



YOUR **50 STATE** PARTNER®

You Can't Always Get What You Want How to Get What You Need in Upstream Contracts

March 14, 2023
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Save the Date – Second Tuesday of Each Month

- **April 11 – See you at NASCC!**
- May 9 – “Don’t go Chasing Waterfalls, Please Stick to the Rivers and the Lakes that You’re Used to.” Best practices in selecting, negotiating with, and managing downstream subcontractors and vendors.
- June 13 – Heffalumps & Woozles: “Beware! Beware! Be a very wary bear!” OSHA lessons learned.
- July 11 – Avoid the Wolf in Sheep’s Clothing. Best Practices for Defending against Bogus Backcharge Claims.
- August 8 – “The Times They Are A-Changin’”: Putting together change orders that will get paid.
- September 12 – Alphabet Soup and the Insurance Industry: What do you need to know about OCIP, CCIP, GCL, Builder’s Risk, Subguard, and Bonding to protect your company from upstream and downstream risks.

Session Overview

- Tips and tools to get what you need in your upstream contracts bearing the following goals in mind:
 - » Get the Work
 - » Focus on What Matters Most
 - » Consider Disputes Upfront
 - » Mitigate Risk
 - » Protect your Interests while Preserving Relationships
- Identify and Discuss Critical Provisions

No, you can't always get what you want
You can't always get what you want
You can't always get what you want
But if you try sometimes you find
You get what you need

- *You Can't Always Get What You Want*
The Rolling Stones (1969)



Contract Documents

Contract Documents

- Construction contracts always incorporate other documents by reference. Know what is incorporated by reference prior to signing the Subcontract.
- Example:

ARTICLE 1: ENTIRE CONTRACT

The phrase "Contract Documents" is defined to mean the plans, specifications and other contract documents attached to or incorporated into the Prime Contract and any changes subsequently incorporated into this Subcontract. Subcontractor certifies that it is fully familiar with all of the terms of the Contract Documents, the location of the job site, and the conditions under which the Work is to be performed and that it enters into this Subcontract based upon its investigation of all such matters and is not relying on any opinions or representations of Contractor....Contract Documents are incorporated in this Subcontract by reference, and insofar as they relate in any way, directly or indirectly, to the Work covered by this Subcontract. Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, including, but not limited to, all applicable terms and provisions thereof....

Contract Documents

ARTICLE 1: ENTIRE CONTRACT

The phrase "Contract Documents" is defined to mean the

- **plans,**
 - » All plans including architectural and mechanical, electrical, and plumbing?
- **specifications,**
 - » All specifications or those applicable to your scope of work?
- **and other contract documents attached to or incorporated into the Prime Contract...**
 - » Did the general contractor provide you with copies of these documents, e.g., the Prime Contract, conditional lien waivers, insurance requirements, project specific safety requirements?
- **...Subcontractor certifies that it is fully familiar with all of the terms of the Contract Documents...**
- **Subcontractor...is not relying on any opinions or representations of Contractor...**
 - » You should be able to rely on the representations of the general contractor.
- **...Subcontractor agrees to be bound to Contractor in the same manner and to the same extent as Contractor is bound to Owner under the Contract Documents, including, but not limited to, all applicable terms and provisions thereof....**

Contract Documents- Negotiation Tactics

- **Obtain copies of all Contract Documents (including the Prime Contract)**
 - Prior to execution of the Subcontract.
 - Ex. Negotiation Tool: “*Subcontractor cannot accept this Paragraph at this time as the Prime Contract has not been provided. Upon receipt of the Prime Contract, Subcontractor will review it in order to determine whether further revisions are necessary to the Subcontract.*”
 - » The subcontractor has an absolute right to obtain copies of all the contract documents, including the prime contract.
 - Additional Proposed Revision: “*To the extent that the Contractor has furnished the Subcontractor a copy of the Prime Contract and all other Contract Documents enumerated herein,* Subcontractor agrees to be bound...”

Contract Documents

- **Read the Prime Contract word-for-word. Oftentimes, the Prime Contract gives rights to the General Contractor that the General Contractor never intended to provide to its subcontractors.**
 - If the Prime Contract contains favorable terms (e.g., payment terms, escalation, force majeure, supply chain issues, or storage costs), you should be able to use this as leverage for your benefit to get similar provisions into your agreement.
- **The Prime Contract (and other Contract Documents) will contain terms binding on the Subcontractor and necessary for effective contract administration (e.g., schedule, payment, change order, claims provisions).**
- **Take extra care to ensure that any terms you really care about (pricing, force majeure, etc.) are specifically written in your subcontract. Make sure that the important terms and conditions in your subcontract will prevail in the event of a conflict.**



Scope of Work

Scope of Work

- Care should be taken at the outset to ensure that what you assume your scope of work to be at time of bid is actually consistent with the Subcontract.
 - Are you comfortable with the scope of work described in the contract?
 - Are there conflicts between specifications and a narrative description of the scope of work that may appear in the contract?
 - » If the scope of work references or incorporates a specification section, you must assume that you are responsible for everything in that section unless you specifically exclude it in writing.
- Remember, if it's in writing, it's a part of the contract. Remove or modify any written term with which you do not completely agree.

Scope of Work: Incorporate Your Proposal

- **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
- **If you want your proposal in the contract it has to be specifically stated or incorporated.**
- As a practical matter, a subcontractor's proposal often includes terms that do not fit neatly into any other subcontract provision.
- If you cannot incorporate your proposal, make sure any scope clarifications, inclusions, and exclusions are clearly identified in your scope of work.

Scope of Work - Supervision

- “Subcontractor shall provide full-time, on-site supervision and direction of the Subcontract Work...”
 - Contractor’s are using this clause to require the fabricator to employ a full-time supervisor on-site.
 - This may be a cost you did not account for at time of bid as you were going to have your erector assume these duties.
 - In some instances, we have seen the general contractor attempt to issue a deductive change order when full time supervision is not provided by the fabricator.
- Suggested revisions: “**To the extent erection is included in the Scope of Work, Subcontractor’s erector shall provide full-time, on-site supervision and direction of the Subcontract Work, attend onsite meetings, ...**”
- *“For the avoidance of doubt, Subcontractor will not self-perform on-site construction work, the parties understand that Subcontractor will subcontract with specialty subcontractors (e.g. erection specialists) who will provide on-site safety compliance and competent persons.”*



Payment Terms

Payment

- Every contract should satisfy you as to:
 - (1) How much will you be paid - does the amount or calculation match your understanding?
 - (2) When will you be paid - is it after you complete your work, after the entire project is completed, or after the higher-tier contractor received its payment?
 - (3) What happens if you are not paid - are you entitled to interest and/or attorney's fees for pursuing payment rightfully due to you?
 - (4) By whom are you supposed to be paid - can you trust that party to uphold its end of the bargain?

Payment - Retainage

- Include a precise description regarding the amount of retainage and the method of calculating retainage. Consider negotiating a reduction in the amount of retainage based on the percentage of work completed.
 - Given a large subcontract sum, a 5-percent reduction in retainage can represent a significant cash flow to the subcontractor.
 - Example: “*Retainage shall be reduced to 5% of the total contract amount after 50% completion of Steel Fabricator’s Work, and Retainage shall be paid in full within thirty (30) days after final completion of Steel Fabricator’s Work.*”
- Retainage is another item where it is helpful to have the prime contract. Align your payment terms with the prime contract.

Payment Provisions: Pay-if-Paid

- Pay-if-Paid Clauses: These provisions makes the contractor's receipt of payment from the owner an express condition precedent to the contractor's obligation to pay the subcontractor.
- Example: “....Contractor and Supplier expressly agree that payment to Contractor on the Supplier's account by the **Owner is an absolute condition precedent to Contractor's obligations to pay the Supplier under this Purchase Agreement. Supplier expressly agrees that it relies on the credit of the Owner, not Contractor, for payment of its Work.** In the event Owner does not make payment to Contractor for Supplier's work, then Supplier waives its rights under applicable lien and bond statutes, and any payment bond posted by Contractor on this project, and **Supplier agrees its sole remedy shall be against Owner....”**
- The enforceability of these clauses varies from state to state and whether it is a public or private project.

Payment Provisions: Pay-when-Paid

- Pay-when-Paid Clauses: A pay-when-paid clause is the less severe of the two. This provision makes the contractor liable for payment when the owner pays them, or within a “reasonable time.”
 - Example: “...**Subcontractor agrees that if the Owner fails to make progress payment(s) or final payment to Contractor, Contractor shall have sixty (60) days to make such payment to Subcontractor after Contractor has exhausted all reasonable efforts, through legal proceedings and otherwise, to collect from the Owner, or others responsible on the Owner's behalf, such amounts due Subcontractor, and that Contractor may deduct the pro-rata portion of its costs and attorney fees for such collection efforts from the amount due Subcontractor....**”
- The enforceability of these clauses varies from state to state. Some states find that there must be a reasonable limitation on the amount of time Contractor has to pay the Subcontractor any undisputed amounts.

Payment Provisions: Pay-if-Paid and Pay-when-Paid

- Tips for Dealing with Pay-if-Paid and Pay-when-Paid Clauses:
 - The enforceability of these clauses varies from state to state and whether it is a public or private project. Check the laws of the jurisdiction where the project is located.
 - Privity of contract exists only between the contractor and subcontractor and not between the subcontractor and the owner.
 - The owner's failure to make timely payment is caused exclusively by the contractor.
 - The contractor is the party in the better position to monitor and to assure the owner's ability to pay--to most efficiently manage the risk--and is therefore the party that should assume the risk of owner non-payment.
 - » ConsensusDocs 751 and AIA Document A401-2017 place the risks of owner insolvency or failure to pay squarely on the contractor.
 - » If the subcontractor satisfactorily completes its obligations under the subcontract, then the subcontractor should be paid the agreed-upon amount irrespective of whether the contractor needs to resort to its own working capital as the source of the necessary funds.
- Suggested Revision: *"To the extent payment is not made from the Owner to Contractor within 60 days of Steel Fabricator's Invoice, due to no fault of the Steel Fabricator, Contractor shall make payment to Steel Fabricator within 75 days of Steel Fabricator's invoice."*

Payment: Adequate Assurances

- ADEQUATE ASSURANCES. *In the event a reasonable doubt exists as to the Buyer's financial responsibility,*
- *Seller shall have the right, in addition to all others it may possess,*
 - *to stop operations, withhold shipment and recall in transit,*
 - *and/or require a full or partial cash payment,*
- *Until the Buyer shall have paid for all material previously delivered or satisfied Seller of Buyer's financial responsibility and ability to pay the full Contract price.*
- *Seller shall have no obligation to begin or continue performance until adequate credit and funding information is provided, at any time on request of Seller.*
- *Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other Contract with Seller or Seller has insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.*



Right to Stop Work

- Does the contract provide a right to stop work for non-payment?
 - Contracts that have this also include conditions before you can stop:
 - » how long payment must be past due,
 - » a notice requirement,
 - » and a period of time for the non-paying party to resolve the issue
- Remedies for Nonpayment. If Buyer does not pay Seller any ... without liability to Buyer, and without prejudice to Seller's other lawful remedies
 - (i) terminate Seller's obligations under this Contract;
 - (ii) declare immediately due and payable all Buyer's obligations to Seller;
 - (iii) change credit terms with respect to any further work, including, but not limited to, receipt of cash in advance of further shipment for amounts owed or to be owed;
 - (iv) **suspend or discontinue any further work** and, if suspended, the time to complete the Contract shall be extended for the period of such suspension; and/or
 - (v) repossess the Products.
- The Contract amount shall be increased, by appropriate adjustment, by the amount of Seller's demobilization, delay, and remobilization costs.

Payment: Setoff

- **Setoff Provisions:** “Contractor shall have the right to set off any amounts Subcontractor owes to Contractor under this Subcontract or by law against the remaining balance under this Subcontract, **or against any amounts due Subcontractor under any other agreements with Contractor.**”

STRIKE RIGHT TO SET-OFF FROM OTHER PROJECTS/CONTRACTS

- Suggested Revision: “Contractor shall not have the right of set off or withhold funds due on one contract or subcontract for alleged claims or damages due on another contract or subcontract.”
- These are enforceable in most jurisdictions with some exceptions.

Lien Waivers - Two Types

(1) Advanced Waiver in Subcontract

- Example: “...Contractor and Supplier expressly agree that payment to Contractor on the Supplier's account by the Owner is an absolute condition precedent to Contractor’s obligations to pay the Supplier under this Purchase Agreement. Supplier expressly agrees that it relies on the credit of the Owner, not Contractor, for payment of its Work. **In the event Owner does not make payment to Contractor for Supplier’s work, then Supplier waives its rights under applicable lien and bond statutes,** and any payment bond posted by Contractor on this project, and Supplier agrees its sole remedy shall be against Owner....”
- **Negotiation Tips to Eliminate or Modify Advance Lien Waivers:**
 - ✓ Unenforceable or Prohibited by Law as against Public Policy?
 - This will depend on the jurisdiction where the project is located
 - ✓ Prohibited by the Prime Contract or Contract Documents?
 - ✓ Modify the language to limit the advance lien waiver, e.g., “**To the extent Supplier has been paid**, Supplier waives its rights under [applicable lien and bond statutes]...”
 - ✓ Do not waive your right to both assert a lien and make a payment bond claim.

Lien Waivers - Two Types

(2) Lien Waivers for Progress Payments

- These waive ALL CLAIMS (including pending Change Order claims or disputed payments) through the date of the Lien Waiver or Release. Lien Waivers are typically located in two places:
 - 1) A contractual provision in the subcontract; and
 - 2) A conditional lien waiver required to be submitted with payment applications.
- **Suggested Approach to Lien Waivers:**
 - **Step One:** “Subcontractor shall provide partial lien and claim waivers in the form specified by this Agreement and in the amount of its application for payment for completed Subcontract Work. **Such waivers shall be conditional upon payment, shall not apply to retainage, and shall not apply to amounts that are the subject of pending, disputed, or undiscovered claims or change orders.**”
 - **Step Two:** Add the same or similar language to the form lien waiver: “This release shall apply only to work for which payment has been received in full by Subcontractor, and it shall not apply to retainage, pending or disputed changes or payments, or amounts not yet paid.”

Lien Waivers: Preserve Your Lien Rights

- **Request Information Required to File a Lien at the Outset of the Project:**
 - Some contracts contain provisions requiring the contractor to provide this information upon the subcontractor's written request for this information. (See, e.g., A201-2017 and A401-2017.)
 - If the lien filing deadline, you do not want to be in the position of relying on the contractor to provide ownership and property information necessary to perfect your lien.
 - Shared Goals: This information benefits and protects the lien rights of the contractor.



Lien Waivers: Preserve Your Lien Rights

- Request Information Required to File a Lien at the Outset of the Project:
 - Sample Language: “***The Contactor shall furnish to the Subcontractor, within five (5) days after execution of this Agreement, information necessary and relevant for the Subcontractor to evaluate, give notice of, or enforce mechanic’s lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located and the Owner’s interest therein. If the Contractor does not have such information, the Contractor shall request the information from the Owner and promptly furnish the information received from the Owner to the Subcontractor.***”



Lien Waivers – Parting Thoughts

- “Subcontractor shall provide at least five (5) business days’ written notice to Contractor prior to filing any liens, charges, claims and judgments, security interests and encumbrances against the real property described on Exhibit A, a Project, the Work and any structures comprising a Project or located on such real property.”
- Sample Provision to Preserve Rights: *“Nothing contained in this Agreement shall be deemed a limitation of rights or remedies the Subcontractor may have under federal law, under state mechanics’ lien laws, or under applicable payment bonds unless such rights or remedies are expressly waived by the Subcontractor.”*
- This is beyond the scope of this presentation:
 - Make sure following lien requirements – advance notice and/or posting requirements if applicable to your jurisdiction.
 - Your scope of work is generally finished prior to the completion of the project. A good practice is to make sure you have your lien deadline calendared.



Change Orders

Change Order Provisions:

- Talking Point: We want to get paid for work, including changes if you get paid.
- You Get a Change:
 - *The Contract Sum (or Unit Prices) are based upon the quantity, character, and complexity of the Work shown in the structural design drawings referenced in the Steel Fabricator Agreement. Should the structural design drawings be modified, the Contract Sum (or Unit Prices) and Contract Time shall be adjusted to reflect changes in quantity, character, and complexity of the Work.*
- If you give notice within earlier of 5/10 business days :
 - *Steel Fabricator shall provide written notice of all claims or disputes, including requests to change the Contract Time or Contract Sum, and any other submissions or information required by the Contract Documents, within ten (10) business days in which the Steel Fabricator knew or reasonably should have known of such claims or 5 business days prior to the date required by the Prime Contract, whichever is earlier.*

Change Order Provisions: Notice

- Examples of Notice Provisions:
 - **Delay Claims:** “Subcontractor's written notice of delay must be given to Contractor within forty-eight (48) hours from the beginning of the delay and establish that the delay in completion of the Work arises from causes beyond the control and without the fault or negligence of the Subcontractor.... The Subcontractor acknowledges and agrees that the **Subcontractor's failure to give a written notice of delay as prescribed herein constitutes a waiver by the Subcontractor of any extension of time for delay, disruption, interference or hindrance.**”
 - **Changes/Claims:** “If a dispute arises between Contractor and Subcontractor about whether particular work is a change, Subcontractor shall timely perform the disputed work and may give written notice of a claim for additional compensation for that work. **Such written notice of claim must be given within five (5) days after the disputed work has commenced. Subcontractor's failure to give written notice within five (5) days constitutes a waiver of any claim based on that work.**”
- Change definite notice times to a “reasonably should have known impact” standard.
- Implement a protocol for your team on providing notice, including timing requirements (48 hours), describing how notice is to be provided, and to whom notice must be given.

Change Order Provisions: Watch for Limitations on Owner Recovery

- **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."
 - 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."

Change Order Provisions: Establishing Time Frames for Resolution of Changes

- **Partial Change Order:** *“Contractor and Steel Fabricator agree to process partial change orders for that portion of a Change Order Request that can be agreed upon, while reserving rights on the disputed portion of costs and/or time impacts, and nothing in a partial change order shall prevent payment to Steel Fabricator of the agreed upon amount of the change.”*
- **Change Order Review Process:** *“Contractor and Steel Fabricator shall work in good faith to provide adequate supporting documentation, evaluate, and negotiate change orders within thirty (30) days of submission of a Change Order Requests (“CORs”). Any changes not resolved within thirty (30) days shall be negotiated at the Executive Level within 60 days of submission of the COR, and if not resolved, then the parties have the right to immediately invoke the dispute resolution provisions of this Subcontract.”*

Change Order Provisions: Ability to Refuse Work/Stop Work

Conditions Precedent to Performance of Change Order Work“: However, Steel Fabricator *shall suspend performance of any Change*, ...unless the following conditions are satisfied:

- (1) *..released in writing by Contractor to perform said Change,*
- (2) *..mutually agree in writing upon an equitable adjustment in the price and delivery date ...,*
- (3) *Contractor has timely paid all amounts owed under the original scope of Work ...*
- (4) *Contractor has reviewed and paid for all Contractor caused Changes within thirty (30) days...,*
- (5) *for Owner-caused Changes, ...within 14 days ...Contractor has submitted and requested timely payment of all applicable Change Order Requests,*
- (6) *Contractor shall continue to make payments in accordance with the Contract Documents*

Right to Stop Work:

- *“If the value of pending change orders, ...pending for over 60 days,*
- *equals or exceeds 10% of the original contract amount,*
- *...after three (3) days’ written notice, shall stop work until ...paid,*
- *and bear no obligation ...for the consequences of ...stoppage.*
- *The Subcontract Sum shall be increased by the Steel Fabricator’s reasonable costs of demobilization, delay, and remobilization.”*



Schedule

Contract Time

- **Know the Project Schedule.** What are the deadlines in the contract for substantial completion or final completion? Are they reasonable?
 - Can you meet the requirements with available resources?
 - Are there liquidated damages assessed for each passing day on which a certain deadline is not met?
- **Preserve Your Ability to Request Additional Time:** “Seller shall be entitled to an equitable adjustment in the Contract Time and Contract Sum, including but not limited to, any increased costs of labor (including, but not limited to, rescheduling work, paint touch-up or repainting, additional handling, increases in labor or subcontract rates, etc.), overtime, and materials resulting from any change of drawings, change of schedule, acceleration, out of sequence work or delay caused by others for whom Seller is not responsible.”

Establish Milestone Dates

“Subcontractor's Baseline Schedule is attached hereto as Exhibit ____.
The Subcontract Time and the achievement of Milestones in this Agreement are contingent upon:

- (1) **Issued for Construction Drawings**, which comply with Section 3.1 of the AISC Code of Standard Practice, current edition, obtained on or before ____;
- (2) **Return of approved shop drawings** within ____ business days of submission to Contractor,
- (3) **Prompt return of RFI responses** to Subcontractor, but in any event, no later than ____ business days of submission by Subcontractor, and
- (4) **Subcontractor being given approved shop drawings ____ weeks** prior to the necessary delivery date for that sequence of work.”

❖ Makes performance contingent upon receipt



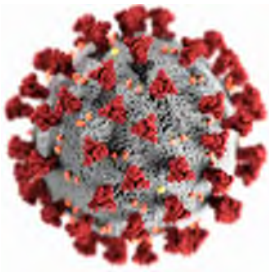
Contract Time

- **“Time is of the Essence”**
 - Implicit in the language is a mutual obligation that both parties see to the performance of their respective work so that the entire project is completed in accordance with the contract documents and project schedule.
 - Use this language to your advantage if the contractor is slow processing RFIs or approving submittals.

No Damages for Delay Provisions

- Owners and contractors frequently use “no damages for delay” provisions in contracts to minimize the risk of additional costs associated with delays.
- Example of a “No Damages for Delay” provision:
 - “**The Subcontractor expressly agrees that an extension of time shall constitute the Subcontractor's sole and exclusive remedy should the Subcontractor be delayed or hindered in its Work by Contractor or by other Subcontractors** in which case Contractor shall owe the Subcontractor only an extension of time for completion equal to the delay. Such extension shall only be available if the notice required by subparagraph (d) of this Section 4 has been given [i.e., within 48 hours of the beginning of the delay].”
 - “The Subcontractor ~~expressly agrees that~~ shall be entitled to an equitable adjustment of the contract sum and an extension of time for completion equal to the duration of the delay shall constitute the Subcontractor's sole and exclusive remedy should the Subcontractor be delayed or hindered in its Work by Contractor or by other Subcontractors ~~in which case Contractor shall owe the Subcontractor only an extension of time for completion equal to the delay.~~”
- Check the governing law as “no delay for damages” provisions are not enforceable in every jurisdiction:
 - Caution: **Do not hang your hat on a contract provision being unenforceable under state law.





Force Majeure

- *FORCE MAJEURE. If the performance of the Contract by Steel Fabricator is interrupted by any cause beyond the reasonable control of Seller, ... Seller shall be excused from the performance of this Contract while and to the extent it is prevented from so performing by any one or more of such causes:*
 - (1) labor shortages, ..., or other inability to obtain necessary labor;
 - (2) acts of God, including, but not limited to, epidemic, ...;
 - (3) changes in laws, proclamations, acts, regulations, ...;
 - (4) explosions, accidents...;
 - (5) lack of or failure of or other *inability to obtain necessary transportation, supplies, fuel, power, materials, machinery, equipment or facilities*, delays caused by other contractors, subcontractors or their subcontractors of any tier, *or any materialmen or suppliers (including the suppliers of metal deck)*.
- *Any such delay shall extend the time for completion of the Contract by not less than the duration of the delay.*
- *Additional costs incurred to complete, repair and/or replace any portion of the work due to a force majeure event shall be compensable to Seller, whether or not a change order for this work has been issued.*



Limitations of Liability

Liquidated Damages

- Liquidated Damages quantify or “liquidate” in advance the amount a party will be required to pay if it breaches a contractual obligation
 - » Arrived at by a good faith effort to estimate damages in advance of actual damages
 - » The amount of damages is incapable or very difficult to accurately assess.
 - » Must be addressed by the contract.
- Step One: Try to strike any provisions that impose liquidated damages. If this was an express exclusion in your accepted proposal, you can use this in negotiations as exposure to liquidated damages was not something factored into your price.
- Step Two: Suggested Limitation of Liability Language: *“Both parties agree that the Subcontractor’s liability for damages, including liquidated damages, shall not exceed 10% of the total Subcontract amount, that no liquidated damages will be assessed to the Subcontractor if the Contractor has not been assessed liquidated damages by the Owner, and that in no event shall Contractor be allowed to recover liquidated and actual damages when doing so would result in a double recovery to Contractor or Owner.”*
- Step Three: If the contractor will not agree to a percentage cap on liability, include the following “... **Such liquidated damages for delay shall only be assessed to the extent that the Owner actually assesses liquidated damages against the Contractor.**”

Indemnification

- **To the fullest extent permitted by law, Subcontractor shall defend, indemnify, and hold harmless Contractor...**
 - The indemnity obligation typically includes a defense obligation. Such an obligation can require the Subcontractor to incur costs related to a claim before your fault in causing such claim has been established.
 - **Suggested Revision:** “Subcontractor shall ~~defend~~, indemnify, and hold harmless Contractor...”
- **Insurance Considerations.** The indemnification responsibility is generally fully insurable to the extent that it indemnifies against personal injury or property damage arising out of the contractor’s negligent acts or omissions. If the owner attempts to add indemnification against other damages, e.g., breach of contract, this indemnification would fall outside the scope of standard contractual liability insurance.

Indemnification

- *...from and against any and all liabilities...arising out of and/or attributable to Subcontractor's operations for...personal injury, including, but not limited to, bodily injury, emotional injury, sickness or disease, or death to persons or damage to property of anyone (including loss of use thereof), **caused or alleged to be caused in whole or in part by any act, negligent act or omission of Subcontractor or anyone for whose acts Subcontractor may be liable...***
 - The indemnity obligation is not proportional to your fault. Instead, you may be liable for the claim even if the other party is partially or wholly responsible.
 - **Suggested Revision:** “...to the extent caused ~~or alleged to be caused in whole or in part by any act,~~ by the negligent act or omission of Subcontractor...”
 - **Qualify your indemnification obligations:** “*provided, however, that such indemnification obligations shall not apply to the extent such claims are due to the negligence of an Indemnified Party or any other party for which Subcontractor does not control.*”
 - » We don't want to be held responsible for someone else's negligence. Under no circumstances, should you be held responsible for the contractor's acts or omissions.

Indemnification

- **The indemnity obligation typically is not reciprocal.** Seeking reciprocal obligations also can be a strategy to point out an unreasonable scope of the other party's "standard" indemnity term.
- **INDEMNITY.** To the fullest extent permitted by law, the Parties agrees to indemnify and hold harmless one and another and their directors, officers, shareholders, employees, agents, representatives, parents, affiliates, and subsidiaries(Collectively, "Indemnitees") from any allegations, claims, costs, demands, losses, expenses, liabilities, damages, judgments, actions, suits, fines, penalties, attorneys' or other fees ("Claims"), to the extent arising from or out of the following: (a) any claim for or arising out of any injury to or death of any person or loss or damage to property of any person to the extent arising out of the responsible party's negligence or willful misconduct or (b) any infringement of patents or the improper use of other proprietary rights by the responsible party or its employees or representatives that may occur in connection with the performance of this Agreement. The responsible party shall indemnify (including any costs or expenses related to defense) Indemnitees for any proportion of fault or liability not attributable to Indemnitees' negligence or willful misconduct, regardless of the proportion of fault attributable to Indemnitees, claimant, or other parties.

Warranties

- Is there an express warranty?
 - Suggested Revision: “*Subcontractor warrants labor and materials provided by the Subcontractor only and specifically disavows any warranty of merchantability, habitability, or fitness for particular purpose.*”
- What is the time period for the warranty?
- What is the remedy for the defect? Repair or replace?
 - Suggested Revision: “*The Contractor shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work and to make a claim for breach of warranty, if the Contractor fails to notify the Subcontractor and give the Subcontractor an opportunity to make the correction, the Contractor waives the rights to require correction by the Subcontractor.*”
- Add the following to the end of any warranty provision:
“*Subcontractor’s warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation or normal wear and tear under normal usage.*”





Termination

Termination

- Termination for Cause:
 - You want to be notified and have a reasonable opportunity to cure before the contractor takes adverse action.
 - » Sample Provision: “*If the Subcontractor materially defaults or persistently fails or neglects to carry out the Work in accordance with this Agreement, the Contractor may give written notice that the Contractor intends to terminate this Agreement. If the Subcontractor fails to commence to correct the defaults within seven (7) days after being given notice, the Contractor may then give a second written notice and, after an additional seven (7) days to correct the defaults, the Contractor may make good such deficiencies and may deduct the cost thereof from the payment due the Subcontractor and/or, at the Contractor’s option, may terminate the employment of the Subcontractor.*”
 - Watch for provisions that provide for termination for cause due to failure to pay your subcontractors. There may be valid reasons for refusing to pay subcontractors and vendors and the contract can be crafted to provide security to the contractor.
 - Reject any provision permitting the contractor to take control of your tools and equipment without compensation.

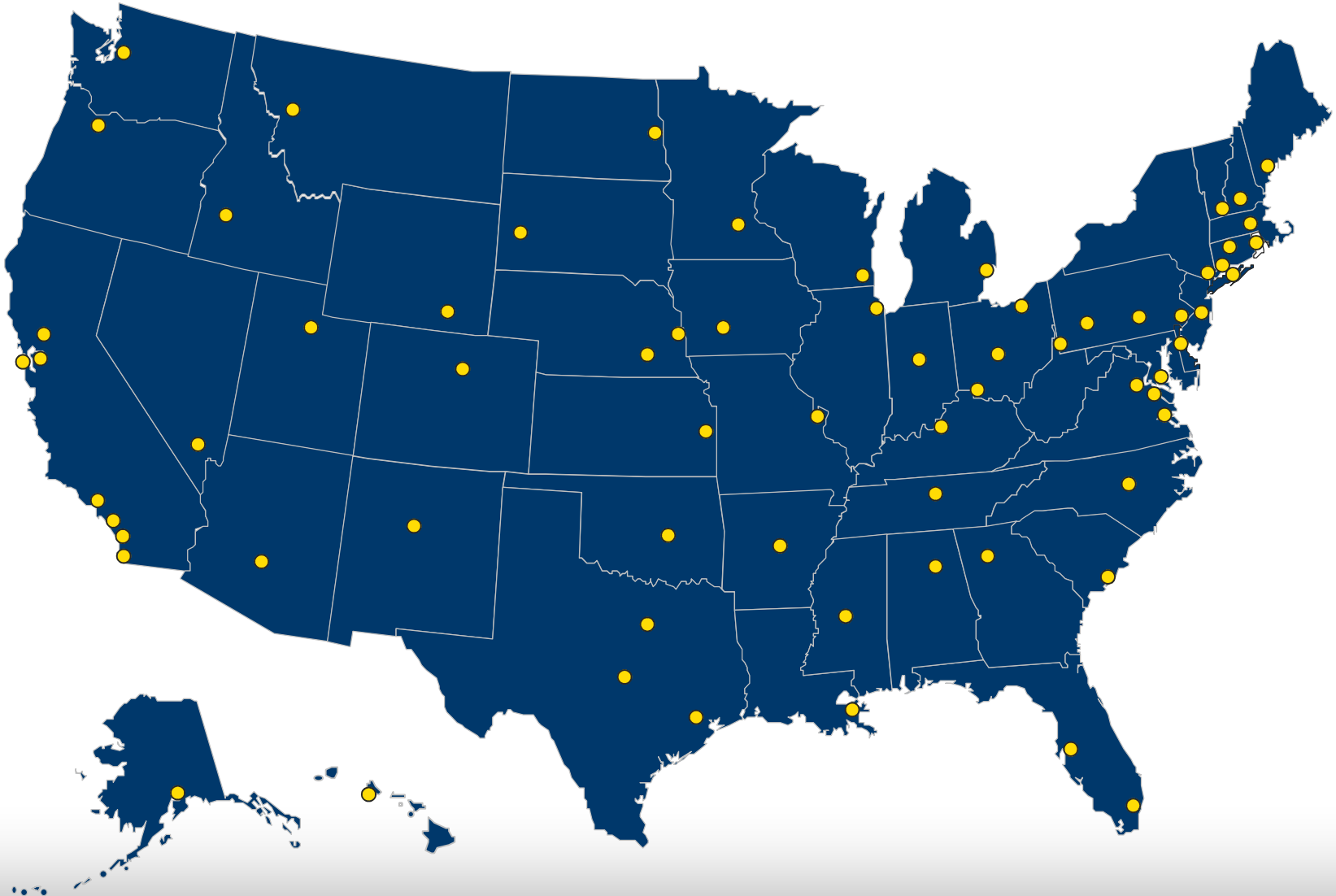
Termination

- Termination for Convenience:
 - The key with termination for convenience is determining how you will be compensated.
 - » *“Contractor shall reimburse the Subcontractor for any unpaid portions of the Contract Sum due it under this Agreement for the Work to the effective date of termination..*
 - » *...all reasonable costs of demobilization*
 - » *...and ten percent (10%) of the remaining balance of the Work remaining to be performed at the time if termination.*
 - » *Contractor shall further assume and become liable for obligations, commitments and unsettled claims that the Subcontractor has previously undertaken or incurred in good faith in connection with said Work, actual cancellation penalties for outstanding contracts and undelivered materials or equipment on orders...”*
 - Beware of language that makes payment by Contractor contingent on payment by the Owner.

Termination by Subcontractor

- Termination by the Subcontractor:
 - *“If the Contractor defaults by failing to make payment in accordance with this Agreement and payment is overdue by a period of fourteen (14) days or more...*
 - *...the Subcontractor shall have the right, upon written notice to the Contractor of the default(s), to suspend all Work under this Agreement.*
 - *If the Contractor fails to correct the defaults within seven (7) days after being given such notice, the Subcontractor may then give a second written notice of its intention to terminate the Agreement and, after an additional seven (7) days, the Subcontractor may terminate the Agreement.*
 - *In case of any termination of this Agreement, Subcontractor shall be entitled to payment for all completed Work through the date of the Work stoppage, along with any other reasonable losses sustained by the Subcontractor.*
 - *Upon termination of the Agreement for default by Contractor, Subcontractor is relieved from all duties under this Agreement, including all punch list and Warranty work.”*

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Questions?

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