Chapter 5

THE CONSTRUCTION DOCUMENTS WE ADVOCATE USING WHEN REPRESENTING A SUBCONTRACTOR

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§5.01 INTRODUCTION

A subcontractor often views a construction contract with its general contractor as a "necessary evil" which it must endure and which often is signed by the subcontractor without it's carefully reading the terms of the contract or if read, with a lack of understanding and a blind faith in the "trust me" comments of the general contractor. Frequently, the project is substantially under way before the subcontract is signed and the subcontractor is then faced with being forced to sign the "Standard form" of the general contractor which was referenced in the bidding documents, but which the subcontractor has either never reviewed or which was unavailable for review at the time of the bid. It is for these reasons that many times a subcontractor will find itself in a position of being owed significant amounts for change orders, extras or contract modifications but is unable to sustain its claim for additional money because the terms of the contract, which it failed to read, have imposed severe time limitations on claims, or will not permit such a claim, as for example where there is a "no damage for delay" clause and a substantial portion of the subcontractor's claim is for delay damages or where it has inadvertently waived its mechanics' lien right by failing to read the general contract terms which provided for an advance waiver of lien.

The purpose of this chapter is to highlight those "murder clauses" which should be red flags to subcontractors engaged in contract negotiations. The following may be used as a checklist so that a subcontractor can review its subcontract and look for these clauses without the necessity of an elaborate analysis of the subcontract terms.

§5.02 FORMATION OF THE CONTRACTUAL AGREEMENT

[A.] Oral or Written Agreements

It is always possible that there will not be a written subcontract in any of the forms which this chapter covers -- that the parties will proceed on a verbal agreement and handshake. An oral agreement is enforceable under some circumstances. If it is a service contract such as most construction subcontracts will be, it is enforceable provided it takes less than one year to perform. If it is an agreement to purchase goods, it is enforceable if it is for less than $500. However, it is not a wise procedure to rely on oral agreements when there is any chance of a dispute, or with companies with which you do not have an established working relationship. Construction activities contain numerous chances for dispute. Obviously, once a dispute arises, the parties may not have orally agreed on how to handle that dispute or may have different memories of what the oral agreement was. The very best written subcontract is no more valuable than the best oral agreement until there is a dispute or disagreement. Then a good written agreement is infinitely preferable. On the other hand, a bad written subcontract is a disaster when the dispute arises, because you will have agreed to a variety of terms that no self-respecting court would ever force on you, but for your having signed the subcontract.

[B.] Agreement Formed in Bidding or Negotiation Stage

When you are reviewing a proposed subcontract, your power to make changes is related to a number of factors:

What was agreed upon at the time of bidding?
What is reasonable?
How low is your price?
How good and reliable are you?

The contractual agreement is usually formed first in the bidding or negotiation stage and then committed to writing. The entire subcontract could have been agreed to during the bidding

process or parts of it could have been agreed to during the process. The worse case is for you to be considered to have accepted the contractor's form.

The discussion in this section does not apply to contracts with suppliers of goods. The common law of offer and acceptance has been significantly modified by the Uniform Commercial Code agreement. The second worse case is for the agreement to cover only price and general scope. Waiting until you have been sent a subcontract before considering what terms are acceptable is letting the prime contractor shoot first.

It is important to understand how an agreement is formed during the bidding stage in order to understand whether you are entitled to argue over the proposed terms of the subcontract.

[1.] Offer

The bid of the subcontractor is the "offer" in contract law and a contract is not formed until the general contractor "accepts" the offer. The use of a subcontractor's bid by the general in putting together its bid is not normally considered acceptance of the bid. At this point, there is a decidedly one-way street in favor of the general contractor. The use of its bid gives the subcontractor no rights against the general. However, once the general relies on the bid and uses it, then the general may be able to force the subcontractor to comply with the bid, provided the general can show that the rules of "promissory estoppel" apply. In other words, when a subcontractor (1) submits a bid, (2) which it reasonably expects the general to rely upon, (3) which the general does in fact rely upon, and (4) it would be unjust to allow the subcontractor to refuse to perform, then the subcontractor is bound to perform or to pay damages incurred by the general. If the general proceeds to shop for a better price, this has been considered evidence that the general did not rely and so the subcontractor may not be bound. Consequently, the point is that your offer can be turned into a binding subcontract by the person to whom you bid. You

need to think of the form of the subcontract that will result if your offer is accepted at the bidding stage.

[2.] Acceptance

The next step comes with the acceptance by the general. As noted above, acceptance does not occur by using your bid to win the job. At that stage, however, the general is entitled to accept the bid. Acceptance normally occurs by some form of notification to you that the bid is accepted, that your company will be used, that a subcontract will be sent, etc. Generally speaking, the acceptance must not vary the terms of the offer.

Some states, e.g. New Mexico and California, have subcontractor listing laws for public construction contracting. Such laws can affect the usual rules of offer, acceptance and counteroffer. Subject to a list of exclusions, the acceptance must be for that scope of work with those exclusions. It is not an acceptance, if it is for a different scope of work or without those exclusions -- in other words, if it materially changes the terms of the offer. At that point it becomes a counteroffer which can then be accepted or rejected by the subcontractor. The fact that the acceptance is conditional, i.e., accepted, if the general receives the award, can be an acceptance, but the condition cannot be such as to modify the express terms of the offer contained in the bid. Once the general notifies the subcontractor of its acceptance, then the subcontractor can usually enforce the agreement.

[3.] Counteroffer

In practice, the most common occurrence is for the general to notify the subcontractor that the offer is "accepted", but to send a subcontract which either adds significantly to the offer or materially modifies the offer. In this case, as in all cases where the general proposes terms that differ from those offered by the subcontractor in its bid, the general has made a counteroffer. If a counteroffer is made, then the subcontractor does not have an

acceptance and a subcontract has not been reached unless the subcontractor in turn accepts the counteroffer. Essentially, at this stage you are into the negotiation stage and you drive the best bargain you can get. Once negotiations begin, neither side has the opportunity to enforce an alleged agreement reached during the bidding process.

[4.] Additional Terms

What happens when the proposed subcontract received from the contractor contains terms that are additional to those in the bid? The offer might have expressly stated that the bid is made on the condition that the subcontract be on the AIA A401 form. If there is an acceptance, then that form or some form that will be considered to deviate only in minor and immaterial ways will be acceptable. The proposal of a subcontract with additional terms materially differing from those of the AIA A401 would not be binding, but would be a counteroffer.

A more usual situation is when the bid did not refer to any particular subcontract form and did not specify all of the possible terms of the proposed subcontract agreement, for example a bid with price and scope only. If such a bid were accepted and no further terms were agreed upon, the agreement would be supplemented by terms reasonably within the contemplation of the parties or common and ordinary in the industry. The context might provide a factual basis for that supplementation. For example, if the parties had dealt with each other in the past, the subcontract form used previously would be the most likely form to be used. If the parties have not dealt previously, but the subcontractor knows or has reason to know the form used by the general contractor, the contractor's form could be imposed. If the contractor issued an invitation to bid specifically referencing its subcontract, failure to indicate that the subcontract form is not acceptable or to propose an alternative may result in your being bound by the contractor's form. Absent such factors, the conditions from one of the standard forms might be applicable. It is

more likely that you will end up being bound to a term that you do not want if your bid does not specify the acceptable terms.

[C.] Importance of the bid/proposal form

Unlike the general contractor which must bid an entire project per plans and specs, the subcontractor has some latitude to shape the terms and conditions under which it will perform. All subcontractors recognize that they have the ability to determine the scope of work contained in the bid. A subcontractor can bid all of Division 9, just 9900 Painting, or 9800 and 9900, or some of the other divisions also. Actually, at the time of bidding the subcontractor has control over all the terms of the subcontract, but the subcontractor has to exercise that control by use of a bid or proposal form that states what its terms and conditions are. It is recommended that a bid be submitted using a form such as that attached as Exhibit 1. The inclusion of the sentence designating the appropriate subcontract form controls the general terms and conditions other than price and scope, which are handled in more detail.

The use of such a proposal generally will not result in your terms being the terms of the subcontract unless you are dealing with an unsophisticated general or the general likes your terms. However, the use of a proposal form will result in your ability to negotiate the terms of the general's subcontract and will avoid being bound to terms to which you absolutely will not agree.

Once a subcontract is signed, that subcontract will govern the relationship and the bidding process or bidding documents will normally be examined only in two types of situations: first, when the bid documents are made a part of the contract documents; and, second, when the subcontract is ambiguous and the court needs to look to prior conduct to determine what was meant. Absent those circumstances, what is in your bid proposal will not be part of the agreement. You should attempt to incorporate your bid proposal into the subcontract.

§5.03 SUBCONTRACTS

[A.] Introduction

Construction subcontracts commonly state terms of agreement which fit into a series of normal types, e.g., scope of work, termination, cost, time, disputes, etc. This chapter analyzes a number of types of clauses which are of importance to the subcontractor --important either to avoid or to obtain. Always remember when you dispute the plain meaning of a subcontract term, the opposition will argue a central principle of contract law, i. e. "If the contract is unambiguous, the Court will generally enforce its terms." There are many exceptions, but when you sign a subcontract you should sign it expecting to have to live with its terms.

[B.] Subcontracts Generally

As a subcontractor you will confront a huge variety of subcontracts. There are standard forms which are used occasionally, e.g., the AIA A401, AGC Form 650 or 655, the AGC/ASA/ASC Subcontract and, perhaps, for small projects with unsophisticated generals, some form prepared by a stationery store. Even standard forms may have supplemental general conditions attached. However, the majority of subcontracts you will be asked to sign are subcontracts which were created especially for a particular general. These have common themes, but you must read and think about every paragraph. You cannot say to yourself: "This is just a normal subcontract like I have signed many times before." Many completely unique subcontracts are titled "Standard Subcontract" or some similar title. Some subcontract are almost identical, even in appearance, to the standard forms for the first few pages and then diverge radically. This chapter concerns the custom form.

[C.] Scope of Work

The Scope of Work clause sets out the work that is to be performed by the subcontractor. It can be as simple as the following:

Example. Description of Work:

Subcontractor agrees to perform the following Work:
[A blank space to insert description of the work.]

Everything necessary to install the Fire Protection as shown and described in the contract documents and as outlined in Division 1 and 15 as applicable.

Obviously, the preprinted part of the subcontract does not contain the language of interest. It is the description of the work that is completed in the blank that bears close scrutiny. It is very important to review the scope to assure it includes only what you agreed to do and excludes what you did not agree to do. Do not rely on your bidding documents to handle the scope of work. First, they may not even be a part of your subcontract. Second, the general contractor probably regards its written scope of work to control anyway.

You can do some fairly simple amendments here if you have used a bid proposal form. The simplest is to insert within the "fill in the words": specifically including only the work set forth in the Bid Proposal and excluding the work excluded from the Bid Proposal (which Proposal is expressly made a part hereof). Alternatively, if you are using an addendum, include the provision there, e.g. ¶1 of the Subcontractor Addendum to Subcontract - See Exhibit 2.

In addition, always make the subcontract scope of work refer to a specific set of plans and specifications using the sheet numbers and dates. It is not uncommon for the drawings or specifications to have been revised between the time of the bid and the time the subcontract gets signed. You might very well end up doing the work on a set of plans that you did not see at the time of the bid. Increasingly, a list of all drawings and specifications are being attached to the subcontract. The masonry subcontract may list the electrical drawings. Perhaps in an excess of caution, you could use:

> The enumeration of the Contract Documents is not intended to imply that all contract documents or drawings are relevant to Subcontractor's Scope of Work except as a description of the entire project undertaken by Contractor.

Normally the scope of work is not detailed enough to cover all items and it will be interpreted reasonably to include all incidental work necessary to do the described work in accordance with the plans and specifications. These clauses are usually referred to as "dragnet" clauses and purport to account for omissions, as follows:

> The plans, drawings, and details, and the specifications are intended to supplement one another, and any work or materials shown, mentioned or reasonably implied in one and not in the others are to be furnished by the Subcontractor without extra charge. The enumeration of particular items in this agreement or in the specifications shall not be construed to exclude other items. The intention of the documents is to include all labor, materials, equipment, transportation, tools, plant, appliances, appurtenances and other facilities, whether specified herein or not, which are necessary for the proper execution and completion of the work.

It is difficult to avoid this type of clause because it will be embedded not only in the subcontract but the A/E will have inserted it or similar types of language on the drawings and in the specifications. You can attempt to limit this dragnet by the language: "as applicable and limited to the work covered in this subcontract."

There will be other sections of the plans and specifications which elaborate on the scope of work. Examples: the drawings for the mechanical systems may contain a note with regard to the duties of the electrical or control subcontractor; the supplemental conditions may say that each subcontractor is responsible for clean up every day, for providing its own water, for providing all necessary scaffolding, etc. Disputes frequently arise when the subcontractor has reviewed only a part of the plans and specs.

There are two other provisions to watch out for in the scope of work provisions: (1) provisions raising the standard of performance or quality of work and (2) provisions

delegating the design duties. More and more there are provisions requiring a subcontractor to provide the best materials and the highest quality performance. Most of the time it is recommended that the normal performance standards be used by adding the following:

> Notwithstanding any higher standard stated elsewhere, Subcontractor's work shall be executed in substantial compliance with the Subcontract Documents in a good and workmanlike manner and free of defects not inherent in the type of work. Contractor may reject Subcontract Work only for demonstrated non-compliance with the Subcontract Documents and only if the Architect/Engineer concurs that the Subcontract Work is unacceptable.

Design delegation is a large topic in and of itself and may or may not be appropriate in the circumstances. However, if your company is willing to undertake design duties, it should not take on the task of integration with all the other designs. An addendum provision such as the following is suggested:

> Any design services provided by the Subcontractor or its Designer will be reviewed by the Architect/Engineer responsible for the overall project to assure that the design will be acceptable when integrated with the entire work. Contractor, Owner and Architect are entitled to rely on the accuracy and completeness of the designers hired by Subcontractor only if all design criteria are furnished to the Subcontractor by the Contractor, Owner and Architect.

[D.] Incorporation by Reference and Contract Documents

Subcontracts contain numerous "flow down" clauses that flow down the rights, obligations and remedies from the contracts between the general contractor and the owner. Most subcontracts have a general "flow down" clause at the start which is similar to the following:

> The Subcontractor, as an independent contractor, agrees to furnish all materials, labor, tools, equipment and supplies necessary to perform the Work described below and to do so in accordance with the terms of this Subcontract and the Contract between the Owner and the Contractor, including all the General and Special Conditions, Drawings and Specifications, and such other documents as form a part of the Contract between the Owner and

> the Contractor (hereinafter "Contract Documents"). Subcontractor agrees to be bound to the Contractor with respect to the Work described below to the same extent as the Contractor is bound to the Owner.

You need to be careful that the flow down clause is not one-sided; that is, that you obtain the same rights and remedies against the general contractor as the general contractor has against the owner, and not just the same obligations and duties. The above example is one way and the following clause can be used to modify it:

> Subcontractor shall have all those rights and remedies with respect to the Contractor as the Contractor has with respect to the Owner.

You should also check to assure yourself that the subcontract governs if there is an inconsistency. Thus require the following:

> Where a provision of the Contract between the Owner and the Contractor is inconsistent with a provision of this Subcontract, this Subcontract shall govern.

There is no known way to guess what is in those other documents. You must have a copy! This is a major source of problems and one which is very common in this area. How can you sign a subcontract without knowing what you are agreeing to do? It is equivalent to signing a subcontract which has as its first sentence:

> I agree to perform in accordance with a secret agreement negotiated by the general contractor and owner.

Notice also that the contract clause contains a definition of "Contract Documents." This is always an important definition to review because it will set out the types of documents which are part of the contract. You should check, for example, whether the bidding documents are part of the contract documents or whether geotechnical reports are a part of the contract documents.

You can cover most of the incorporation issues by addendum provisions such as:

> Subcontractor shall have the benefit with respect to the Contractor of all the same rights, remedies and redress that the Contractor has with respect to the Owner. No terms and conditions or other document that Contractor includes by reference in the Subcontract shall be binding on the Subcontractor unless a copy of any such terms and conditions or document has been furnished to the Subcontractor prior to execution of the Subcontract unless expressly accepted in a writing signed by the Subcontractor.

[E.] Money and Payment

Every subcontractor reviews the blanks that contain the dollar amount of the subcontract. The payment clause of a subcontract normally contains a number of other items, including the progress payment provisions, retention agreement, some provision for withholding money, and, frequently, a "pay when paid" clause. A typical example is as follows:

> Price and Payment: Contractor agrees to pay the Subcontractor for the satisfactory completion of the Subcontractor's Work the sum of $ _____dollars, subject to additions and deductions for changes as provided herein. Progress payments shall be made by Contractor to the Subcontractor in the same pro-rata amount as that allowed to the Contractor for the Subcontractor's Work within five (5) days after such payment is received by the Contractor. It is expressly agreed that a condition precedent to the right of Subcontractor to receive payment is that the Contractor be paid by the Owner for Subcontractor's Work. Subcontractor acknowledges that should Contractor, for any reason, not receive payment for Subcontractor's Work., Contractor will not be responsible to pay Subcontractor. (pay if paid) (Alt. 1) Subcontractor shall be paid monthly progress payments on or before the 15th of each month for the value of work completed plus the amount of materials and equipment suitably stored on or off site. Final payment shall be due 30 days after the work described in this Subcontract is substantially completed. No provision of this agreement shall serve to void the Subcontractor's entitlement to payment for properly performed work or suitably stored materials. (no condition) (Alt. 2) Subcontractor shall be paid monthly progress payments within 3 days after receipt of the payment by the general contractor for the value of the work completed plus the amount of materials and equipment suitably stored on or off site. (pay when paid)

Numerous courts have interpreted a clause which states that payment will be due a certain number of days following receipt of payment from the owner to allow the subcontractor to be paid after a reasonable period of time even if the general has not been paid. However, carefully drafted subcontracts which make it clear that the general has no obligation to pay unless paid by the owner have been upheld by some courts. You should expect such a clause to be upheld. Here are two alternatives that can be used in an addendum:

> No provision of this Subcontract shall serve to deny Subcontractor's entitlement to full payment each calendar month for properly performed work or suitably stored materials. Payments shall be due seven (7) days after payment is received or should have been received by Contractor from Owner. Interest shall become due and payable on any Subcontractor billing that remains unpaid after the payment due date. The rate of interest shall be three percentage points above the prevailing prime interest rate at the largest national bank in the state where the project is located.

or

> Any condition precedent for payment to Subcontractor based upon receipt of payment from Owner by Contractor shall extend only for a period of sixty days after the date of Subcontractor's application for payment covering work properly performed and material suitably stored.

If you cannot negotiate the exclusion of a pay if/when paid clause, you should consider two possible actions: (1) investigate the owner's financial condition and the method by which it plans to finance the project; and (2) try to negotiate an additional clause that provides if money is withheld through no fault of the subcontractor, subcontractor will be paid.

> Notwithstanding any provision to the contrary, if Contractor does not receive any payment from Owner, whether progress payment, final payment or retention, due to the fault of Contractor or a claim by Owner of fault by Contractor not the responsibility of the Subcontractor, then payment by Owner shall not be a condition precedent to payment of Subcontractor by Contractor.

As a subcontractor, you want a progress payment provision which unconditionally requires payment on a certain day, including payment for stored materials, to wit:

> Subcontractor shall be paid monthly progress payments on or before the 15th of each month for the value of work completed plus the amount of materials and equipment suitably stored on or off site. Final payment shall be due 30 days after the work described in this Subcontract is substantially completed. No provision of this agreement shall serve to void the Subcontractor's entitlement to payment for properly performed work or suitably stored materials.

An alternative progress payments provision is keyed to a period of time after the general contractor receives payment, to wit:

> Subcontractor shall be paid monthly progress payments within 3 days after receipt of the payment by the general contractor for the value of the work completed plus the amount of materials and equipment suitably stored on or off site.

Retention is an expected occurrence. Here is a sample clause:

> If the Owner holds retainage, then Contractor shall retain the same percentage retainage from each progress payment made to Subcontractor. These retentions shall become due and payable within thirty-five (35) days after the Contractor has received final payment including retainage from the Owner and further provided that the Subcontractor has complied with all the terms and conditions of this Agreement.

Examine the contract to determine (1) when it will be paid, (2) whether it is ever reduced, (3) all conditions for receiving retention, and (4) whether posting a bond will release retention. It is particularly important to attempt to get a retention provision which provides your retention a specific number of days after your work is complete rather than after the general's work is complete. Also, you should assure yourself that the general contractor does not withhold retainage in excess of that held by the owner.

> Contractor shall not withhold from Subcontractor as retainage a percentage that is higher than the percentage held by Owner, except for good cause and as provided in the remainder of the Subcontract and Addendum.

A much stronger retention clause is included in the ASA General Addendum, but it is very difficult to obtain.

> Contractor shall not withhold from Subcontractor as retainage a percentage that is higher than the percentage held by Owner on Subcontractor's Work. Final payment, including release of retainage, shall be due within 30 days after substantial completion of Subcontractor's work, less the reasonable value of uncompleted work.

Examine the provisions carefully for final payment and acceptance. Normally, acceptance by the subcontractor of final payment will be a waiver of certain types of rights, e.g. all claims not previously resolved, or all claims not previously made in writing.

In return for payment, most general contractors request releases of some variety. Subcontractors frequently sign the most outrageous releases in exchange for monthly progress payments -- releases which give away rights to changes, extras, claims, even retention.

> Any form or contract language wherein the Subcontractor purports to release the Contractor, Owner or Design Professional is hereby qualified by the following language, whether or not the Subcontractor specifically adds the language: "This release shall apply only to work for which payment has been received in full by Subcontractor; shall not apply to retention; shall not apply to unbilled changes, to claims which have been asserted in writing or which have not yet become known to Subcontractor; and shall be conditional upon receipt of funds to Subcontractor's account."
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> Other typical payment-related clauses are:
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> No payment received by Subcontractor shall be used to satisfy or secure any indebtedness other than one owed by the Subcontractor to a person furnishing labor or materials for use in performing Subcontractor's Work until all such project-related indebtedness shall have been paid. (restrictions on use of project funds)
>
> The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor. In the event of any breach by the Subcontractor of any provision or obligation of this Agreement, or in the event of the assertion by other persons of any claim or lien against the Owner, the Contractor, the Contractor's Surety, or the premises upon which the project is located, which claim or lien arises out of the Subcontractor's performance of this Agreement, the Contractor may, at its option, retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense, until the claim or lien has been resolved by the Subcontractor to the satisfaction of the Contractor. This provision shall apply even if the

Subcontractor has posted a full payment and performance bond. (right to withhold)

The latter clause is almost impossible to remove, but you might consider two supplemental clauses:

(1) Payments withheld pursuant to this section shall be reasonably calculated to cover the anticipated liability and all funds not in dispute shall be promptly paid.

(2) No backcharge or claim of the Contractor for services shall be valid except by an agreement in writing by the Subcontractor before the work is executed, except in the case of the Subcontractor's failure to meet any requirement of the Subcontract. In such event, the Contractor shall notify the Subcontractor of such default, in writing, and allow the Subcontractor reasonable time to correct any deficiency before incurring any costs chargeable to the Subcontractor. No backcharge shall be valid unless billing is rendered no later than the 15th day of the month following the charge being incurred. Furthermore, any payments withheld under a claim of Subcontractor default shall be reasonably calculated to cover the anticipated liability, and all remaining payment amounts not in dispute shall be promptly paid.

[F.] Time

In a construction project, time is generally stated to be "of the essence", that is, the time given is not simply a guideline but is intended as an important enforceable provision. Generally, the subcontract will provide that the subcontractor will comply with the general contractor's schedule and time requirements. Consequently, you must know how much time the general contractor has and how it has scheduled your work. These items may not be stated in the subcontract and again, it is necessary to have all of the contract documents.

A typical fairly abbreviated subcontract time provision might be as follows:

Time And Scheduling: Time is of the essence for this Agreement. Subcontractor shall commence Work within 48 hours after receipt from the Contractor of a notice to proceed and shall diligently prosecute the Work in conformity with the Contractor's construction schedule. Subcontractor shall notify Contractor when portions of Subcontractor's Work are ready for inspection. Contractor may change the schedule from time to time for any reason and the Subcontractor shall adjust its

operations to conform to all such construction schedule changes within twenty-four (24) hours after notice of the changes. The Subcontractor acknowledges that revisions may be made in such schedule and agrees to make no claim for extra compensation or damages for acceleration or delay by reason of such revisions or by reason of delay in the Subcontractor's Work.

In reviewing the subcontract's provisions relating to time, you should watch for a number of different areas.

(1) How much notice do you receive prior to having to start work? In the example, there is a 48-hour notice. This clause can generally be negotiated to include a longer period.

(2) What counts as an excusable delay? Generally, subcontracts do not say and one has to go to the contract documents for that information. A common clause would provide for extra time for delays "beyond the control and without the fault of" the contractor or subcontractor. Beware that such a clause generally does not provide for extra time for delay in material shipment.

(3) When and how must one ask for additional time or notify the contractor of delay? Again, this may be in the general contract.

(4) Can you recover additional costs for delay? In the example there is a rather typical "no damage for delay" clause precluding any compensation for delay. In other subcontracts, the subcontractor may be limited to some share in any amount the general recovers from the owner.

(5) Are there any liquidated damages for non-excusable delay? Sometimes a general contractor will set up a scheme of liquidated damages within the subcontract, but usually, if there are liquidated damages, they will occur in the general contract documents. In that case, you need to look very carefully at how they will be apportioned.

You should attempt to negotiate a subcontract which provides (1) for subcontractor input in scheduling, (2) that the subcontractor shall have a reasonable time within which to perform its work in the proper sequence, (3) that the subcontractor shall receive all scheduling information, and (4) for extra time and compensation for delays beyond the control and without the fault of the subcontractor. The typical example above could be eliminated and the following clause used:

> The project schedule and any modification shall allow Subcontractor a reasonable time to complete Subcontractor's Work in an efficient manner considering the contract completion date or times set forth in the Subcontract Documents. Subcontractor shall be entitled to 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 Subcontractor is not responsible. Subcontractor shall not be required to commence or continue work unless sufficient areas are ready to ensure continuous work. Contractor shall promptly provide the Subcontractor with all schedules of work and with any other information necessary for the proper scheduling of Subcontractor's work.

Frequently, liquidated damages are related to failure to complete the work in accordance with the schedule. Liquidated damages clauses have the benefit that they set a specific amount in advance which is reasonably related to the possible damages and, accordingly, such clauses avoid litigation with respect to actual damages incurred. In checking liquidated damages clauses, you need to check whether the liquidated damages apply to delays in the subcontractor's work or only to the project as a whole. If the general is subject to liquidated damages and the subcontractor has contributed to the delay, the subcontractor should expect to pay that portion of the liquidated damages which were caused by it. The subcontractor should not agree to liquidated damage clauses which simply allocate or flow through the damages without fault. In addition, liquidated damages should not attach to the subcontractor's work when the general contractor has been able to avoid them. Try to control liquidated damages and other consequential damages by:

> Contractor shall make no demand for liquidated damages or actual damages for delays in excess of the amount assessed against the Contractor and paid by the Contractor for unexcused delays actually caused by Subcontractor. Subcontractor shall not be subject to any consequential damages other than any contractually provided liquidated damages. The Contractor expressly waives all consequential damages.

[G.] Changes

One of the unique features of construction contracts is that they all have a changes clause allowing the general or the owner to make changes in the work. A typical change clause is as follows:

> Changes: The Contractor may order in writing changes in Subcontractor's Work whether by addition or deletion and Subcontractor agrees to perform in accordance with the change. The Subcontractor agrees to proceed with the Work as changed when so ordered in writing by the Contractor so as not to delay the progress of the Work. Adjustments in the price or time of the Work shall be set forth in a written change order signed by the Subcontractor and the Contractor. Subcontractor shall not be entitled to receive extra compensation for extra work or material or changes of any kind unless a written authorization therefor has been issued by the Contractor, even though the same has been verbally ordered by the Contractor or any of its representatives. If extra work or material or changes were ordered by the Contractor and the Subcontractor performed but did not receive a written order therefor, the Subcontractor shall be deemed to have agreed to perform the extra work, supply the extra material or perform the change at no additional change to the price or time of the Work regardless of written or verbal protests or claims by the Subcontractor.

There may be other changes clauses or clauses dealing with extra work. For example, there may be a clause allowing changes or additional payment for unforeseen physical conditions, subsurface conditions, and acts of God. Frequently, these may be set forth only in the general contract documents.

Changes clauses are written from the perspective of the owner or contractor adding or deleting work. However, they generally apply to any claimed changes and the situations most often litigated are situations in which the subcontractor believes there is a change but the owner or general contractor either did not know or did not agree, i.e. a situation in which the change did not result from a written change order. As a consequence, there are two areas of primary importance in reviewing the changes clause: (1) how do you get paid (both method and amount); and (2) what type of notice do you have to give to preserve your right to claim the work was a change? Make sure you and your employees in the field know the procedure. Some of

the claims provisions may be included in the Changes clause, but they may also be in the Claims and Disputes Clauses.

Some protection can be gained by inserting the following provision:

> Subcontractor's entitlement to adjustments in the subcontract time or price for changes in the work shall not be contingent upon or limited to the amount that the Contractor receives from the Owner. Under no circumstances does the Subcontractor waive its right to payment for extra work performed by the Subcontractor pursuant to instructions from the Contractor.
>
> or
>
> Notwithstanding anything to the contrary in this section or elsewhere, Subcontractor shall be entitled to an equitable adjustment should Contractor fail to provide a Change Order or Field Order under circumstances in which Subcontractor is entitled to one.

[H.] Claims and Disputes

Generally, subcontracts will have some type of provision governing claims for additional money and/or time. These may or may not also be the provisions which have notice and time provisions governing the perfection of the claim. The following is a typical claims clause:

> Claims: In case of any dispute or claim between the Subcontractor and Contractor, Subcontractor agrees to be bound to the same extent that Contractor is bound to the Owner by the terms of the Contract between the Owner and Contractor and by any and all decisions or determinations made thereunder by the person or agency so authorized in that Contract. The Contractor agrees to present to the Owner, in Contractor's name, all of Subcontractor's claims for extras and equitable adjustments whenever the Contractor is permitted to do so by the terms of the Contract and to further invoke, on behalf of the Subcontractor, those provisions therein for determining disputes. Subcontractor also agrees to be bound to Contractor to the same extent that the Contractor is bound to the Owner by the final decision of a court or tribunal, whether or not Subcontractor is a party to such proceeding. Contractor shall be liable to Subcontractor to the same extent that Owner is liable to Contractor, but never to any greater extent.
>
> If at any time any claim, dispute or controversy should arise between the Contractor and the Subcontractor with respect to a matter which does not

> involve the Owner, Subcontractor shall be conclusively bound by and abide by the Contractor's decision, which shall be final and binding, unless the Subcontractor shall commence arbitration proceedings, in accordance with the Construction Industry Rules of American Arbitration Association, not later than thirty (30) days following written notice of the Contractor's decision, which decision states that it is final.

Notice that the claims are divided into two types: (1) those that involve the owner and (2) those that do not. Although this is a reasonably typical example, it is equally typical for the claims provision to include only the former. This can cause a great deal of confusion on those matters which do not involve the owner. For those the subcontractor is left with normal legal contract remedies together with other provisions of the subcontract that may apply. With respect to claims or disputes involving the owner, the purpose of the claims or disputes clause is to require the subcontractor to comply with all provisions of the general contract and to assure that the general has sufficient notice so it also can comply.

With respect to claims which exist only between the general and the subcontractor, those parties can more easily set up specific terms. You should note whether the provision provides for court or arbitration procedures. You should also note any provision which places a deadline on commencing the formal procedures. In the above example, arbitration must be commenced within 30 days of an adverse decision of the general contractor. This can be used to force the subcontractor to decide for each dispute whether it is worth pursuing separately. One cannot wait until the end of the project after having just complied with the notice provisions.

The subcontractor needs to be familiar with the contract procedures for making claims. You should, at the time of reviewing the subcontract, flag the notice and time provisions so that they can be complied with properly. If the dispute or claims procedure is not satisfactory, the addendum should be used to negotiate modifications. Such provisions should attempt to prevent delay because of a dispute between the owner and contractor. For example:

> All claims, disputes, and matters arising out of or relating to this Agreement or breach thereof shall first be submitted to mediation through the American Arbitration Association and if not resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect, unless the parties mutually agree otherwise at the time. The mediation and/or arbitration shall not be stayed pending resolution of any disputes between the Contractor and the Owner or other third parties.

Frequently associated with subcontracts will be an express provision such as the following which provides that a dispute will not interfere with the work. Even in the absence of such a provision, a subcontractor should not stop work without detailed consultation with counsel. The consequences are almost always worse than continuing.

> Continuation Of Work: Unless otherwise agreed to in writing, the Subcontractor shall continue to perform Subcontractor's Work and maintain the construction schedule pending the resolution of any claim, either administratively or by litigation or arbitration, and, if so, Contractor shall continue to make payments of any undisputed amounts in accordance with this Agreement.

This particular clause has the benefit of providing for payment of all undisputed funds.

[I.] Applicable law and jurisdiction

Find the clauses that say what law governs and where the claims must be brought. To your surprise it might say:

> Applicable Law: This Agreement shall be governed by the law of the state of the Texas. Any dispute for which arbitration is demanded shall be arbitrated in Dallas, Texas.

Refuse to sign a subcontract that has such a provision. Insist that it be changed to provide that the applicable law is that of the state in which the project is located and that the forum shall be in that state or, even better, in the City where your main office is located.

> Any dispute shall be governed by the law of the state where the project is located and the federal or state courts in the state where the project is

located shall have exclusive jurisdiction and venue, and any arbitration shall be conducted within the state where the project is located.

[J.] Indemnity

An indemnification agreement is an agreement whereby one person (the indemnitor) agrees to reimburse another (the indemnitee) for a particular type of loss. Such "indemnify and hold harmless" clauses are very common and pervasive in the construction industry. Since the industry contains high risks of substantial losses, the parties to contracts attempt by these clauses to establish where the risk is and, all too frequently, to shift the risk downstream. In the AIA A201 the contractor is the indemnitor of the owner, architect and their employees and agents. Frequently, the contractor will have similar provisions in its subcontracts so that the indemnity obligation can be passed down to subcontractors with the contractor added as an indemnitee. Any indemnity agreement must be analyzed to determine (1) the indemnitor, (2) the indemnitee, (3) the type of loss, (4) from what occurrences the loss may arise, and (5) what limitations or exclusions are present. With these determined, it must then be compared with where the risk reasonably should be and who has control of the risk. For example, if the indemnity agreement requires the contractor to indemnify the architect from losses that occur because of errors in the plans, the risk has been shifted from those who can best control the risk.

Indemnity Agreement: To the fullest extent permitted by law, the Subcontractor agrees to indemnify and hold harmless the Contractor, the Owner, the Architect/Engineer, and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance or failure of performance of the Subcontractor's Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge, or otherwise impair any other right or

> obligation of indemnity which would otherwise exist as to any party or person described herein.
>
> The indemnity obligations of the Subcontractor shall not extend to liability, claims, damages, losses or expenses, including attorney fees, arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by any indemnitee, or the agents or employees of the indemnitee, or (2) the giving of or the failure to give directions or instructions by the indemnitee or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damages to property.

The first effort with regard to indemnity provisions should be to limit the indemnity to that for which the subcontractor is responsible:

> Any indemnification or hold harmless obligation of the Subcontractor shall extend only to claims relating to bodily injury and property damage and then only to that part or proportion of any claim, damage, loss or defect that does not result from the negligence or intentional act of the indemnitor or someone for whom it is responsible. Subcontractor shall not have a duty to defend.

Although the standard indemnification provision may be practically impossible to eliminate, watch for special indemnification provisions, especially those that try to shift liability to the subcontractor even when the subcontractor is not at fault. You should expect to be responsible for those problems that arise which are your fault, maybe those partially your fault, but not those for which you have nothing to do.

In reviewing the indemnity provisions you should recognize that this is the standard way subcontractors may become liable for greater amounts than would otherwise be allowed by worker's compensation insurance. The injured worker sues the general for the injury and the general brings the subcontractor in under the indemnity clause. If the worker prevails, the liability passed through to the subcontractor may be greater than or in addition to that which the worker could obtain by a claim against the worker's compensation insurance.

You might consider using the following when there is an indemnification clause for fines and penalties:

> Each party to the Agreement shall be liable for any safety violation fines or penalties imposed upon it, regardless of the cause of the fine or penalty.

or

> Subcontractor shall indemnify Contractor for fines and penalties only to the extent such fines or penalties are caused by the Subcontractor's failure, and then only to the extent that such fine or penalty is based upon the particular failure, and not due to prior or repeated violations by the Contractor.

An indemnification such as this will be covered by the normal CGL insurance policy.

[K.] Warranties

Generally, there are two types of warranty clauses somewhere in the subcontract or the contract documents. The first kind states a specific warranty provision:

> If, within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date for commencement of warranties, or by the terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Subcontractor shall correct it promptly after receipt of written notice from the Contractor.

This is the common one year warranty in which the Subcontractor has a right to correct the work. The second warranty clause is:

> The Subcontractor warrants to the Owner, Architect and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless otherwise required or permitted by the Subcontract Documents, that the Work under this Subcontract will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Subcontract Documents.

If you want to limit the exposure to one year, you will have to add a provision such as:

Notwithstanding any provision to the contrary and unless otherwise provided in a separate writing signed by the Subcontractor, any warranty regarding performance or materials shall last only one year from substantial completion of subcontractor's work.

[L.] Termination, Suspension and Work Take-over

The following is a complete set of the types of clauses that concern termination, suspension and work take-over.

Failure To Cure: If the Subcontractor fails at any time to supply a sufficient number of properly skilled workmen or sufficient materials or equipment of the proper quality, or fails in any respect to prosecute the Work with promptness and diligence, or fails to promptly correct defective Work or fails in the performance of any of Subcontractor's obligations, the Contractor may, after giving forty-eight (48) hours' notice to Subcontractor to cure and at Contractor's option, provide such labor, materials and equipment and deduct the cost thereof, together with all loss or damage occasioned thereby, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

Suspension Of Work: If, as a result of flood, fire, earthquake, act of God, war, strikes, picketing, boycott, lockouts, or any other cause beyond the Contractor's control including an order by the Owner to suspend or stop work, the Contractor determines to suspend, in whole or in part, Subcontractor's Work, the Subcontractor shall, upon written notice from the Contractor, immediately discontinue further work until such time as the Contractor advises the Subcontractor by written notice to resume work, which Subcontractor shall promptly do. The Subcontractor hereby releases and discharges Contractor from any liability for damages or expenses which may be caused to or sustained by the Subcontractor by reason of the suspension of work. The Contractor shall have no obligation to Subcontractor to protect Subcontractor's work, materials, tools, equipment and facilities, and Subcontractor shall bear the risk of loss or damage thereto, by whatever cause inflicted, until the job is accepted by the Owner.

Termination For Default: If the Subcontractor at any time shall (1) fail or refuse to proceed with or to properly perform its Work as required by the Contract Document or as directed by the Contractor, or (2) fail or refuse to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality and quantity, or (3) fail or refuse to prosecute the Work with promptness and diligence, or (4) cause by any action or omission the stoppage of or interference with the work of the Contractor or other subcontractors, or (5) fail to pay and discharge when due indebtedness arising from the Subcontractor's Work, or (6) be

unable to meet its debts as they mature, or (7) make an assignment for the benefit of creditors or commit an act of insolvency or seek relief under the federal bankruptcy laws or similar local laws, whether voluntary or involuntary, or (8) breach any provision of this Agreement or the Contract Documents, then Contractor may, at its option, provide Subcontractor written notice to cure within seven (7) days. If the Contractor determines that the Subcontractor has not remedied and cured the default within the seven (7) days, then Contractor may, at its option, without releasing its rights or remedies against the Subcontractor or the Subcontractor's sureties and without prejudice to any other rights it may be entitled to under law, terminate this Agreement after giving forty-eight (48) hours' notice to Subcontractor. Thereafter, Contractor may take possession of the Work, materials, tools, appliances and equipment of the Subcontractor, and may finish the Subcontractor's Work by any means, methods or agency which the Contractor in his sole discretion may choose.

Good Faith Determination: The Contractor's determination of the Subcontractor's default and the Contractor's decision as to the Subcontractor's failure to remedy and cure said default upon notice of their existence, made by the Contractor in good faith under the belief that a default existed and that Subcontractor failed to remedy or cure the default, shall be conclusive as to the Contractor's right to proceed as provided herein.

Interim Remedies: If the Contractor terminates this Agreement, the Subcontractor shall not be entitled to any further payments under this Agreement until Subcontractor's Work has been completed and accepted by the Owner, and payment has been received by the Contractor from the Owner for Subcontractor's Work. In the event that the unpaid balance exceeds the Contractor's costs and expenses to complete, including overhead and profit, the difference may be paid to the Subcontractor. If the Contractor's costs and expenses to complete, including overhead and profit, and including interest at the legal rate, exceed the balance due, the Subcontractor shall upon written notice promptly pay the difference to the Contractor.

Termination For Convenience: The Contractor shall, at its sole option and discretion, have the right to terminate this Agreement for any reason whatsoever by providing the Subcontractor with a notice of termination to be effective five days after receipt by Subcontractor. Whenever the Subcontractor is terminated for convenience under this clause or is wrongfully terminated under any other clause of this Agreement, the Subcontractor shall be entitled only to the actual direct costs of all labor and material expended on the job prior to the effective date of the termination plus ten percent for overhead and profit or Subcontractor shall be entitled to be paid a pro-rata percentage of the total Subcontract price which is equal to its percent of completion on the effective date of the

> termination, whichever of the two methods provides the lowest sum. In no event shall the Subcontractor be entitled to assert a claim in quantum meruit or any other measure of damages other than that stated herein.
>
> Wrongful Termination: A termination for default pursuant to this Agreement shall, if wrongfully made, be treated as a termination for convenience under this section and Subcontractor shall be limited to recover damages, costs and expenses as provided therein.

You should be aware of the effect each of these provisions has both with respect to your right to terminate or suspend work, and the general's right to terminate and suspend work. It is very important to review what will be paid for in the case of a termination for convenience and to consider whether your liability to those suppliers and subcontractors downstream will be covered.

[M.] Insurance

Construction insurance is an intricate, complex area. The best advice is to have a knowledgeable insurance agent who will tell you in advance whether you have the coverage required, or can get it and what it will cost. Let your agent review the insurance requirements of every subcontract. Sometimes the insurance provisions become so complicated that it is not possible to know what is required. You can consider use of the following:

> Notwithstanding anything to the contrary, Subcontractor shall provide the types and limitations on insurance as shown on the attached certificate of insurance.
>
> This provision can be supplemented with:
>
> Contractor shall pay for any additional policy premium required for insurance beyond that provided in the attached certificate of insurance.

Alternatively, the following can be used when the requirements only call for listing additional insured.

> Contractor shall pay any additional policy premium required for additional insured or named insured.

A valuable provision to look for in the subcontract concerns indemnification for conditions which are insurable. The parties to the project will have provided insurance for certain types of liabilities. They should, therefore, agree that to the extent a liability is covered by insurance, there will be no right to sue each other over that event. Such clauses are called "waiver of subrogation clauses." A typical clause would be as follows:

> The Contractor and Subcontractor waive all rights against each other and against the Owner, the Architect, separate contractors and all other subcontractors for damages caused by fire and other perils to the extent covered by property insurance provided under the General Conditions, except such rights as they may have to the proceeds of such insurance.

[N.] Some Clauses to Avoid:

[1.] Lien Waiver:

Why give up exceedingly valuable rights? Do not sign subcontracts that waive your lien rights even when you have not been paid.

> Subcontractor does hereby covenant and agree that it will not, at any time or for any cause, file or assert any liens, legal, statutory or equitable, against the premises to which this Agreement relates, and subcontractor releases the premises from any and every lien, charge, claim or demand of any nature whatsoever. Subcontractor further covenants and agrees that it will not permit to be filed or asserted by any of its subcontractors or materialmen any liens, legal, statutory or equitable, against the premises to which this Agreement relates. If there is ever any evidence of any lien or claim chargeable to the failure of payment by Subcontractor, then the Contractor shall have the right to retain out of payments due the Subcontractor an amount which in the opinion of Contractor is sufficient to completely indemnify the Contractor against such lien or claim. In addition, if, within ten days of demand by Contractor, Subcontractor does not cause such liens or claims to be released, Contractor, in its sole discretion, may pay the claiming or liening company directly and offset that payment amount against any amounts due Subcontractor. The provisions of this paragraph are independent of all other provisions of this Agreement.
>
> A number of states now have statutes prohibiting waiver of lien rights.

[2.] The Strange and the Unusual

Throughout the subcontract you need to watch for the strange and unusual. For example, the subcontractor has its contractual relationship with the general and, if one of the other subcontractors is the cause of damage, that damage claim normally proceeds via the general. In the following example, however, an attempt has been made to shift that fight purely to the subcontractors. Generally, such efforts to modify common rights and obligations should be resisted.

> Contractor shall not be liable to this Subcontractor, its materialmen, laborers, or subcontractors, for any damages, loss or expense sustained by any of them resulting from acts or omissions (whether or not negligent), failure to perform, delays in performance or defaults, or another's failure to perform, delays in performance or default of another subcontractor, materialmen or supplier of services in connection with the performance of any work covered by the general contract; provided, however, that the Subcontractor shall have a direct right of action against such other Subcontractor, materialman, or supplier who may be bound by the same terms and conditions that exist between Contractor and Subcontractor as set forth in this Agreement, as an intended third-party beneficiary of the Contractor's agreement with such other subcontractor, materialman or supplier.
>
> The Subcontractor agrees to pay (and to protect and indemnify the Contractor against any liability for) any damages sustained by another subcontractor, materialman or other party supplying labor, materials and/or services in the performance of the work covered by the general contract, resulting from this Subcontractor's acts or omissions (whether or not negligent), failure to perform, delays in performance or default in the performance of the work to be done under this subcontract.

The clause above changes the normal and usual contractual relationship which exists between the contractor and the subcontractor. It is an effort to avoid the contractor's obligations for scheduling, coordinating and administering the project.

Another unusual clause to avoid is the following:

> In consideration of the signature of the Contractor to this Agreement, I (we) do hereby personally and individually guarantee each of the terms, covenants, and conditions of the Subcontract as covenanted to within this Agreement.

Personal guarantees should be left for your banker and bonding company.

More and more frequently, there are provisions which set specific penalties for contract infractions. For example,

> A fine of $50 per meeting will be assessed against Subcontractors who do not attend the weekly job site meetings.

Subcontracts may attempt to avoid the uncertainty of having to deal with assessing responsibility and damages. For many years, liquidated damages have been used as a substitute for the difficult job of determining and proving damages resulting from delay. The principle of liquidated damages is occurring more frequently for individual types of problems. For example:

> Should the Contractor be required to perform clean-up for which the Subcontractor is responsible, the Subcontractor agrees to pay the Contractor $25 per hour per laborer for that work. If damages occur which are definitely due to the carelessness of various workmen, but cannot be specifically assigned to any individual subcontractor, the contractor may in its discretion assess all subcontractors their proportionate share of the damages involved.

Clauses of this type should be lined through or specifically deleted in the Addendum.

[O.] Miscellaneous

[1.] Legal Fees

The standard rule is that attorneys' fees are not recoverable absent a contractual provision or statutory right. Generally, there is no statutory right except that contained in the Mechanic's Lien Law. With respect to contractual rights, there may be no provision and, consequently, no right to recover fees. There may be an even-handed provision such as the following which allows the prevailing party to recover its fees:

> Legal Fees: Should either party employ an attorney to institute litigation or arbitration to enforce any provision of this Agreement or to collect damages or debts under this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and expenses incurred.

Or there may be a contractual provision which allows the general contractor to recover fees from the subcontractor but not vice-versa, such as:

> The subcontractor shall be responsible to the Contractor for all damages incurred as a result of the Subcontractor's breach of this agreement or any portion thereof, including reasonable attorneys' fees.

This clause can be embedded practically any place in the subcontract. You should negotiate it out entirely or substitute the two-way clause. It is a significant weapon.

[2.] Entire Agreement

Practically every well-drafted subcontract will have a provision such as the following which eliminates oral and written negotiations which have not been included in the subcontract writing. Be aware it is there and make sure the subcontract contains your entire agreement.

> Entire Agreement: This Agreement is solely for the benefit of the parties hereto. It represents the complete and exclusive statement of the terms of the agreement between the Contractor and the Subcontractor and supersedes all prior negotiations, proposals, bids, representations or agreements, whether written or oral.

It is this type of clause which will eliminate the exclusions made in the bidding process, unless the bidding documents are part of the contract documents or the exclusions are restated in the subcontract itself.

§5.04 THE FAIREST SUBCONTRACT

The AIA A401 (1997 ed.) Contractor/Subcontractor Agreement represents the fairest document to date for subcontractors. Its terms are relatively clear and the Agreement contains adequate protection for subcontractors.

As opposed to fighting against a general contractor's "loaded" subcontract form, subcontractors are often more comfortable with the A401. This does not mean, however, that the A401 should not be modified on an as-needed basis.

Below is an analysis of the 1997 changes to the A401 Agreement. Hopefully, this analysis will enable subcontractors and their legal counsel to determine their rights and liabilities under the latest Contractor/Subcontractor Agreement.

ARTICLE 1 - THE SUBCONTRACT DOCUMENTS

1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

One of the biggest problems in determining one's obligations on a construction project is the vast number of Contract Documents. The Contract Documents include the Contract between the Owner and Contractor, conditions of the Contract (General, Supplementary and other conditions), Drawings, Specifications, Addenda and Modifications.

Under Article 1, the A201 General Conditions is incorporated by reference unless in conflict with specific subcontract terms. This provision facilitates the pass-through of A201 Benefits but protects the subcontractor if there is a conflicting term in the A401.

ARTICLE 3 - CONTRACTOR

3.2 COMMUNICATIONS

3.2.1 The Contractor shall promptly make available to the

Subcontractor information, including information received from the Owner, which affects this Subcontract and which becomes available to the Contractor subsequent to execution of this Subcontract.

The driving engine of any construction project is payment. Once the General Contractor obtains financial information about the Owner it should make such information available promptly to Subcontractors. This information would include evidence of the Owner's ability to finance the Project and any notices received from the Owner of Material Changes in its financial arrangements as required by A201, ¶2.2.1.

3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, 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, usually referred to as the site, on which the Project is located and the Owner's interest therein.

This Section requires that a Contractor respond within 30 days or less to a Subcontractor's request for information regarding the Owner's interest in the Property and Title information. This is extremely helpful to allow Subcontractors to give appropriate notices regarding mechanics lien claims, and to enforce their mechanics liens rights. This Subcontractor's right should be exercised as early as possible in the Project when all parties are still cooperating.

3.2.6 If the Contractor asserts or defends a claim against the Owner which relates to the Work of the Subcontractor, the Contractor shall make available to the Subcontractor information relating to that portion of the claim which relates to the Work of the Subcontractor.

Frequently, a Contractor and Owner become embroiled in claims that relate to the work of the Subcontractor. The Subcontractor, however, is often not provided with information

regarding the Contractor's assertion or defense of a claim that relates to the work of the Subcontractor. This section enables the Subcontractor to obtain information from the Contractor about claims relating to the Subcontractor's work.

3.3 CLAIMS BY THE CONTRACTOR

3.3.2 The Contractor's claims for services or materials provided the Subcontractor shall require:

.1 seven days' prior written notice except in an emergency:

.2 written compilations to the Subcontractor of Services and materials provided and charges for such services and materials no later than the fifteenth day of the following month.

Frequently a General Contractor withholds notices of claims of backcharges against subcontracts until the end of a Project. The time when the Subcontractor may be expecting its final retention is also the time when it first learns of alleged backcharges. This Section requires that if a Contractor has a claim for backcharges, it must provide the Subcontractor with not only 7 days prior written notice, but the backcharge must be billed no later than the 15th of the month following the claim to be valid. This clause offers the Subcontractor protection against "after-the-fact" backcharges asserted at the end of a Project.

ARTICLE 4 - THE SUBCONTRACTOR

4.3 SAFETY PRECAUTIONS AND PROCEDURES

4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the

> Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

If hazardous material is encountered on a job site, the Work should shut down until the area is made safe. This Section entitles Subcontractors to a time extension and price increase to cover any additional costs for the shut down, delay and remobilization of its work.

4.3.4 > To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

This Article requires that the General Contractor indemnify the Subcontractor against losses related to hazardous materials unless the loss was caused solely by the Subcontractor's negligence. This clause, therefore, is protection for the Subcontractor from any liability where joint or contributory negligence is alleged by an injured third party.

4.4 CLEANING UP

4.4.2 > As provided under Subparagraph 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

One of the most frequent areas for back charges occurs in the clean-up area. General Contractors back charge Subcontractors for cleanup costs which are divided among the

Subcontractors working in a particular area, even if a Subcontractor may not have contributed to the cost for cleanup. This paragraph allows the Contractor to charge clean up costs only if it has provided 7 days' prior written notice to the Subcontractor, and provided details of the charges for cleanup by the 15th days of the following month. Additionally, a Subcontractor can be charged only for its "appropriate" share of the cleanup costs.

4.6 INDEMNIFICATION

4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, 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, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6

Previously, the Subcontractor had to indemnify the indemnitees to the extent the Subcontractor caused a problem in whole or in part. The new language is that the Subcontractor is only responsible to indemnify the indemnitees to the extent caused by the negligent acts or remissions of the subcontractor.

ARTICLE 6 - MEDIATION AND ARBITRATION

ARTICLE 6.1 MEDIATION

6.1.1 Any claim arising out of or related to this subcontract, except claims as otherwise provided in subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

A major improvement to the A401 is the addition of mediation prior to arbitration or court action. Mediation is non-binding on the parties and provides an opportunity for the parties to air their grievances and work toward a resolution prior to incurring the expense of arbitration or court action.

ARTICLE 7 - TERMINATION, SUSPENSION OR ASSIGNMENT OF THE CONTRACT

7.2 TERMINATION BY THE CONTRACTOR

7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with seasonable overhead and profit on the Work not executed.

In the event of termination for convenience by the Owner, the Subcontractor is entitled to receive payment for the work performed to date, the cost incurred for demobilization and reasonable overhead and profit on the Work not executed. It is unlikely, however, that this clause will not be stricken by the Owner in the General Contractor's Contract and, therefore, stricken in the A401.

7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the subcontractor is responsible;

.2 than an equitable adjustment is made or denied under another provision of this Subcontract.

In the event a General Contractor suspends, delays or interrupts the Subcontractor's work for the Contractor's convenience, this clause entitles Subcontractors to an equitable adjustment in time and price. Moreover, Subcontractors are specifically authorized to include profit on the increased cost of performance for these delays, suspension or interruptions.

ARTICLE 9 - DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

Previously the A401 stated that time was of the essence of the Subcontract. This often meant that it was an obligation due and owing from the Subcontractor to General Contractor. The new Form clarifies that time is of the essence for both the General Contractor and the Subcontractor. This clarification helps Subcontractors establish their claim or entitlement for additional costs due to delays caused by the General Contractor.

ARTICLE 11 - PROGRESS PAYMENTS

11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Architect, and certificates for payment issued by the Architect, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the contractor or Subcontractor for breach of the requirements of this provision.

This is the AIA's attempt to create a trust fund. The clause states that unless there is a payment bond, any payments made by the Owner to the General Contractor has to be held for payment to the Subcontractors. The language falls far short of setting up a solid trust fund doctrine, but should help Subcontractors in claims against General Contractors. Additionally, it is hoped that this clause would prevent bankruptcy trustee from claiming this money, but it is unclear whether this clause is sufficient to prevent the bankruptcy court from claiming the funds prior to the Subcontractor.

11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor.

Pending final determination of cost to the Contractor of changes in the Work which have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

This clause allows Subcontractors to bill monthly for amounts that are not in dispute which cover extra work authorized by the General Contractor, but not yet confirmed by a change order. Previously, it was only an option to include these costs for payment.

11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

This clause allows Subcontractors to bill monthly for materials stored off site so long as the General Contractor approves. Previously, the Subcontractor could only bill if the off site storage had been approved in advance and in writing by the Owner.

11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

In the event a Subcontractor's Work is not approved, this clause obligates the General Contractor to provide notice to the Subcontractor of such non-approval. Moreover, the Subcontractor must still be paid the amount withheld once the reason for the disapproval has been remedied by the Subcontractor.

ARTICLE 13 - INSURANCE AND BONDS

13.7 PROPERTY INSURANCE

13.7.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment

policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

Frequently, the Subcontractor is unaware of the property and equipment policies in effect for a Project. This clause requires the Contractor to provide such information to the Subcontractor when requested to do so in writing. Moreover, the General Contractor must supply the Subcontractor with copies of the property and equipment policies in effect. In the event there is no policy in effect the General Contractor must also so advise the Subcontractor.

13.7.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

In the event full and complete insurance is not in effect for the Subcontractor's work, this section authorizes the Subcontractor to purchase and bill for property insurance covering the value of its work.

13.7.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

This clause entitles Subcontractors for payment for the cost of insuring material that it stores off site or goods being delivered if the Project property insurance does not include off site or transient coverage.

ARTICLE 15 - MISCELLANEOUS PROVISIONS

15.4 The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party's termination in accordance with Article 7.

This is the "Perini" clause. In a case involving Perini Construction, Perini ended up paying millions of dollars in consequential damages to the Owner of a Casino even though Perini's

contract was for less than a million dollars. This clause states that the Contractor and Subcontractor each disclaim consequential damages against the other. This protects Subcontractors against claims for indirect damages claimed by the General Contractors.

§5.05 COMMENTARY ON AGC 650/655

In 1998, the Associated General Contractors of America (AGC) issued two new standard subcontract forms to be used by its members and others. The new forms were identified as AGC Document No. 650 and AGC Document No. 655, both of which are entitled "Standard Form of Agreement Between Contractor and Subcontractor." The two subcontract forms are almost identical in all of their terms with the exception of the payment clause. The AGC 655 contains a "pay-if-paid" clause, while the AGC 650 contains a "pay-when-paid" clause.

Prior to the issuance by AGC of the 650 and 655 subcontracts AGC, the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC) had jointly produced and adopted a standard subcontract which was published as AGC Document No. 640, ASA Document No. 4100 and ASC Document No. 52, respectively. This joint form is the predecessor to the current AGC subcontract documents. As this document was jointly drafted by associations representing general contractor and subcontractor interests, this earlier form was considered to be a relatively even-handed subcontract. However, the earlier form saw little if any use other than as a condition on bids and was rarely the actual subcontract signed between the parties for a project.

After releasing an interim draft of the 650 and 655 subcontract forms, AGC asked for comment from ASA and ASC with respect to modification of the forms. The American Subcontractors Association refused to submit comments on the forms and took the position that the forms were unacceptable even if modified. The Associated Specialty Contractors, however, submitted comments to the interim versions of the subcontract forms and eventually approved the use of the AGC 650, if not the AGC 655. As the AGC 650 and 655 forms were developed primarily by the Associated General Contractors of America, they should be modified prior to

execution by any subcontractor presented with them, particularly the AGC 655, because of its payment provisions.

A standardized addendum to both the AGC 650 and AGC 655 subcontracts is provided at the end of these materials. However, in addition to the addendum, it is worthwhile to consider some of the more important clauses in the AGC 650/655 and possible modifications of those provisions.

[A] Payment Terms

As indicated previously, the only significant difference between the AGC 650 and the AGC 655 relates to the terms for payment. Where possible the payment terms of both of these contracts should be modified to provide some measure of protection for the subcontractor. There are many reasons why any contractor, whether a prime or general contractor or a subcontractor, contracts for the construction of a project, but the primary reason is that the contractor receives payment for doing so. The principal obligation of the Owner is to pay for the project. One of the principal obligations of a general contractor is to pay its subcontractors and suppliers. Non-payment is the principal cause of disputes in the construction industry.

The AGC 650 takes a middle-of-the-road approach to payment. It provides that progress payments will be made to subcontractors within seven days after the contractor receives payment from the owner. ¶8.2.5 If payment is not received by the contractor "through no fault of the Subcontractor", payment will be made within a "reasonable time." ¶8.2.5 While this provision ensures that the contractor will ultimately be responsible for paying the subcontractor for the work performed, it still leaves a lot to be desired. The most obvious problem with the clause from the subcontractor's perspective is that it still ties the time for payment to the receipt of payment from the owner. While the subcontractor can be reasonably assured of payment at some

point in time, such payment can be delayed weeks or even months past when the subcontractor submitted its payment application, waiting for the owner to make payment to the general contractor. One of the other problems with the AGC 650's payment clause is the "reasonable time" requirement. There is, however, no definition of what would constitute a reasonable time for payment. Courts interpreting the "reasonable time" requirement have allowed anywhere from months to years, in some cases, for payment without violating the requirement that the subcontractor be paid within a reasonable time. Generally, where the owner has failed to make payment under the prime contract, courts will allow the general contractor to pursue its legal remedies in an effort to collect the monies owed prior to concluding that the subcontractor is entitled to payment.

The "reasonable time" requirement creates additional problems for subcontractors because in addition to having to wait for payment, it affects the other remedies provided by the subcontract. Paragraph 8.2.6 would appear to allow the subcontractor to stop work as a result of payment delays. However, the right to stop work granted by paragraph 8.2.6 is conditioned on failure to receive payment within seven days of the payment being due under paragraph 8.2.5. As paragraph 8.2.5 does not provide any specific time for payment where the general contractor has not been paid by the owner, the right to stop work is often illusory. Paragraph 10.8 similarly grants the subcontractor the right to terminate the contract for failure of payment. However, the right to terminate the contract is in turn predicated on the ability to stop work. Paragraph 10.8 provides that "[i]f the Subcontract Work has been stopped for thirty (30) days because the Subcontractor has not received progress payments or has been abandoned or suspended for an unreasonable period of time not due to the fault or neglect of Subcontractor, then the Subcontractor may terminate this Agreement upon giving seven days' written notice." If you

cannot stop work, however, until months or years after non-payment, the right to terminate the contract is also illusory.

In comparison to the AGC 650, the AGC 655 provides, both for progress and final payment, that "receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to payment by the Contractor to Subcontractor." ¶¶ 8.2.5 and 8.3.3. These provisions further provide that "[t]he Subcontractor hereby acknowledges that it relies on the credit of the Owner, not the Contractor, for payment of Subcontract Work." This language is sufficiently unambiguous that it would be strictly enforced in those jurisdictions not having statutorily or judicially voided "pay-if-paid" language.

The AGC 655 also differs from the AGC 650 in its terms for payment of interest. Paragraph 8.4 of the AGC 655 provides that "[t]o the extent obtained by the Contractor under the Subcontract Documents, progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the rate provided in the Subcontract Documents." While nonsensical in application, this provision allows for collection of late payment interest only where the owner owes the general contractor interest. By its terms it does not allow the collection of late payment interest where the general contractor has received payment from the owner, but simply refuses to make payment to its subcontractors and suppliers.

From the subcontractor perspective the payment provisions of the AGC 650 and particularly the AGC 655 are simply unacceptable. Any subcontractor faced with having to execute one of the AGC subcontract forms should attempt to alleviate the oppressiveness of the payment terms by modifying the clauses to provide an express right to payment by a date certain. This can be accomplished by language substantially similar to the following:

> Subcontractor shall be paid monthly progress payments on or before the 15th of each month for the value of work completed plus the amount of

> materials and equipment suitably stored on or off site. Final payment shall be due 30 days after the Subcontract Work is substantially completed. No provision of this Agreement shall serve to void the Subcontractor's entitlement to payment for properly performed work or suitably stored materials.

It would be the aberration, however, if a subcontractor were able to obtain this modification in its entirety, particularly where the baseline for negotiations is the AGC 655. An intermediate approach which is generally acceptable is the payment provision from the AIA A401 or payment provision from the AGC 650, suitably modified by the standard addendum included in this chapter. A final option may be to simply negotiate the use of the AGC 650 instead of the AGC 655, provided that some definition of "reasonable time" acceptable to the subcontractor is also included.

[B] Scope of Work

When reviewing subcontracts for scope of work, it is always important to remember that the parties to the subcontract have competing interests. When it submitted its bid, the contractor had to accept performance of the entire scope of work for the project. On the other hand, the subcontractors submitting bids to the contractor have generally picked and chosen only those specific portions of the work they wanted to perform and have made that work subject to conditions and exclusions. Particularly where there is potential overlap between different specialty contractors, the contractor may not have received a bid for a portion of the work. Often this missed work is not noted and the prime contractor is in the position of having to carry the cost of having this work performed or force one of the existing subcontractors to perform the work within the original bid price.

You can do some fairly simple amendments here if you have used a bid proposal form. The simplest is to insert within the fill-in the words:

> specifically including only the work set forth in the Bid Proposal and excluding the work excluded from the Bid Proposal (which Proposal is expressly made a part hereof).

Alternatively, if you are using an addendum, include the provision there.

In addition, always make the subcontract scope of work refer to a specific set of plans and specifications using the sheet numbers and dates. It is not uncommon for the drawings or specifications to have been revised between the time of the bid and the time the subcontract gets signed. You might very well end up doing the work on a set of plans that you did not see at the time. Even if the plans and specifications do not change between bidding and the time you sign the contract, this modification ensures that the scope of work is tied to the drawings on which your takeoff was based. Increasingly, subcontracts will include as an exhibit to the subcontract a complete listing of all of the drawing sheets for the project. The masonry subcontract may list the electrical drawings. Perhaps in an excess of caution, you could use:

> The enumeration of the Contract Documents is not intended to imply that all contract documents or drawings are relevant to Subcontractor's Scope of Work except as a description of the entire project undertaken by Contractor.

As with many subcontracts the AGC 650/655 contain a fairly broad scope of work definition. ¶2.1. Paragraph 2.1 provides that the general contractor enters into the subcontract with the subcontractor for "all labor, materials, equipment and services necessary or incidental to complete the work described in Article 1 for the Project in accordance with, and reasonably inferable from, that which is indicated in the Subcontract Documents.…" The problem with this clause is, of course, its inclusion of work that is not depicted on the plans or designated in the specifications. The subcontract provides that the Scope of Work includes work "incidental to" and "reasonably inferable from" the Subcontract Documents. Of course, hindsight is 20-20. Once the project is ongoing, it is fairly obvious when the architect failed to include return air

vents in a room, but it is often much more difficult to catch those errors and omissions while reviewing a large number of different plan sheets and prepare a bid under time pressure.

It is difficult to avoid this type of clause because it will be embedded not only in the subcontract, but the A/E will have inserted it or similar types of language on the drawings and in the specifications. Even if the subcontract, plans and specifications do not contain a "dragnet" clause, most states by caselaw apply a rule that in preparing a bid, the subcontractor must have reviewed the plans and specifications and caught any errors and omissions that would have been found by a reasonable subcontractor in the field. Thus work that is reasonably inferable from the plans and specifications will be generally incorporated into your scope of work. You can attempt to limit this dragnet by the following language:

> ... as applicable and limited to the work covered in this subcontract.

The AGC 650 and 655 also include another provision affecting the scope of the subcontract work in paragraph 3.2. Paragraph 3.2 is directed primarily to the responsibilities of the subcontractor under the agreement, but includes a requirement that the subcontractor "furnish its best skill and judgment in the performance of the Subcontract Work." As with the scope of work clause, this clause leaves the subcontractor open to after-the-fact judgments as to what would constitute its best skill in performing the work. It is best to avoid the heightened standard of performance and tie the performance standards back to the specifications for the project. Language similar to the following can be used to accomplish this:

> Subcontractor's work shall be executed in substantial compliance with the Subcontract Documents in a good and workmanlike manner and free of defect not inherent in the type of work.

[C] Indemnification

The AGC 650 and 655 indemnity language tracks fairly closely the language used in the AIA A401 document. It is in the differences between the two, however, where issues may arise for the subcontractor. The AGC 650 and 655 provide that the subcontractor shall indemnify the general contractor, owner, architect/engineer and other subcontractors. ¶9.1.1. This paragraph, however, goes beyond indemnification for the subcontractor's own negligence. Paragraph 9.1.1 provides:

> To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Contractor, the Contractor's other subcontractors, the Architect/Engineer, the Owner and their agents, consultants and employees (the Indemnitees) from all claims for bodily injury and property damage that may arise from the performance of the Subcontract Work to the extent of the negligence attributed to such acts or omissions by the Subcontractor, the Subcontractor's subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

This is to be compared to the language used in the AIA A401 (1997) document.

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, 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, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

There are two notable differences between the clauses. First, the AGC 650 and 655 require that the subcontractor assume the defense of the indemnitee if a claim is made under the indemnification clause. The problem with including a defense obligation is that generally the obligation to defend is broader than the obligation to indemnify. Where the indemnification

clause is at least supposed to create only an indemnity obligation to the extent the claim was caused by the subcontractor, the addition of a requirement that the subcontractor defend the claim may result in the subcontractor incurring costs to defend portions of the claim which are not the result of its work.

The second difference between the AGC 650/655 and the AIA A401 (1997) is that the AIA language limiting the subcontractor's liability under the clause is much clearer than that used in the AGC 650/655. The AIA clause provides that the indemnity obligation extends "only to the extent caused by the negligent acts or omissions of the Subcontractor." The AGC 650 and 655 on the other hand extend the indemnity obligation "to the extent of the negligence attributed to such acts or omissions by the Subcontractor." The AIA language in requiring that the subcontractor's negligent acts or omissions actually have been the cause of the claim, damage or loss is significantly clearer in restricting claims for indemnification. The "attributed to" language used in the AGC 650 and 655 allows for the creation of an indemnification obligation even where the subcontractor did not cause the damage or loss.

To avoid the additional risks passed to the Subcontractor due to the drafting of the AGC 650 and 655 indemnification clauses, the clauses should be modified to remove the defense obligation and further limit the ability of the general contractor to make any indemnification claims for damages not the result of the subcontractor's negligence. This may be accomplished by simply striking the reference to defense and by replacing the "to the extent of the negligence attributed to such acts or omissions by the Subcontractor" with the language quoted above from the AIA A401. The effect of the indemnity provision may also be alleviated by the use of an addendum clause similar to that suggested by ASA:

Any indemnification or hold harmless obligation of the Subcontractor shall extend only to claims relating to bodily injury and property damage and then only to that part or proportion of any claim, damage, loss or defect that results from the negligence or intentional act of the indemnitor or someone for whom it is responsible. Subcontractor shall not have a duty to defend.

Any number of states by statute or by judicial decision have placed limits on indemnification clauses. In addition to the above modifications, one should always modify the indemnification clause to comply with whatever restrictions are applicable in the jurisdiction. As the states vary significantly as to the restrictions that are imposed on indemnification clauses, it is impossible to propose a single modification that addresses all of the various situations that may be encountered.

[D] Scheduling

The AGC 650 and 655 provide for subcontractor and contractor input in the scheduling of the subcontractor's work. However, paragraph 5.2 goes further in providing that:

> The Contractor shall have the right to determine and, if necessary, change 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.

Clearly, as the general contractor is responsible to the owner for completion of the project in accordance with the prime contract schedule and is responsible for coordinating the work of the various subcontractors, some form of ultimate control over the project schedule is appropriate. The AGC 650/655 approach, however, leaves subcontractors at the mercy of the general contractor's schedule. Nowhere in the AGC documents is the subcontractor entitled to additional compensation or additional time in which to perform its work due to the general contractor's modification of the Progress Schedule. In fact, the AGC documents rest ultimate

control over the schedule in the general contractor, regardless of whether such schedule modifications result in acceleration, labor inefficiencies or disruption.

It is not difficult to imagine the situation where modifications to the schedule in order to accommodate other subcontractors, the owner or the general contractor will result in various economic impacts to the subcontractor. While the AGC 650/655 do provide for adjustments in the contract sum for changes in the work or for delays caused by the general contractor, there is no specific right under the contract to recover for additional costs incurred due to schedule modifications not resulting in delay to the overall project.

As a result of the unfettered control over the schedule granted to the general contractor, the AGC 650 and 655 should be modified to specifically allow for an adjustment to the contract price and time for schedule modifications. The ASA addendum to the AGC 650/655 suggests modification as follows:

> Subcontractor shall be entitled to an extension in subcontract 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 Subcontractor is not responsible. Subcontractor shall not be liable for any delays beyond its reasonable control nor be required to commence or continue work unless sufficient areas are ready to ensure continuous work.

§5.06 SUGGESTED CHECKLIST FOR CONSTRUCTION CONTRACTS FOR SUBCONTRACTORS

[A] GENERAL PROVISIONS

[1.] Get copies of all referenced contract documents

[2.] Check for rights and benefits passing through to the Subcontractor

[3.] Do not waive legal rights

[4.] Only the laws of the state of the Project apply

[5.] Litigation or arbitration take place in the location of the Project

[6.] Attorneys' fees for breach should be reciprocal

[7.] Avoid "highest quality" or "highest standard" or "strict accordance" = scope

[8.] Avoid extra administrative requirements – daily manpower, supplier lists etc.

[9.] Commencement of warranty-substantial completion of your work not Owner acceptance

[B] PAYMENT PROVISIONS

[1.] Payment within 7-10 days after payment received by Contractor

[2.] Eliminate Pay When Paid – The impossible dream

[3.] Arrange for payment for offsite materials suitably stored

[4.] Your retainage should be no more than Contractor retainage

[5.] Retain right to suspend work if payments not on time on due notice

[6.] Final payment due upon substantial completion of your work not project

[7.] Use rolling or delayed waivers of lien

[C] INSURANCE AND LIABILITY PROVISIONS

[1.] Limit liability to your negligence or acts only

[2.] Limit damages to actual expenses and avoid consequential damages

[3.] Do not allow offsets against this contract for other projects

[4.] Avoid primary insurance obligation

[5.] Avoid be liable for Contractor's OSHA fines – only yours

[D] CHANGES, DELAYS & BACKCHARGES

[1.] Are notices (24 hour) realistic

[2.] Retain right to claim for time and money for conditions beyond your control

[3.] Deal with claims for delays, out of sequence and acceleration

[4.] Establish markup for changes up front

[5.] Require advance notice of backcharges and retain right to cure

§5.07 CONCLUSION

It is always a battle of the forms between the subcontractor and the general contractor with the subcontractor most often coming out on the losing end. Most subcontractors do not have their own standard form contract and are often compelled to use the contract imposed upon them by the general contractor. When engaged in negotiations with the general contractor as to which form to use, it is suggested that the AIA A401 is perhaps the best agreement which is available. Subcontractors should avoid use of the AGC Subcontract Form 600 or similar form which contains most of the provisions which are overwhelmingly in favor of the general contractor at the expense of the subcontractor. It is further suggested that the subcontractor prepare a standard addendum for use in any contract which it signs and should submit its addendum at the time it submits the bid with the statement that "this ... bid is expressly contingent upon acceptance of the attached addendum to the contract ...." Further, the subcontractor's contract should contain the language:

> "Notwithstanding anything to the contrary contained in the agreement between the general contractor and the subcontractor, the terms contained herein shall prevail over any such agreement and shall be controlling."

Finally, there is the procedure which is sponsored by the American Subcontractor's Association and that is the program of direct disbursement to subcontractors. While most general contractors object strenuously to the use of this procedure as they feel that it deprives the general contractor of the ability to control the reluctant subcontractor, such reasoning is specious. The ability of the general contractor to refuse to submit the subcontractor's payment request in any current draw request is the most potent tool available to the general contractor to deal with an uncooperative subcontractor. Any subcontractor who is adequately performing need not have this threat hanging over its head.

The concern for subcontractors should become increasingly more important as the advent of the construction manager becomes more of the general rule rather than the exception in the construction industry. If this occurs, subcontractors will have to be more astute in protecting their rights and become educated in the manner of construction contract analysis if they wish to continue in business. To paraphrase a philosopher, those who refuse to read and understand the terms of their construction contract are doomed to failure and bankruptcy. §5.08 EXHIBIT 1

§5.08 Exhibit 1

CONDITIONS OF PROPOSAL

Acceptance of this proposal by Buyer shall be acceptance of all terms and conditions recited herein which shall supersede any conflicting term in any other contract document. Any of the Buyer's terms and conditions in addition or different from this proposal are objected to and shall have no effect. Buyer's agreement herewith shall be evidenced by Buyer's signature hereon or by permitting Seller to commence work for project.

1. Seller shall be paid monthly progress payments on or before the 15th of each month for the value of work completed plus the amount of materials and equipment suitably stored on or off site. Final payment shall be due 30 days after the work described in the proposal is substantially completed. No provision of this agreement shall serve to void the Seller's entitlement to payment for properly performed work or suitably stored materials.

2. The Buyer will withhold no more retention from the Seller than is being withheld by the Owner from the Buyer with respect to the Seller's work.

3. All sums not paid when due shall bear interest at the rate of 1½% per month or the maximum legal rate permitted by law, whichever is less; and all costs of collection, including reasonable attorneys' fees, shall be paid by Buyer.

4. Nothing in this subcontract agreement shall require Seller to continue performance if timely payments are not made to Seller for suitably performed work or stored materials.

5. No backcharges or claim of the Buyer for services shall be valid except by an agreement in writing by the Seller before the work is executed, except in the case of the Seller's failure to meet any requirement of the subcontract agreement. In such event, the Buyer shall notify the Seller of such default, in writing, and allow the Seller reasonable time to correct any deficiency before incurring any cost chargeable to the Seller.

6. Buyer is to prepare all work areas so as to be acceptable for Seller under contract. Seller will not be called upon to start work until sufficient areas are ready to insure continued work.

7. Seller shall be given a reasonable time in which to make delivery of materials and/or labor to commence and complete the performance of the contract. Seller shall not be responsible for delays or defaults where occasioned by any causes of any kind and extend beyond its control, including but not limited to: delays caused by the owner, general contractor, architect and/or engineers, delays in transportation, shortages of raw materials, civil disorders, labor difficulties, vendor allocations, fires, floods, accidents and acts of God. Seller shall be entitled to equitable adjustment in the subcontract amount for additional costs due to unanticipated project delays or accelerations.

8. All workmanship is guaranteed against defects in workmanship for a period of one year from the date of installation. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. The exclusive remedy shall be that Seller will replace or repair any part of its work which is found to be defective. Seller will not be responsible for special, incidental, or consequential damages. Seller shall not be responsible for damage to its work by other parties or for improper use of equipment by others.

9. Work called for herein is to be performed during the Seller's regular working hours. All work performed outside of such hours shall be charged for at rates or amounts agreed upon by the parties at the time overtime is authorized.

10. Any notice or written claim required by the contract documents to be submitted to the Buyer, on account of changes, extras, delays, acceleration, or otherwise, shall be furnished within a time period, and in a manner to permit the Buyer to satisfy the requirements of the contract documents and its contract with the Owner, notwithstanding any shorter time period otherwise provided.

11. The subcontract form used between the Seller and the Buyer will be the AIA Standard Form Subcontract Document A401 (1978 edition). Where there is a conflict between provisions of either the AIA Subcontract Form, or the contract documents between the Owner and Buyer and this Proposal, then this Proposal shall govern.

12. Nothing in this agreement shall serve to void Seller's right to file a lien or claim on its behalf in the event that any payment to Seller is not timely made.

13. The Buyer shall furnish all temporary site facilities including suitable storage space, hoisting, temporary electrical and water at no cost to Seller.

14. The Buyer shall make no demand for liquidated damages for delays or actual delays in any sum in excess of such amount as may be specifically named in this Proposal and no liquidated damages may be assessed against Seller for more than the amount paid by the Buyer for unexcused delays to the extent caused by Seller.

15. Buyer shall, if the Owner does not, purchase and maintain all risk insurance upon the full value of the entire work and/or materials delivered to the jobsite which shall include the interest of Seller.

§5.09 EXHIBIT 2

SUBCONTRACTOR ADDENDUM TO SUBCONTRACT

Between: Subcontractor

and

_____, General Contractor

For: _____

CONTRACT - "C"

1 Subcontractor hereby accepts the terms of the attached Subcontract subject to Contractor's agreement with the terms set for in this Addendum which shall supersede any conflicting term in any other Contract document. Any of the Contractor's terms or conditions in addition or different from this Addendum are rejected and shall have no effect upon Subcontractor unless expressly agreed to in writing by subcontractor. Except as noted in the foregoing, Contractor's agreement herewith shall be evidenced by Contractor's signature hereon or by permitting Subcontractor to commence work.

2. Subcontractor shall be given a reasonable time in which to make delivery of materials and/or labor to commence and complete the performance of the Contract. Subcontractor shall not be responsible for delays or defaults where occasioned by any causes of any kind and extent beyond its control, including but not limited to delays or interference caused by the Owner, General Contractor, Architect and/or Engineers, delays in transportation, shortages of raw materials, civil disorders, labor difficulties, vendor allocations, fires, floods, acts of God or accidents. Subcontractor shall be entitled to an equitable adjustment in the Subcontract amount for additional costs due to such delays or accelerations.

3. Contractor shall not have the right to assess consequential or other damages against Subcontractor except for direct job costs incurred as a direct result of Subcontractor's actions or lack thereof in direct performance of its subcontract, and no liquidated damages may be assessed against Subcontractor except where such damages were caused by the direct acts of the Subcontractor and to which Subcontractor has specifically agreed in writing.

4. Any notice or written claim required by the Contract documents to be submitted to the Contractor, on account of damages, extras, delays, accelerations, or otherwise, shall be furnished within a time period, and in a manner to permit the Contractor to satisfy the requirements of the contract documents and its Contract with the Owner, notwithstanding any shorter time period otherwise provided in the Subcontract.

SCOPE - "S"

1. Material and/or labor shown on other than architectural drawings or shown in sections of the specifications not specifically involved with Subcontractor's work will not be furnished without a duly authorized written change order from the Contractor's authorized personnel providing for an adjustment to the contract price for such additional work, acceptable to the Subcontractor.

2. The Contractor shall furnish all temporary site facilities including suitable storage space, hoisting, temporary electrical, heating and water at no cost to Subcontractor.

3. Contractor is to prepare all work areas so as to be acceptable for Subcontractor's work under the Subcontract. Subcontractor will not be required to start work until sufficient areas are ready to insure continued work and in such sequence as to allow reasonable production.

4. Subcontractor's material will be stored on the site at the direction of the Contractor with reasonable access available to the Subcontractor. If it must be moved for the convenience of the Contractor, the resultant expense will be borne solely by the Contractor.

PAYMENT - “P”

1. The Contractor will withhold no greater payment or retention from the Subcontractor than is being withheld by the Owner from the Contractor with respect to the Subcontractor's work. "Extra" work shall not be subject to retention.

2. Subcontractor shall be paid monthly progress payments on or before the 30th of each month for the value of work completed in the prior month, plus the amount of materials and equipment suitably stored on or off site. Final payment shall be due 60 days after the work described in the Subcontract is substantially completed. No provisions of this agreement shall serve to void the Subcontractor's entitlement to payment for properly performed work or suitably stored materials, regardless of whether Contractor is paid by Owner or not.

3. All sums not paid when due shall bear interest at the rate of 1% per month or the maximum legal rate permitted by law, whichever is less. All costs of enforcement of this agreement, including reasonable attorney's fees, whether by suit or settlement, shall be paid by the losing party.

4. If timely payments, as provided herein, are not made to Subcontractor for suitable performed work or stored materials, Subcontractor shall have the right to suspend performance upon five days’ written notice until such payments are made to Subcontractor.

5. Contractor will hold waivers of mechanics' lien for Subcontractor's labor or material on trust for the benefit of Subcontractor and will pay to Subcontractor, within five (5)

days of receipt of any funds received for the benefit of Subcontractor. Contractor's obligation to pay Subcontractor, however, shall not be contingent upon any payments by Owner to Contractor.

6. Nothing in this agreement, or any other agreement to which Subcontractor is not a party, shall affect Subcontractor's right to a mechanics' lien or other claim in the event that any payment to Subcontractor is not timely made.

7. "Delivered only" material is NOT subject to retention and is to be paid for not later than 30 days following the month of delivery and billing of same.

8. Should delivery of material or performance of work be delayed beyond 90 days from Contractor's original schedule date, and through no fault of Subcontractor, Subcontractor shall be entitled to additional compensation for increased labor and material costs, upon submittal of appropriate invoices.

9. Should materials require storage on or off site in areas other than the structure or other than on the floor of their installation, costs for storage and extra handling shall be borne by the Contractor.

INSURANCE - "N"

1. Contractor shall, if the Owner does not, purchase and maintain all risk insurance upon the full value of the entire work and/or materials delivered to the job site which shall include the interest of Subcontractor as it may appear. Subcontractor shall not be held liable for damages, theft or disappearance of its materials after delivery to the job site.

2. If Subcontractor is required to name any parties other than Contractor, Architect, Owner and Lender as "additional insureds", the cost for same shall be borne by the Contractor.

3. Under no conditions will Subcontractor waive its insurance carrier's subrogation rights on general liability, auto liability, workers compensation or umbrella liability insurance, nor will it agree to its insurance being deemed "primary".

4. Insurance to be provided by this Subcontractor shall be limited to that which is provided by Subcontractor's attached Certificate of Insurance.

5. The cost of any insurance or bond required in addition to Subcontractor's standard certificate of insurance shall be paid within 30 days of issuance of certificate by contractor.

EXCLUSIONS - "E"

1. The cost of all permits, laboratory or testing fees, utility costs and temporary structures of any kind shall be born solely by the Contractor.

2. The following are excluded from this Subcontract agreement:

3. Unless specifically agreed to in writing, "no damages for delay" clauses shall not apply to Subcontractor.

EXTRAS - "X"

1. All extras for material, work or non-standard work shifts shall include the direct costs of such items plus 10% overhead plus 10% profit.

OVERTIME - "T"

1. Work called for herein is to be performed during Subcontractor's regular working hours. All work performed outside of such hours shall be charged for at rates or amounts agreed upon by the parties at the time overtime is authorized and paid at the time of next payment due Subcontractor.

BACK CHARGES - "B"

1. No back charges or claim of the Contractor for services shall be valid except by an agreement in writing by the Subcontractor before the work is executed, except in the case of the Subcontractor's failure to meet any requirement of the Subcontract agreement. In such event, the Contractor shall notify the Subcontractor of such default, in writing, and allow the Subcontractor reasonable time to correct any deficiency before incurring any cost chargeable to the Subcontractor.

REPLACEMENT WORK - “R”

1. Owner shall provide suitable storage space within the building, with reasonable access to sufficiently sized elevators, for storage and removal of material required to complete this contract.

2. Concealed conditions and/or specifications, or conditions which differ materially from plans, if available, or which are not readily evident and which necessitate additional or revised material or labor, shall be brought to the Owner's attention and an equitable Contract price adjustment shall be agreed to by Subcontractor in writing prior to continuation of work on the project.

3. Delays caused by Owner or Contractor's failure to provide adequate working conditions or weekly work continuity, shall be charged as "work interruption" costs and be paid for by the Owner or Contractor as an addition to the Contract amount.

WARRANTY - “W”

1. All workmanship is guaranteed against defects in workmanship for a period of one year from the date of installation. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. The exclusive

remedy shall be that Subcontractor will replace or repair any part of its work which is found to be defective. Subcontractor will not be responsible for special, incidental, or consequential damages.

2. This warranty excludes any remedy or damage or defect caused by abuse, modifications not executed by this Subcontractor, damage caused by other parties, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.