

# WHAT YOU DON'T KNOW CAN HURT YOU

## Why General Conditions and Prime Contracts Can Change Your Subcontract

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### INTRO

Many subcontract agreements contain a clause that incorporates the terms of the Prime Contract between the Owner and Contractor or which reference separate General Conditions which apply to the work.

Subcontractors need to pay close attention to these documents since the terms of the Prime Contract or General Conditions may materially alter the terms of the Subcontract.

#### 1. WAIVERS OF CLAIMS FOR ADDITIONAL TIME OR DELAY DAMAGES

Some Owners try to get Contractors to waive any claims for delays on the project, even if the Contractor is not in any way responsible for the delay:

Owner has the right to revise the Contract Schedule to accommodate changes in conditions affecting the Work. Contractor shall adjust its operations to conform to all such Contract Schedules changes, and agrees to make no claim for acceleration or delay.

If a Subcontract incorporates the Prime Contract then the Subcontractor also is agreeing not to make a claim for delay or acceleration of the work schedule.

What your Subcontract should include is the following:

The project schedule and any modification shall allow sufficient time for Contractor to complete its Work in an efficient manner considering the contract completion date or times set forth in the Contract Documents. Contractor shall be entitled to an extension of time and an equitable adjustment in the price of the work, including but not limited to any increased costs of labor, including overtime, or materials, resulting from any change of schedule, acceleration, out of sequence work or delay caused by others for whom Contractor is not responsible.

#### 2. RIGHT TO RELY AND DUTY TO DISCOVER

Both Prime Contracts and General Conditions have various clauses which effect a parties' right to rely on Owner-provided information and a Contractor or Subcontractor's duty to discover and

report problems with the contract documents. Even if a Subcontract makes no mention of a Subcontractor's duty to discover defects, if the Prime Contract has such a clause and it is incorporated into the Subcontract, that duty then passes to the Subcontractor.

Under most standardized contracts (such as AIA and ConsensusDocs) Contractors (and Subcontractors) are entitled to rely on the accuracy of information furnished by the Owner including surveys showing physical characteristics, legal limitations and utility locations at the job site.

Contractors (and Subcontractors) generally do not have a duty to discover design errors, omissions or inconsistencies, nor to ascertain if the contract documents comply with applicable laws, codes or regulations. There is only an obligation to report any such discrepancies promptly when observed.

### 3. AUDIT OF FINANCIALS

Some Prime Contracts include this clause:

In the event of a claim or disputed change order, or as otherwise deemed necessary by Owner, Contractor's financial records shall be available to Owner for audit or review.

The Owner and General Contractor should have no right to audit or review your books. This is nothing more than an opportunity for the Owner to make you spend time and money and thus discourage claims.

### 4. CONTRACTOR'S RIGHT TO TAKE OVER WORK

Prime Contracts and General Conditions may also contain this clause:

In the event of default by Contractor, Owner reserves the right to take over the work of and may take possession of all materials, tools and equipment of the Contractor at the site.

While the Owner/Contractor is entitled to take over your work if you are in default, you should not agree to have them take your materials, tools and equipment. If the materials have been paid for, then those belong on the project. But tools and equipment are yours.

### 5. WRITTEN CHANGE ORDERS

Almost all contracts contain a statement that change orders must be in writing and signed by the parties before the work starts. Your Subcontract will probably include such a clause. But where you may get tripped up is if the Prime Contract or General Conditions include a paragraph that only certain representatives of the Owner or Contractor can approve change orders. For example:

Owner will not pay Contractor for any extra work that is not approved in writing prior to the work being done. The only person who is authorized to approve such work is the Owner's Vice-President of Operations, and Contractor waives any claim for extra work not approved by the VP, even if another Owner representative has requested the extra work.

The Arizona courts are mixed on whether such a clause is enforceable. On the one hand, if the extra work had to be performed (required by code, wouldn't pass inspection, etc.) then courts may say prior written authorization is not needed. If the work is elective (not required) then courts may require that a change order be issued in order for the Contractor to get paid.

## **6. TERMINATION CLAUSES**

Prime Contracts and General Conditions may also include a provision that allows the Owner to terminate the project at any time and stating the only compensation due to Contractor will be for work performed. If you are part way through a project you will have already committed substantial time, resources and workers with the anticipation of many more weeks or months of work.

If the Owner terminates the work without cause then the Contractor and Subcontractors should be entitled to payment for actual work performed plus reasonable overhead and lost profit for the remaining work that was to be performed.

## **7. DISPUTES CLAUSES**

Most construction contracts contain a provision that requires the parties to submit to binding arbitration before the American Arbitration Association. While AAA arbitration has its merits, bear in mind that you will be paying AAA an administrative fee to oversee the case *and* you will be paying the arbitrator for his or her time. This essentially doubles the cost of arbitration.

As an alternative to AAA, we suggest private arbitration to be held pursuant to the Arizona Statutes:

All claims, disputes, and matters arising out of or relating to this Contract or breach thereof not resolved by mediation shall be decided by binding arbitration in accordance with the Uniform Arbitration Act, Arizona Revised Statutes §§ 12-1501, et seq. then in effect, unless the parties mutually agree otherwise at the time. The location of the arbitration will be in the County where the project is located and governed by the laws of the State of Arizona. Any decision of an arbitrator in such arbitration shall be final and binding. The prevailing party to any arbitration shall be entitled to its reasonable attorney fees, costs and expenses incurred.