Too often subcontractors sign subcontract forms which are furnished to them by general contractors without having knowledge of the very serious legal amplifications of many of the subcontract clauses that gives the general contractors unnecessary legal and practical advantages.

Many subcontractors only check to see that their name is spelled right and that the money is correct before they sign subcontract forms which create unsuspected liabilities on the part of the subcontractors.

The subcontract forms drafted by general contractors contain clauses which would literally make a subcontractor build his own scaffold, tie his own noose and then give the general contractor total discretion to trip the trap door without notice.

And, after it’s all over, there is authority usually built into the loaded subcontract forms to allow the general contractor to backcharge the subcontractor’s estate for the cost of the rope and scaffolding.

Typically, contingent payment clauses appear in subcontract forms devised by general contractors, which provide that subcontractors will not be paid until the general contractor is paid by the owner or until the architect approves the work.

Risk Shift

Under a contingent payment clause, the general contractor has attempted to shift the risk of non-payment by the owner from the general contractor to subcontractor. Many things may happen on a construction project which are totally beyond the control or responsibility of the subcontractor and which may cause payment by the owner or certification by the architect to be substantially delayed or even permanently prevented.

Under contingent payment clauses general contractors often deny responsibility for paying the innocent subcontractors if anything occurs among the multiple facets of the job which causes the job not be certified by the architect or causes the owner not to pay the general contractor.

The subcontractor runs the risk of not getting paid if payment is contingent upon payment by the owner or the general contractor or contingent upon the architect approving the work. A typical example of the contingent payment clause is:

Contractor agrees to pay the subcontractor thirty days after completion of the work, certification by the architect and payment by the owner or general contractor.

Courts Changing

In a substantial number of recent decisions by the courts of Massachusetts, Maryland, North Carolina, California and New York, contingent payment clauses have been interpreted to allow recovery by subcontractors even though the general contractor is not paid by the owner. These recent cases have construed contingent payment clauses as not barring a subcontractor’s right to recovery and that the payment by the owner is not a condition precedent to the subcontractor’s right for the payment after a reasonable length of time.

In other words, courts in recent cases have construed the contingent payment language as a procedural timing device to defer the subcontractor’s payment for a reasonable length of time, but typical contingent payment clauses do not ultimately bar the subcontractor’s right to recover from the general contractor.

In Georgia, the case law has construed contingency payment clause as a bar to the subcontractor receiving his money before the general receives money from the owner.

The dynamics of the law relating to contingent payment clauses in states outside of Georgia are moving rapidly toward the subcontractor’s position, upholding the subcontractor’s right to recover of payment after a reasonable time in spite of the lack of payment from the owner to the general contractor. The courts are particularly prone to allow the subcontractor to recover when the reason for the lack of payment to the general contractor from the owner is the general contractor’s own fault.

There is a strong thread that runs through the law that a party cannot benefit by his own fault, and that the general contractor should not be allowed to raise a contingent payment clause as a bar to payment of the subcontractor when the reason that the owner did not pay the general contractor was the general contractor’s own fault.