Those Flypaper Contract Clauses

Wall and Ceiling Contractors Should Read the Contracts Offered by Customers

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Too often subcontractors sign subcontract forms which are furnished them by general contractors without having any knowledge of the very serious legal implications of many of the subcontract clauses that give 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.

Subcontractors must read each subcontract carefully and completely to discover the legal pitfalls of such clauses. When confronted with an unfair or one-sided contract, a subcontractor should refuse to sign it and should insist on either substituting a subcontract form with neutral terms or modifying the general contractor’s subcontract in order to eliminate the oppressive and objectionable portions.

Through education programs sponsored by the chapters of the American Subcontractors Association and other specialty subcontractor trade associations, many subcontractors have become aware of the practical problems and legal pitfalls of subcontract clauses and are negotiating changes in the clauses which are unduly harsh to the subcontractors.

In many cases subcontractors substitute a more neutral standard subcontract form sponsored by the American Institute of Architects or the standard subcontract form sponsored by the Associated General Contractors of America and the Associated Specialty Contractors, Inc., which will be referred to as the AGC subcontract form. If a subcontractor is presented with a loaded subcontract form which is devised to protect the interests of the general contractor, the subcontractor should retype the special contract terms on an AIA or AGC standard form subcontract and present it to the general contractor for execution of this neutral standard subcontract form.

Subcontractors should become conscious of the problem areas in subcontracts and negotiate with the general contractors to strike out or modify the clauses which give the general contractor unfair advantage. In many cases all the subcontractor has to do is merely ask the general contractor to modify such loaded clauses.

When subcontractors point out the objectionable clauses to the general contractors, the general contractors often state, “I don’t blame you; I wouldn’t sign that either.”

Forms Battle Will Continue

The construction industry has changed greatly from the time when the general contractor performed most of the construction work as a master builder who directly hired employees of the various construction

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crafts to do the work and directly purchased the materials. In the modern-day construction industry the general contractor performs almost no work directly with his own forces but subcontracts practically all the work to specialty subcontractors.

These subcontractors actually perform the overwhelming majority of the construction work with their own forces and purchase most of the materials necessary. Many general contractors obtain a general contract and then merely manage the contract by brokering practically all the work to subcontractors.

Subcontractors are not only faced with harsh and strict provisions imposed on them by the terms of the general contract, but also they are often faced with additional harsh provisions in loaded subcontract forms, which give the general contractors unnecessary legal and practical advantages. These subcontract forms have typically been intentionally drafted by the general contractors’ attorneys to obtain maximum legal and practical advantages over the subcontractors, and the subcontractors may fail to fully appreciate the legal implications and consequences of much of the language.

These loaded subcontract forms have become increasingly more lengthy and more complicated, and they are deliberately devised by attorneys to protect the interests of the general contractors at the expense of the subcontractors.

Such subcontract forms drafted for 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 to hang the subcontractor without notice. And after it is 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 the scaffolding.

As an alternative to the loaded subcontract forms devised by general contractors, subcontractors should substitute more neutral standard subcontract forms such as those sponsored by the American Institute of Architects and the Associated General Contractors of America. A standard form sponsored by the Associated General Contractors was developed in conjunction with several subcontractors associations in 1966, and this more or less neutral form has come into wide use by general contractors and subcontractors.

In 1967, the American Institute of Architects followed very closely the terms and conditions of the AGC

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standard subcontract form in the AIA standard subcontract form agreement (AIA Document A401). In 1972, the author had the pleasure of negotiating certain additional changes in the AIA standard subcontract form which strengthened some of the subcontract terms and conditions for the benefit of the subcontractors. However, both the AIA and the AGC standard subcontract forms contain similar neutral provisions.

It is a sound approach for subcontractors to substitute either the AIA or the AGC standard subcontract form in lieu of any subcontract forms devised by individual general contractors.

If a subcontractor is presented with a subcontract form that is obviously devised to protect the interest of the general contractor, then the subcontractor should retype the special contract terms on either an AIA or an AGC standard subcontract form and present it to the general contractor for execution as a neutral agreement. General contractors have readily accepted these two neutral forms, and they have come into wide national use.

Copies of the AIA subcontract form can be obtained either from AIA national headquarters or from virtually any blueprint company for a very minor charge. Copies of the AGC subcontract form may be obtained from the national or local chapters of Associated General Contractors of America or from the national or many of the local chapters of the American Subcontractors Association or many other construction specialty associations.

When a subcontractor is presented with an obviously loaded subcontract form, he could call the general contractor and say, “How about substituting the American Institute of Architects Standard Subcontract Form A401?”

However, when orally approached, the general contractor will initially be inclined to say no because he may not be familiar with the terms of this standard subcontract form or know how to fill out the form, and he may feel that consideration of this standard subcontract form would require substantial legal review by his lawyer. So the general contractor is initially inclined to simply say no to an oral proposal to substitute a more neutral subcontract form.

The wise subcontractor takes another more practical approach by filling out the terms and conditions of an AIA Standard Subcontract Form A401 and sending filled-out copies to the general contractor with a polite letter proposing to substitute the form in lieu of the original obviously loaded subcontract form. The
subcontractor might sign the filled-out neutral form or await the general contractor’s signature before signing and request that the general contractor sign all copies and return one copy to the subcontractor.

More often than not, the subcontract form is returned in the mail signed by the general contractor without comment. The difference in using this last approach is that the general contractor can readily see that the filled-out Standard Subcontract Form A401 is more or less neutral and protects the general contractor and subcontractor equally. All the general contractor then has to do to the filled-out standard subcontract form to have a legally binding subcontract is sign his name.

Alternate Form Can Be Offered

However, when the general contractor responds to the subcontractor saying that he cannot accept the AIA Standard Subcontract Form A401, the subcontractor is in an excellent position to propose the AGC standard subcontract form as a compromise.

More often than not, the AGC subcontract form is a very acceptable compromise with both the general contractor and the subcontractor. The AGC subcontract form is more readily accepted by general contractors than the AIA subcontract form because the AGC’s form is sponsored and approved by the general contractor’s own national association.

In any event, either the AIA or the AGC standard subcontract form contains terms that protect both the general contractor and the subcontractor, and both forms are certainly more neutral in respect to the subcontractors than the loaded subcontract forms devised by the general contractors.

Many subcontractors also include stipulations in their bids that the subcontractor’s bid be conditioned upon use of an AIA or AGC standard subcontract form between the parties if their bid is accepted. If the subcontractor’s bid is accepted, the use of the stipulated standard form subcontract is then legally required to be used by the general contractor.

Many subcontractors are also drafting either the AIA or the AGC subcontract form and initially sending the form to the general contractor after the general contractor has indicated that the subcontractor’s bid has been accepted.

A subcontractor should not be complacent and blindly sign the general contractor’s form, which is obviously loaded against the subcontractor. If a subcontractor signs a loaded subcontract form, he may need the services of a preacher rather than a lawyer to pray that nothing happens on the construction job.