In this second of a two-part series examining the effects of changing contract language between GCs and subs, we asked contractors around the country why a dozen clauses have crept into contracts that tilt the playing field dramatically in favor of the general contractors, and what should be done about it.

As quoted in last month's article, The Contracting Bill of Rights calls for fairness among the players in the industry in order to "form a more perfect Construction Industry." It is evident, in listening to subcontractors talking about their contracts with GCs, that the last 15 years have seen increasingly lopsided "agreements" being drawn up, and in many cases, enforced. Obviously, an agreement that one person forces on another to his own advantage, is not an agreement but a slippery path toward rebellion or servitude—and look where that led the Commissars of the Soviet Union of old.

"A couple of contractors in our region are so arrogant, reports one contractor, "that they refuse to allow me to mark up their contract, even if it is to correct errors written to their disadvantage."

Nobody with a choice about what to do with his or her time is going to continue to play in a lopsided game. GCs can't keep enforcing illegitimate and even illegal contracts on subs without first of all a fight ensuing and then, failing to correct the inequities, a flight from the ranks of subs as they either go under or seek fairer pastures. Where would that leave GCs?

Rather than go down this road, maybe we should look at sticking to the Contracting Bill of Rights so that everyone can win.

A Word with a Specific Meaning

Among the essential components of a valid contract, according to one law dictionary, are "mutuality of agreement and obligation." The word comes from root words meaning to draw together. "Mutuality" means a reciprocal relation between interdependent individuals or groups. At the very least, contracts should be negotiable. Ideally, even if written by one party, the contract would provide for the interests of both parties. If this ideal is departed from, it is generally because one party is pursuing its own short-term interests and the other party is letting them get away with it, for some reason.

In the case of GCs and subs, maybe the sub never reads contracts because he doesn't have time or doesn't understand them. "A major client presented us with an 80-page contract recently," relates one
Time Out, Ok?

contractor. "I don't believe contractors with smaller businesses have the resources or time to read contracts carefully and understand what they are agreeing to."

With pages of legalese to wade through that some lawyer probably fell asleep over while trying to decide which word goes where, it's not surprising someone with work to do finds some reason to do it. But in doing so, as the same contractor adds, "They expose themselves to huge liabilities that can take down the company they've built up over the years—and all based on some unfair clause in a contract."

Maybe the sub reckons contracts are only for when things go wrong. "If nothing goes wrong," points out one contractor, "which is usually the case, it's not an issue. But if something does go wrong, it could be the end of your company."

Or maybe the sub is concerned about losing the job or new business if he makes a fuss about the contract. "If the first thing you tell the GC is that you don't like his contract, you're the SOB from where he's standing," says one contractor. "He wants to give you a job and you're already arguing with him before you've even started. You do have to be responsive to your customers, but you also have to draw the line at one-sided contracts that can potentially take you under—and so you walk a fine line between protecting your behind and losing your shorts." Another contractor reported that, "If you complain about the contract, you don't lose the job, but you won't be back."

Maybe the sub grew up with a handshake as the way one seals deals, as is still done "if you know the right people," according to one contractor. The only person interviewed who was experiencing no problems with contract language was a Floridian who has been servicing the same four clients for the past 15 years and undertakes projects on a PO basis, not requiring any contracts—if all subs could be so fortunate.

One contractor, whose family has been in the business for more than 50 years, hardly ever signed contracts until the 1980s, with the most complicated contract being the AIA 401. "It's been downhill ever since," he complains.

Lastly, maybe the sub has become disillusioned with trying to change contracts and doesn't make an issue out of it. As one contractor put it, "That's a train wreck waiting to happen."

Dusting Off Ethics

So if the above are possible reasons for subs signing off-the-wall contracts, what's with those GCs who think it's in their own best interests to for-

By Steven Ferry
mulate contracts that place their business partners in jeopardy?

Whatever reasons GCs have, they are off base on one critical point: the question of ethics. Ethics is another one of those sticky words that just won’t go away. Yes, might is right, money talks and BS walks, but nobody who ever looked after number one as the priority has ever been a winner in the long run. Ethics is a word that either has been sidelined or put on a pedestal instead of being the stuff of everyday relationships, mainly because it’s not well understood.

Ethics are not morals. Morals are what people follow because they’re told to or else . . . . It’s something society does or doesn’t enforce. Ethics is something a person does of his own free will, because he can think and decide for himself or herself and is strong, decent and proud enough to do the right thing. It’s orders of magnitude senior to morals and laws.

What does this have to do with the real world of construction and the fast world of big business? Everything, because ethics includes the idea of survival for all parties, not just oneself. The simple reason for this is that if everyone is out only for number one, life sure becomes a bear. If everyone works to make things work for self and others, then cooperation results and life’s a breeze. So when Mr. GC tries to shove all penalties, liabilities and risk off self and onto the subs, he can expect life to become a bear.

Now maybe the GC is merely trying to solve some problem that owners, subs, OSHA, the government or God are throwing at him. But entering into force and/or chicanery, instead of communication and mutual assistance, to solve problems is the same road that every failed enterprise, from conquerors to CEOs, has gone down. Force begets counter force and there goes the whole ball game.

**Anyone Seen the GC?**

Some subs suspect one driver behind the lopsided contracts may be the fundamental shift in what GCs do these days. “It’s my guess,” says one contractor, “that the reason GCs are tilting the playing field is that they don’t do any work on the job anymore but just manage it. They do have a man on the job and he has responsibilities, but they are trying to limit them, even to the point of putting in their contracts that subs are meant to coordinate with each other on the job to resolve matters. Obviously, we do to a certain extent anyway. But the GC is ultimately responsible for the coordination and scheduling. We have been wondering lately what the GCs do. Many of them have backed out of their real business of construction into being brokers and ‘construction managers.’ I can see the GC’s side, but we all take risks in business. Let’s stand up and take those risks, not try to push them off on someone else.”

“GCs aren’t contributing much these days,” agrees another contractor. “They have a man on site who is supposed to schedule, direct and pay for the job. I can’t say this about all GCs, but some are tending toward acting solely as a middleman, between the owner and the subs, and avoiding all responsibility. If
GCs want to be so in name only, acting purely as a gateway that makes the owner and subs responsible for everything, then what are they bringing to the table, really? We are seeing more and more of this ‘no responsibility,’ such as telling subs to work out problems on the site with each other, and it’s quite frustrating. Lawyers are behind this trend—I went over a contract yesterday and used more than 15 stickies to pinpoint problematic clauses.”

**So What Now?**

Until those GCs who are tilting the playing field come to their senses, it is the opinion of subs interviewed that all subs should take the time to read contracts and negotiate to remove one-sided, unfair clauses. Don’t accept any paid-if-paid clauses, and ensure that paid-when paid clauses are understood to mean that the GC is ultimately responsible for paying. You don’t want some upset between the owner and the GC, which has nothing to do with your own performance, preventing your being paid.

Contest any demand that you give up your lien and bond rights.

The rash of indemnifying clauses have to go, because a GC can’t legally sign away his liabilities, but you don’t want to have to go to court to prove it. Indemnify GG against losses as a result of your full or partial negligence, but only to the extent that the problem was caused by your negligence.

One contractor used to handle one-sided contracts by “placing them in a drawer without signing until the job was over and the GC needed a signed contract to pay me. If no problem had occurred, I’d sign.” This is not an advisable approach, because it could be argued that, in starting the job, he had agreed to the terms of the contract—and some contracts even include a statement to this effect.

He now sends the GC a letter objecting to specific clauses in the contract and then starts the job anyway. He also adds “a two-page addendum that I’ve compiled over the years, using portions of the American Subcontractors Association’s addendum. In doing so, I state that I agree to the contract subject to the modifications set forth in the addendum, and that the addendum takes precedence over any inconsistent position in any part of the entire contract. There have been times when the contract and addendum would have been significant in protecting us if we had gone to court, but we’ve been able to resolve disputes before they went that far.”

The ASA has its own addendum, which is a good starting point for anyone wanting to create his own (which should be done in collaboration with legal and insurance advisors).

Several subs stated that they go through each contract, mark them up and negotiate. Sometimes, the GC will change the troubling clauses, and sometimes not. If not, the subs either agree to the changes after the GCs have explained them, or they walk.

One contractor pointed out that, “These one-sided clauses attempt to circumvent
traditional law through private contracts, and they violate legal precedents. If a sub signs a contract containing such clauses, however, he’s agreed to them, so what can a judge say except, ‘Boy, are YOU stupid!’?”

The message is that subs don’t have to and shouldn’t take these contracts on the chin—there are simple actions they can take to ensure they have a level playing field, including training on contracts at legal seminars and joining associations.

**NAY FEAR**

It’s been said that the price of freedom is constant alertness and willingness to fight back. Some contractors are certainly doing just that, and the price has not been so heavy, really, as one contractor states: “We did lose one job because we didn’t agree with the contract, which isn’t bad over all these years—proving that it pays to stand up for one’s rights. If more contractors stood up for their rights more often, we would all be better off.

“If I were a GC and felt my contract was the best thing for my company, and one drywaller wouldn’t sign it but another never gave me any flack about my contract, there’s no question who would get the business. I wouldn’t care if the drywall company went out of business because of my contract, because there are always other drywallers.

“So the more subs who look at these contracts, deal with these issues and confront the GCs, the less places the GCs will have to turn and the more willing they will be to start writing fair contracts. We are not looking for any advantage over the GCs, just a level playing field.”

Another sub explained that “some GCs
become peeved when I insist on reading and negotiating contracts, but when I go through the contracts with them in their office, they say, ‘Oh, I didn’t know that was in there.’ Most GCs haven’t read their contracts, either.”

Which brings up the possibility that the fight brewing between GCs and subs over contracts could be entirely the handiwork of lawyers—after all, who gets paid and enjoys job security from conflicts over contracts? As another contractor states, “Some subs cause GCs trouble and sometimes force them into court. Every time a GC’s lawyer finds a new wrinkle, something is added to the contract to cover the GC. That’s not unreasonable, but lawyers have gone beyond a defensive reduction of risk into a proactive shifting of all risk to the subs.

“Judging by the contract data on their Web site (www.agc.org), the lawyers at the AGC (Associated General Contractors), if they haven’t actually been leading the charge, are certainly providing covering fire and support to the idea that GCs should offload all risk to subs.”

It’s usually true that, in any conflict, there is an unsuspected third party whispering in the ears of both parties about how bad the other is. Maybe GCs should take time out to reconsider where the whispered words of wisdom from their legal department are taking them.

It takes a team to erect a building, and the team should be focused on bringing about the end result efficiently, not on infighting. The ASA has laid out, in its Contracting Bill of Bights, how to create a level playing field and improve the construction industry. It’s worth all parties reviewing the bill to ensure their policies and actions align with the articles and so ensure the building industry continues to function to everyone’s advantage.

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