A Better Contract for Subs

The Subcontractors
New Contract Form—
A-401

If you’re a wall and ceiling contractor and you’ve felt from time to time that something oughta be done about the subcontracts that general contractors keep throwing at you, you can relax.

Something has been done—and it’s now available for you to use.

It’s the newest standard subcontract form published by the American Institute of Architects. Called the AIA’s A-401 document, it’s good news for all subcontractors looking for a bit of equity in the contract arrangement.

The A-401 has been a major undertaking between the AIA’s Documents Review Committee and representatives of various subcontracting groups, including the American Subcontractors Association.

The ASA, of which iaWCC/GDCI is a member, has been a moving force in the effort to bring consistency and fairness into the AIA’s official contract forms. Thomas J. Barfield, ASA’s national vice president was chairman of the subcontractors portion of the AIA Liaison Committee. Now, after two years and a long series of drafts, rewrites, and meetings the new A-401 has been finalized.

“The A-401 has long been respected as the outstanding agreement form in the industry,” Barfield explained. “With the latest changes, it can be considered a model document for all parties concerned.”

The important development in this new A-401 is the payment clause where A-401 and the A-201 (the contract between the general contractor and the architect on the same project) are now more consistent with each other.

A few years ago when the A-401 had been altered somewhat to address itself to subcontractor problems, the payment clause was still ineffective because of the inconsistency between the subcontractor’s payment clause and the one the general contractor signed.

The problem was aggravated because the A-401 subcontractor contract form contained these significant seven words as the first condition: “Unless otherwise provided in the contract documents . . .”

What followed those words read like a model payment arrangement. Unfortunately for the subcontractor, it was usually provided otherwise in the contract-specifically the A-201 — and the subcontractor was hung with that payment arrangement which pretty much left the general contractor to his own payment devices. Many subcontractors missed those key words—and the inequities continued.

Now this has ended.

The new A-401 has eliminated these words, and there is now a clearcut obligation on the part of the General Contractor to pay as long as the Subcontractor is not at fault. The new A-401 wording on payment is as follows:

“If the Architect fails to issue a certificate for payment or the Contractor does not receive payment for any cause not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, on demand, a progress payment computed as provided . . .” (Article 12.5).

Some of the key changes in the new subcontract form include:

Contract Documents (Article 1)

Up to this time, when the subcontractor’s contract referred to or included another document it was “made available for inspection” only. Now, the document referred (Continued on page 18)
to must be furnished to the sub upon his request so he may be apprised of his legal responsibilities.

Also, a General Contractor will no longer be able to automatically bind a Sub without first consulting with that sub. Any modifications or changes made after the execution of the agreement must have the Sub’s approval if the latter is to be bound.

**Progress Payments (Article 5)**

Two relatively important breakthroughs for subcontractor rights were scored in the changes of Article 5. These include payments upon substantial completion, and to payment of interest on late payments.

The 1978 subcontractor form provides for the Contractor to make application for payment when the Sub’s work is substantially completed and within 30 days of receiving the Certificate for Payment from the architect the Contractor “shall, to the full extent provided in the Contract Documents” make payment to the sub-less legitimate withholding.

Furthermore, regular progress payments and final payments must still be made by the Contractor within 3 days of receiving payment from the Owner.

The other breakthrough clause is one Subcontractors have long claimed as proper. That is, a given rate of interest may be paid from the date each payment is due. Space is provided in the contract form to fill in the rate of interest agreed upon. Should the blank not be filled in, the legal rate of interest at the place of the project will apply.

**Claims of the Subcontractor (Article 11.10.1)**

The language has been refined considerably in the section with the result that now a claim must be in the hands of the Contractor at least two working days preceding the
time when the Contractor must file his claim.

If the Sub is late in making his request, he will be subject to the same consequences to which the Contractor is bound.

Termination by the Contractor (Article 14.2)

No longer can a General Contractor virtually at will unload on a Subcontractor. Now, the Sub must receive written notice and be allowed seven days in which to “commence and continue correction of such default or neglect with diligence and promptness.” Failing, the Sub then receives another written notice and seven days later can be terminated by the Contractor who will finish the work by his own method.

Indemnification (Article 11.11)

Modification of the old “hold harmless” clause has now been made so that liability is limited to the extent to which damages or losses are caused by the Sub who can no longer be held responsible for 100% of the loss regardless.

Subcontractor’s Remedies (Article 11.12)

A Subcontractor, under A-401, always did have the right to stop work if not paid within seven days of the time payment was due and if he had also provided seven days written notice. Now, he may recover shutdown and start-up costs, significant considerations when weighing whether to take that step or not.

Claims by the Contractor (Article 12.5)

Strengthening of the liquidated damages clause will eliminate the readiness to hold the Subcontractor responsible for delays or causes arising outside the-scope of his subcontract or for acts by other subcontractors.

The new language emphasizes that the Sub can be assessed “only for his negligent acts and his failure to act in accordance with the terms of this Agreement.”

Services Provided by the Contractor (Article 12.2)

No longer is there a sort of gentleman’s agreement—usually observed better in the breach than in the break—that the General and the Sub will work together to schedule and perform work.

Under the new A-401 specific information must be supplied by the General as to the base project schedule and subsequent changes.

Also, this article obligates the General to provide suitable storage areas for the Sub’s material and equipment. If the General should move the storage facilities he likewise must reimburse the Sub’s resultant costs.