract

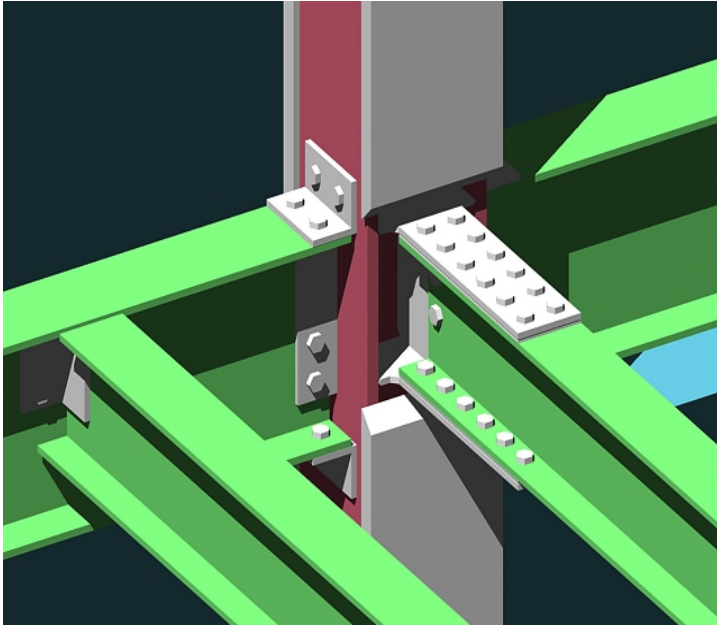
“Vendor shall perform work in accordance with the American Institute of Steel Construction Code of Standard Practice for Buildings and Bridges, **current edition.**”

“This is the Entire Agreement”

The terms and conditions of this Subcontract shall **constitute the entire agreement** between Contractor and Subcontractor and may not be altered except as set forth herein.

Any additional or different provisions contained in any acknowledgements, proposals, sales memoranda, invoices or in other documents issued against or in response to this order that purport to alter or vary any of the terms and conditions of this Subcontract are hereby rejected and objected to in advance and shall not become a part of the parties' Subcontract unless otherwise specifically agreed in a writing signed by the parties.

Scope of Work



Structural Steel & Misc. Detailing

All detailing services to provide complete detailed steel erection, fabrication, and part drawings including model files (CAD), DWG, PDF files, NC files and XSR reports for the complete scope of work listed below

per the contract documents

and as otherwise directed by Steel Fabricator as required by the contract between Steel Fabricator and Prime Contractor.

Connection Design and Detailing

All design and detailing services to provide complete connection designs for the structural steel for Project as set forth in this Agreement.

Detailer shall comply with **Section 3.1.1** of the American Institute of Steel Construction's Code of Standard Practice in carrying out these services.

If the Detailer is performing *connection design* that requires the services of a licensed engineer, the services must be performed by an engineer *licensed in the state the work is being performed*.

Change Orders



Vendor Change Provision



Vendor shall only be entitled to an adjustment to the Agreement Price or Schedule to the extent Steel Fabricator **receives an adjustment for Vendor's work from the Owner or Contractor.**

Vendor Change Provision



Through acceptance of this Change Order, Subcontractor acknowledges that it has reviewed the progress of the Work related to this Project and the potential impact of the added work on the progress of the Project in the future.

As a result, this Change Order includes compensation to Subcontractor for all Work arising out of this Change Order including any and all effects, accelerations, delays, impacts, inefficiencies or similar demands associated with this Project and the Subcontractor recognizes that there is no basis for any such claim in the future.

Duty to Proceed with Disputed Work

- Flow down any requirements to proceed with disputed work.
 - Pending final resolution of a Claim, Subcontractor shall proceed diligently with performance of the Contract.
- If possible, separate disputed from undisputed work

Payment Terms -- Fixed Price v. Unit Price Contract

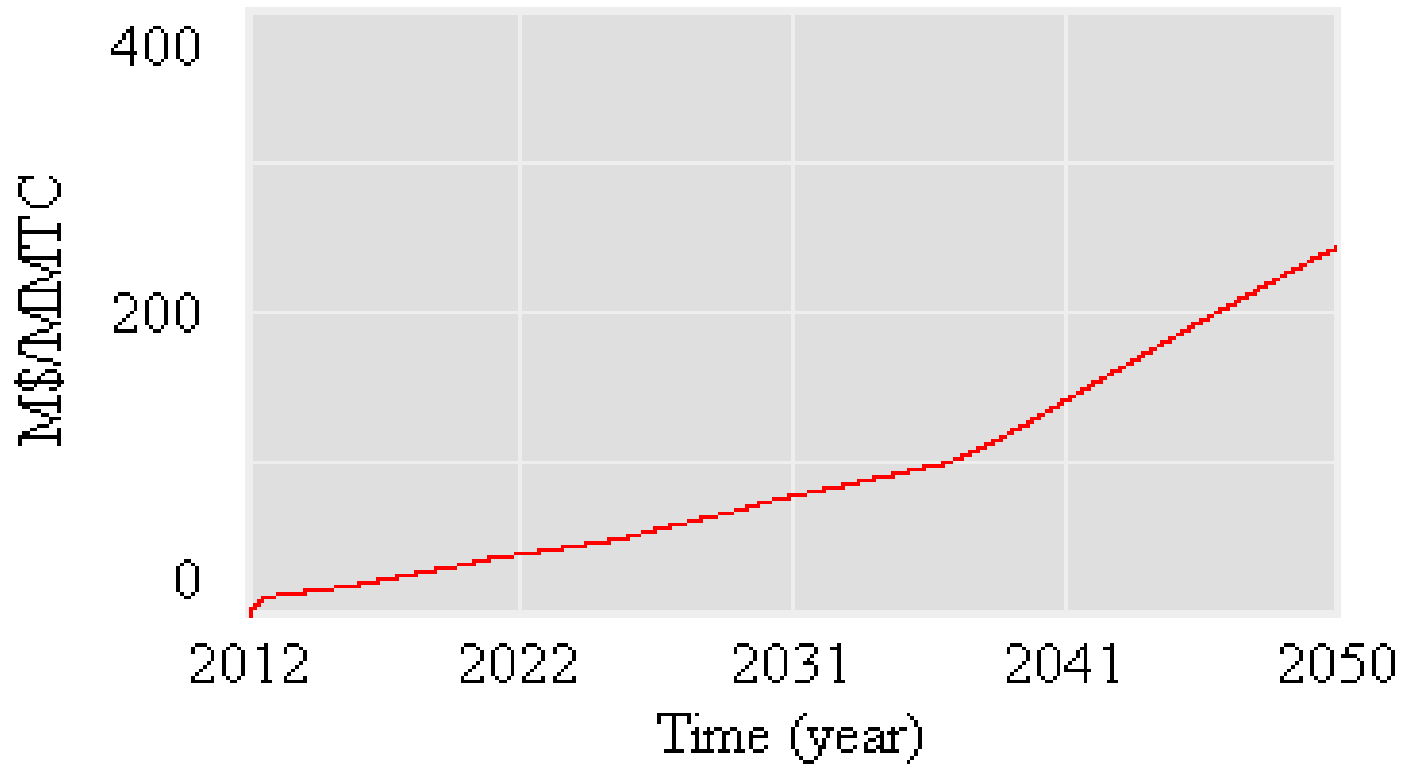


1. What are unit prices based on?



Escalation

Market Price



Market Price : Smooth



Payment Terms -- Pay-If-Paid



- » To the fullest extent allowable by law, receipt of payment by the Contractor from the Owner shall be a **condition precedent** for payment to the Steel Fabricator.

Payment Terms – Duty to Pay Sub-Subcontractors



- » “Subcontractor agrees that all payments made to the Subcontractor . . . shall be used by the Subcontractor first to pay amounts due to” sub-subcontractors.”
- » Consider issuing joint checks to your subcontractors for work performed by lower-tiered subs.

Indemnity Provisions



- » “To the fullest extent permitted by law, the Subcontractor agrees to defend, indemnify and hold harmless the steel fabricator . . . from and against all claims, demands, injuries, fines, penalties, losses, expenses (including attorneys’ fees), damages and liabilities of every nature, including contractual liability”
- » Right to select attorney of your own choosing.
- » Indemnify lien claims; require subcontractors to bond off liens.

Vendor Indemnity Agreement



- Indemnify and defend Fabricator, Owner, Architect from
- Claims or liens arising or related to the work
- Obligation not limited by applicable workers' compensation laws and vendor waives all immunities
- Assume indemnity obligations in contract with general contractor

Use of Subcontractor Facilities



- » “Subcontractor shall make available to Steel Fabricator and all of its subcontractors, for reasonable periods of time, equipment, ladders, scaffolding, and materials or equipment specifically produced for use at the Project, necessary for Steel Fabricator and said subcontractors to complete the work to be performed under the Subcontract.
- » Ensure that you are able to complete the work.

Lien Waivers



Lien Waivers - 2 Types

1. Advanced Waiver in Subcontract

1. Flow it down!

2. Lien Waivers for Progress Payments

1. Waive ALL CLAIMS (including pending CO claims) through date!
2. Get signed waivers from your subs!

ADD – Acceptance of Payment = Waiver



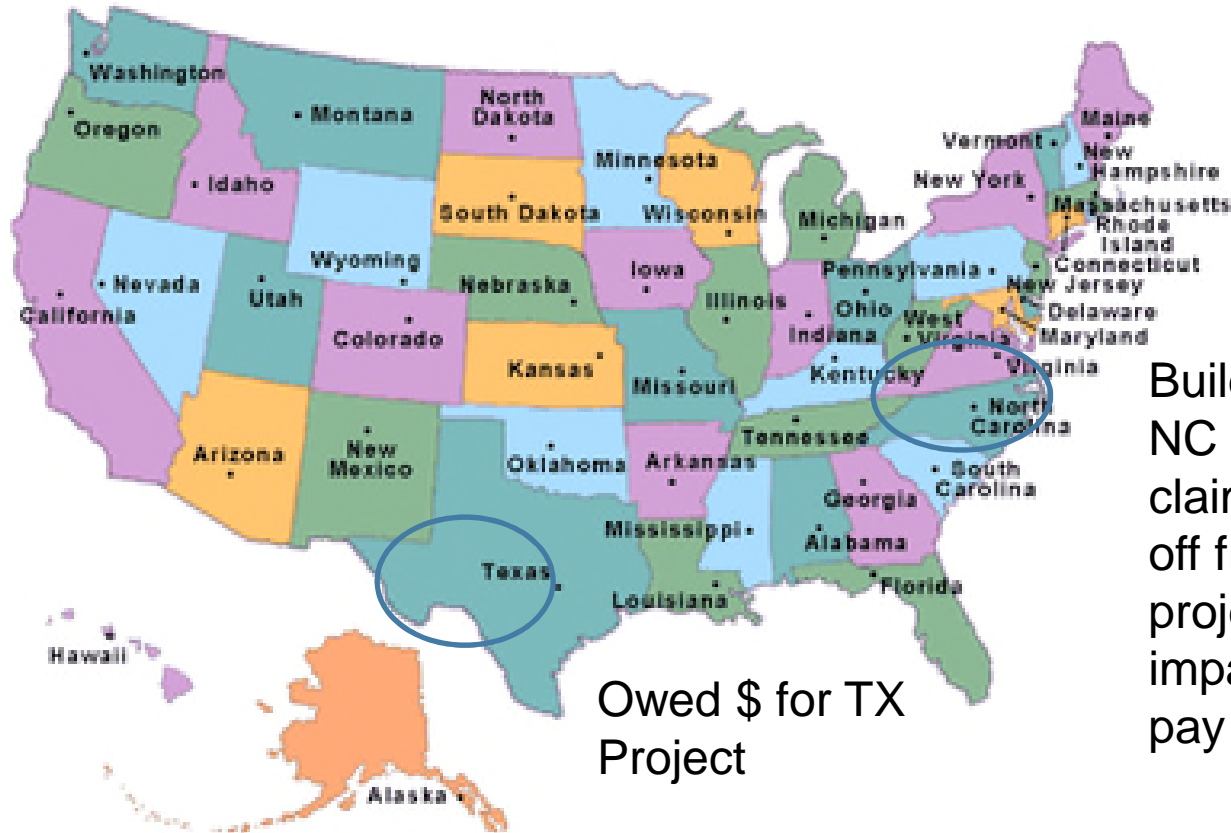
Retainage



Flow it down.

Make sure amount and release date are the same.

Set-off



Building Leaks on NC Project – GC claimed right to set-off from another project – could impact your ability to pay downstream sub.

Subcontract Time



Time is of the essence.

The Vendor shall work in strict accordance with the **Schedule . . .** including any updated or modified schedules.

If necessary to assure such prompt performance, the

Vendor shall accelerate its performance, at its own cost, to make up any delays caused by its own actions or omissions or those of its Vendors or suppliers.

Liquidated Damages



Liquidated damages = quantify or “liquidate” in advance the amount a party will be required to pay if it breaches a contractual obligation.

Vendor agrees to pay Steel Fabricator for any **portion of liquidated damages that may fairly be attributed to Vendor’s delays**. Steel Fabricator may deduct LDs from any unpaid amounts.



No Damages for DELAYS



“In no event shall Vendor be entitled to any compensation or recovery of any damages, in connection with any Delay,

including, without limitation, consequential damages, lost opportunity costs, impact damages or other similar remuneration.”



Force Majeure



Unforeseeable

Drastically Different from that Contemplated

Acts of God; Pandemics; Named storms; war; terrorism; labor strikes; embargo; civil disturbance

Beyond the Control of the Parties

Flow it down

Force Majeure

§ 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**.

Construction Industry Insurance



- General Liability
- Builders Risk
- Workers Compensation
- Professional (E&O)
- Pollution
- Umbrella Insurance

Subcontractor Insurance

- Vendor shall furnish certificates
- The insurance shall name Steel Fabricator as an “additional named insured.”
 - Not “additional insured” - only applies to claims caused by insured
 - Not “certificate holder”
 - “Additional named insured” is covered for all covered losses.

Payment and Performance Bonds



- Require bonds!!
- “Subcontractor shall provide a performance bond and a payment bond for itself for the Contract Sum, and shall be issued **by a surety and contain language acceptable to the Steel Fabricator.** Subcontractor’s failure to obtain a bond shall be grounds for termination of the Subcontract. **The Steel Fabricator’s approval of the surety and the language of the bonds shall be a condition precedent to payment under the Subcontract.”**

Subguard Insurance

- If Subcontractor will not agree to provide bonds, consider Subguard Insurance.
- Insurance policy that protects in the event of default by a subcontractor, including delays and additional costs.
- Covers direct costs, such as costs for completion or corrective work.
- Covers acceleration, LDs, delay costs, extended overhead.
- Discuss options with your broker.

Vendor Warranty



- Flow down all warranties you have
 - Warranty period
 - Terms regarding quality
- Notice and opportunity to cure
- Remove any limitations of warranty
- Warranty applies without showing fault
- Additional warranty period added for warranty work

Termination and Suspension



- Termination
 - For cause
 - » Breach of contract
 - » Insolvency
 - » Right to replace and additional cost
 - For Convenience
 - » Cost of work completed
 - » Not profit
 - » Must be done in good faith

Termination

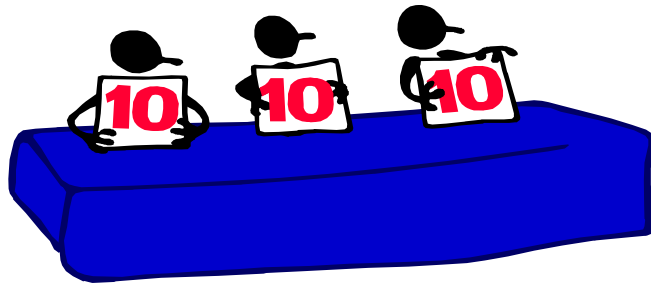
Payment. In case of such termination for convenience, Subcontractor shall be entitled to receive payment for Work executed, and costs reasonable incurred by reason of such termination.

Vendor waives all other claims to Work not performed as of the termination, anticipated overhead and profits upon such work, loss of business, or loss of profits on other projects or projects lost or foregone.

Termination

Non-Waiver of Claims. A termination for convenience shall not relieve the Subcontractor of any responsibility it would otherwise have under the Subcontract to correct work that is defective or otherwise not in conformity with the Subcontract, or to pay any costs arising from such defective or nonconforming work. The Steel Fabricator does not waive any right or claim to damage which it had under the Subcontract prior to termination, and may pursue or continue to pursue any cause of action arising from actions or omissions of the Subcontractor before termination.

Arbitration v. Litigation



Dispute Resolution is Specified in the Contract Documents

If the parties did not agree to arbitrate – you must litigate

Dispute Resolution



Disputes involving the Contractor or Owner.

Subcontractor agrees that **disputes involving the Contractor and/or Owner** shall be governed by the applicable notice, claim, dispute resolution, choice of law, and venue requirements in the applicable **Steel Fabricator Agreement** and/or Prime Contract.

Disputes Between Fabricator and Vendor

Arbitration

10 years experience

<\$1M - 3 depositions, 6 hr max, limited doc exchange

no e-discovery?

>\$1M – increase proportionally

Limitation of Liability



Watch for:

1. Overall Cap on Liability
 1. Exception for indemnity
2. Waiver of consequential damages
3. Repair and Replacement



Work for Hire



Who owns the shop drawings?

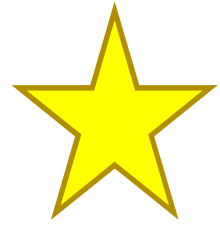
Who owns the detailer's work?

Flow down!

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,

Immigration



“Subcontractor agrees that it shall **comply with the provisions of the Immigration Reform and Control Act of 1986 (“the Act”)**, including, but not limited to, the provisions of the Act prohibiting hiring and continued employment of unauthorized aliens, requiring verification and record keeping with respect to identity and eligibility for employment, and prohibiting discrimination on the basis of national origin, United States citizenship, or intending citizen status.”

Contact Information

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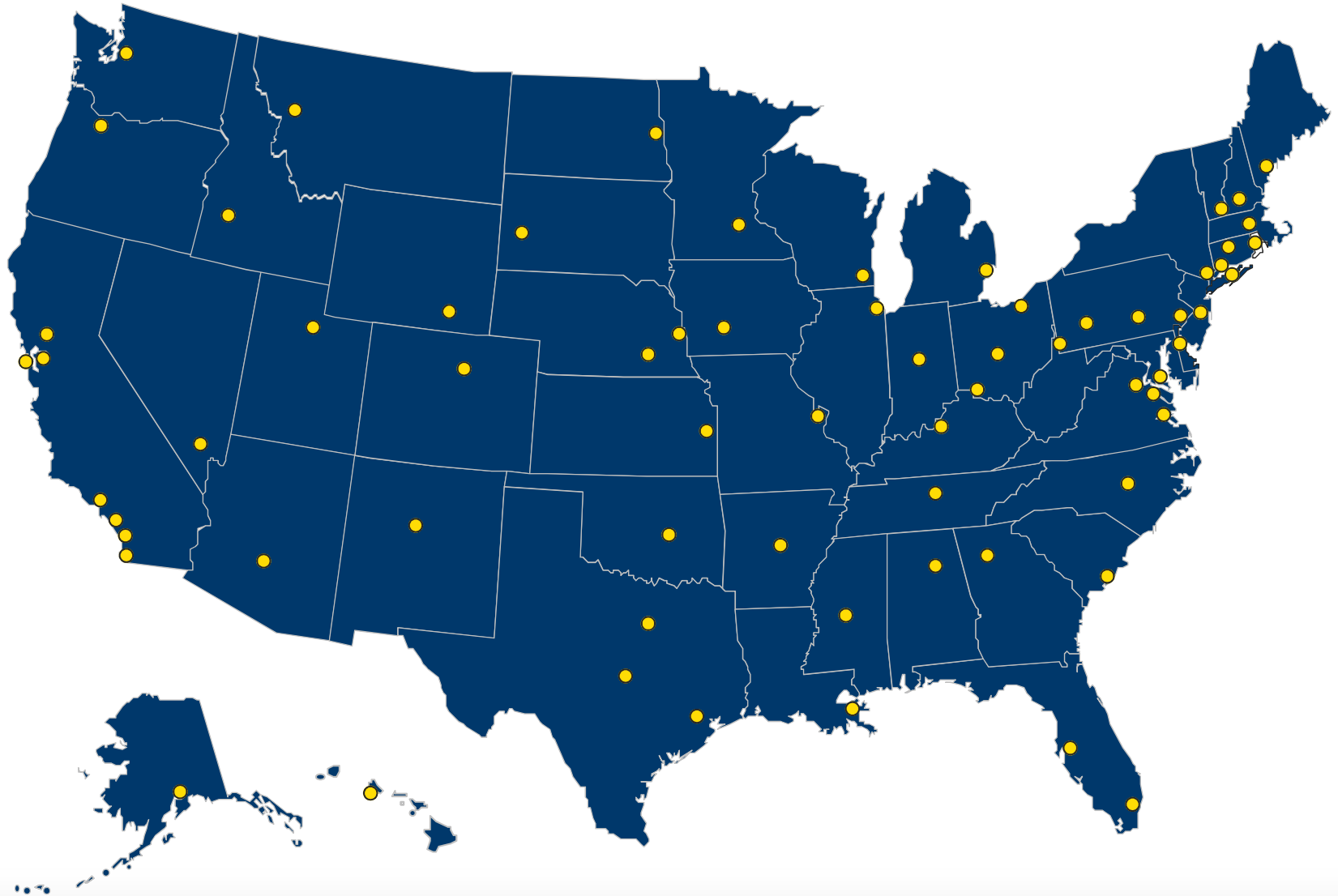


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