Contract language is a pretty dry subject and not something crusty contractors are in the habit of discussing with much enthusiasm over a bottle of their favorite beverage. But of all the topics that contractors have been asked about in Contractor Review, this one had them talking longest and loudest. In this two-part series on contract language, we will first of all see how the language has changed and in the next issue, we’ll look at why the change, and what contractors—both GCs and subs—can do about it.

Contracts have been relied on increasingly over the last 15 years, where a handshake and one’s word were generally sufficient to seal a deal in earlier years. Contracts generally mean lawyers, and where they start to offer their services, matters can soon take on a life of their own, becoming increasingly complex and sometimes even illogical. This is certainly the direction that contracts between GCs and subs have been taking of late, with GCs engineering thoroughly lopsided and complex contracts that, in the words of a contractor from a mid-Atlantic state, “are not a contract at all but a one-sided document, because there’s no sub side.”

A Californian echoed the same sentiment, one shared by nearly all those interviewed:

“The gist of my problem with contracts these days is they are not fair to both sides. A contract should represent equal and fair treatment for both sides.”

It’s All Your Fault, OK?

The latest, and perhaps the most egregious (that’s a fancy word meaning “outrageously bad”) clauses appearing in contracts today are indemnifying clauses. The mid-Atlantic contractor, who being president of the American Subcontractors Association in his state, proved the most knowledgeable of all contractors contacted, describes these indemnifying clauses: “Indemnification or insurance clauses require the sub be responsible for every-
the typical contract is a four-page contract with an eight-page attachment.

thing, even though the damage or injury was the result of actions taken by the GC, the owner or any other entity. If the GC is 100 percent at fault, the sub is not liable, but if the sub is even 5 percent at fault, he has to carry the full burden of restitution, as well as paying for the GC’s attorneys in defending the GC over the matter.”

“Indemnifying clauses, trying to shove all the liability from the GC and owner to the subs,” adds an Arizonan, “have been around a while, but we are seeing much more of them and increasingly boldfaced clauses to cover their own negligence by having the subs assume their liabilities. We laugh about it because it is so outrageous, but that’s the exact wording. Two or three pages of clauses covering what we will indemnify them against, ‘up to and including our own negligence.’ ‘Even if it’s all our fault,’ says the GC, ‘we want you to protect us against it.”

“If it’s our fault, you’ll pay, OK?”

“GCs also want subs to provide a waiver of subrogation,” according to the mid-Atlantic contractor, “to prevent the sub’s insurance company from recouping its costs for a GC’s error by suing the GC’s insurance company.”

“The worst clauses right now are waiver of subrogation,” agrees a Colorado contractor. “We’ve argued with GCs over these, showing them our insurance policy and what it limits us to. We often end up with a solution that makes sense to lawyers but nobody else: Our insurance company charges us a higher price to cov-
If One Is Faulty, Are They All?

The Arizonan gives another twist on indemnification clauses in the guise of construction defect clauses, which he says are spreading through the western states. This broad form liability is meant to combat lawyers finding ways of making more money through housing owner and condo associations. If this seems harsh, consider the Arizonan’s description: “If one or two condo or housing units have some fault, lawyers approach and obtain the agreement of the association to sue for the same fault in all the units. We have had cases that go back 18 years, and it’s killing the contractors.

“The risk managers at the GC therefore attempt to pass the risk onto the subs in order to keep the GC’s own insurance rates level. We have to buy the insurance when we can’t negotiate the clause out of the contract, and it effectively doubles our rate. As the trend continues, it will drive up the price of construction ultimately a phenomenon that always seems to follow when lawyers become involved.”

“Here’s a standard builder’s risk insurance clause for the owner,” the mid-Atlantic contractor says, continuing down the contract he has in his hand. “It specifies a $25,000 deductible in case of a claim for destruction of the property while under construction. No problem there, as the owner then can pay the GC who then pays the subs. But two paragraphs later, the contract stipulates that the subs are responsible for the deductible.”

“Hem’s another example. The GC wants the sub to pay all OSHA fines for violations committed by that sub. Well, let’s say one of my men doesn’t tie down a ladder and an OSHA inspector sees it and fines us, the sub. OSHA can also fine the GC as overall responsible for on-site safety when they determine that the GC was aware of the violation and did nothing. So the GC is disclaiming any responsibility for his responsibility, but it gets worse . . . . If the GC is a repeated violator, OSHA will levy a much higher fine—perhaps as much as $100,000 — for repeated violations. These new contract clauses require the sub to pay that fine, too, even if the sub was not working for the GC during his earlier violations. So for climbing up a ladder that wasn’t tied off, the sub can be fined 10Gs for his own violation, 10Gs for the GC’s complicity, and 100Gs for the GC’s repeated violations. Now that’s steep and can kill a sub.

“Although it’s against the law in our state, some contract clauses also demand that a sub waive his lien rights.”

Nice work if you can get it. If some contracts are starting to sound one-sided, how about these two legal hurdles that Mr. Mid-Atlantic describes? “Sometimes, out-of-state contractors come into our state, and their contracts call for all disputes to be litigated in their home state. This means the sub has to find out what that state’s laws are and file suit in that state, which is a prohibitive barrier for smaller contractors.

“Here’s another clause that says if the
While the newest issue is indemnification clauses, the biggest issue appears to be pay-if-paid clauses.

“You won’t get around paid-when-paid,” explains a Californian, “and that’s a bitter pill to swallow if the GC has a lousy PM or if he doesn’t submit paperwork to the owner for a month or two, because then the owner may refuse to pay. The GC then tells the sub he didn’t get paid, so he won’t pay the sub.

An Alabaman has the same problem: “We have to agree to paid-when-paid because GCs won’t remove it from the contract. But if the GC makes an enemy of the architect or owner of the project, their recourse is to withhold funds. It’s happened to us a dozen times over the last 30 years, and we try to act as a mediator between the GC and the owners or architects. When we haven’t been able to resolve the differences, we’re the ones who have had to eat it.”

It’s worth noting that some contractors talk of “paid when paid” as a problem, which it can be as noted above, but the real problem is “paid if paid,” as our mid-Atlantic man explains. “We are fighting to remove to remove pay-if-paid clauses in our state. We’ve lived with pay-when-paid clauses for years. They’ve never been recognized by the courts to relieve GCs of their responsibility to pay the subcontractor ultimately even if the owner never pays the GC. The onus is on the GC to obtain the money from the owner. The sub can still take the GC to court, lien the project or go after their bonding company for payment.

“There is a new twist, however, which can throw contractors for a loop if they don’t know about it. The ‘condition precedent to payment’ clause shifts the risk of non-payment from the GC to the owner by stating that if the GC is not paid by the owner, the GC has no debt to the sub. Condition precedent is recognized by the court to mean the GC has no debt until the owner pays him. Courts have upheld that you cannot go after their bonding company for payment or lien a job if there is no debt, so this runs in the face of the lien law.

“This issue was litigated in New York three years ago when a shopping mall owner went bankrupt before paying the GC millions of dollars owed. The GC, his bonding company and the court all stood behind this wording when the subs tried to lien the job. It was appealed to the state supreme court, which stated the language was unenforceable because it was against the public interest in negating a sub’s right of lien.

“While on the subject, some contracts also will state that if the contractor is provided a payment and performance bond on the job, the sub agrees that he relies on the credit of the owner, not the GC or its bonding company, for payment. But the sub has no contract with the owner, so how does he collect? If the sub signs such a contract, he will be tossed out of court if he ends up in it.”

Another clause mid-Atlantic found in his contract states that if the owner termi-
nates the project, the GC is only obligated to the sub for the amount he can recoup from the owner for the sub’s work.

**Prompt Payment, Maybe**

“We’ve been working in Arizona on the Prompt Pay Act,” adds another contractor, expanding on the theme of payment agreements in contracts. “We are still seeing contracts where the generals don’t follow the new statutes because they don’t understand them. Basically, they cannot hold any more retention from us than the owner is holding from them, yet we still see contracts where one of their remedies for non-performance—whether they think we won’t deliver or are going down—and whether that is true or not, they will hold 20 percent.”

Another caveat on prompt-pay laws comes from the mid-Atlantic man: “Some states have a good prompt-pay law for construction, so some GC contracts in those states now require the sub waive any rights he has under those laws. Obviously, such clauses are not enforceable.”

The Colorado contractor also complained of “intricate payment clauses such as payment on acceptance, not completion.”

Change orders are often hotspots for trouble, so it’s not surprising that they surface as question marks in question-able contracts.

The Californian contractor complained of “contracts that all change orders be authorized by the GC before work begins. The problem is that in nine out of 10 jobs, subs are told to begin work when they present their pricing, and that authorization will follow.”

Mid-Atlantic points out another clause relating to change orders that states, “if the GCs doesn’t agree with the sub’s price, he can force the sub to do the work and negotiate afterward. So if the sub ask for and spends $100 and the owner only agrees to pay $80, that’s all the GC has to pay the sub.”

**Looking for a Fair Shake**

These above are not all of the contentious points in contracts these days, but they are the major ones. If you have others of major concern, or have anything to offer-experiences, successes, failures, know-how-n the subject of contracts, please e-mail or otherwise contact the editor at porinchak@awci.org.

The purpose of this series isn’t to bash GCs, but to help bring about the preamble of the Contractors Bill of Rights: “We the General Contractors, Subcontractors, Design Professionals and Construction Industry Suppliers of these United States of America, in Order to form a more perfect Construction Industry, establish Fairness, ensure Equality among all Construction Industry Businesses . . . do ordain and establish this Contracting Bill of Rights . . . .”

Next month we’ll look at sticking to the Contracting Bill of Rights so that everyone can win.

After all, who’s fool enough to keep playing on a field that’s tilting at 45°?

**About the Author**

Steven Ferry is a free-lance writer based in Dunedin, Fla.