

A PRIMER FOR CONSTRUCTION SUBCONTRACT REVIEWS

Congratulations, you have gotten the business. Now it is time to negotiate the contract terms. A contract is the means by which you move your business forward and the road map for when things go wrong. Before you sign on the dotted line there are key provisions that can limit your liability and maximize protection.

1. **Scope.** Make sure you understand the scope of work. For example, a subcontract may require adherence to the provisions of upstream documents. Review those documents and understand how they impact your rights and obligations.

2. **Payment.** Most people only focus on how much they will be paid. Look out for provisions that impact your rights to payment. For example, a “pay if paid” provision conditions a subcontractor’s right to payment upon the contractor receiving payment from the owner. This can impact your legal right to suspend performance or declare breach of the contract for non-payment. Try to exclude situations where the owner’s lack of payment is due to the contractor’s fault. Additionally, you can add a provision stating that you have a right to be paid within thirty days regardless of the “pay if paid” provision.

3. **Termination.** Understand the types of actions or omissions that trigger default and termination rights. Require notice of the default and time to cure the default. Note any provision allowing termination for convenience. In such cases, you want: (1) sufficient time to discontinue performance; (2) payment for work, materials or equipment already provided or ordered already; and if possible (3) foreseeable profit.

4. **Warranty.** Make sure the warranty provisions of the contract are in accord with what your company is willing to provide. Usually, standard warranties run

for one year from the date of either the provision of the services or materials, or project completion. You should have the option to repair, replace, or re-perform defective work and services. Exclude work that has been abused, altered, misused or repaired without your written approval or supervision. Finally, if you are not a merchant or manufacturer, it is important to exclude all other express or implied warranties, including warranties for merchantability and fitness for a specific purpose.

5. **Indemnity**. Indemnity represents your obligation to protect the customer from claims brought against the customer because of your performance. Indemnity obligations can range from reimbursement of costs to taking over the defense of a legal claim. Whether or not you want to take over the defense, you can limit the indemnity obligation to the extent the claim results from your negligent acts or omissions. Finally, note the parties you are being required to indemnify. The owner and other upstream contractors are standard beneficiaries of an indemnity provision. However, you should note if the architect, engineer, or other consultants are included as beneficiaries of the indemnity provision. Architects and engineers have separate and unique professional liability for their work. You should avoid assuming any liability toward these design professionals.

6. **Insurance**. Please understand the required types of insurance and policy amounts. The policy requirements should be “in the aggregate” and not “per occurrence”. “Per occurrence” means that each covered incident could require a payout for the full value of the policy. Avoid adding the customer as an “additional named insured.” Otherwise, the customer could have all rights to the policy even if the customer caused the damage. Similarly, avoid making your insurance policy the “primary” policy.

Otherwise, your insurer may have to pay before any other carriers are required to pay for an incident. At a minimum, these provisions should be limited to the extent the damages are caused by your negligence. Finally, if the insurance provision requires a waiver of subrogation rights try to make the waiver mutual. If you waive subrogation rights, you are giving up your insurer's right to pursue a claim against whoever caused the incident.

7. **Hazardous Materials.** Look out for work involving hazardous materials—removal or abatement. This scope of work can be highly regulated and increase your liability. It is important to know the area where you will be performing, and whether the area has hazardous materials. If the area contains hazardous materials, make sure you develop a plan to avoid disturbing the material while you are performing your scope of work. Include a provision stating that your company is not responsible for pre-existing hazardous materials. If such materials are discovered during performance, the customer should be responsible for handling those materials before performance continues.

8. **Limitation of Liability.** One of the best ways to limit overall liability is to include a “limitations of liability” provision. You can limit your overall liability to (a) the contract value; (b) the insurance policy value; (c) or a negotiated amount. Attempt to obtain a mutual waiver of indirect or consequential damages such as punitives, special, exemplary, incidental or consequential, loss of profits, loss of use, loss of revenue, or loss of capital. These damages are not intended to compensate the wronged party for its actual losses. Finally, include a provision that waives obligations to perform when there are occurrences beyond your control. Such “force majeure” occurrences include acts of

God, acts of government entities, strikes, labor disputes, fires, explosions or casualties, thefts, vandalism, riots or war, and acts of terrorism, and/or unavailability of materials.

Whether the contract is two pages or twenty, construction contracts can be fraught with provisions that increase your liability and/or limit your rights. It is important to review contracts carefully and take the opportunity to negotiate favorable modifications to the contract. Remember, your contract is your umbrella. Do not wait until it rains to discover the holes. As always, the best protection you can have is to engage legal counsel, before you sign on the dotted line.