One of the nice things about construction contracts is that everybody has to read the language — all of it — and then, often as not, read other contracts as well.

Take the Subcontractor form for the American Institute of Architects as an example.

For years the first seven words on the payment clause were the heavy hitters for the average subcontractor. They read “Unless otherwise provided in the contract documents . . .”

Those seven words could — and usually did — change completely all of the superb goodies which were contained in the subcontract clause. The clause itself assured the sub that he would receive his money from the general contractor who, if he did not pay promptly, would be subject to dire consequences.

As a subcontractor you should still be aware of such phrases. And the AIA Form A401, called, “SUB-CONTRACT: Standard Form of Agreement Between Contractor and Subcontractor,” contains the same seven words in the payment clause 12.4.1.

What this phrase really means is that the payment obligations are somewhere else in the contract documents, probably in the A201 which is the general conditions statement between the owner and the general contractor for the Contract for Construction.

This payment clause is but one reason why it’s vital to read thoroughly any contract you sign. There are other hooks to catch the unwary — and some hooks aren’t meant to be devious at all.

Take the matter of authorizations for extra or changed work.

Must Give Written Notice

Just about every construction contract in existence contains a requirement that the subcontractor give written notice on any item he feels represents a change or extra. Usually, failure to do so within a specified time prohibits a claim for additional compensation under the contract.

To avoid this kind of a problem — especially because the recognition of such a problem involves the job site and the management people assigned by the sub — detailed instructions are necessary.

Foremen, superintendents, and project managers should be told of what notices are required under the terms of a contract for a specific job. These jobsite personnel must be instructed as to the correct contractual method of reporting any changes, extras, and delays.

One specialty contractor in Oklahoma made the mistake of not filling in his foremen on change order procedures in a hospital job in Oklahoma. By the time he caught up on this job, he found himself obligated for $78,000 in change orders — every single one of which had been accepted verbally by the foreman.

He immediately got a new foreman, turned the job over to him —
and the latter ran up $33,000 more in verbal change orders. That’s when the sub went to court to recover, shortly after he informed the new foreman that any change orders must be signed, must be authorized, etc. etc.

By implementing a methodical system which consistently recognizes circumstances that require written notification to the owner, subcontractors won’t have to absorb the cost of changes due to procedural technicalities.

Notice Might Be Elsewhere

Remember, too, that the notice provision which a sub must follow might not be in his subcontract. Like the payment clause, the real substance may also be in the General Conditions. These General Conditions may be a part of the specifications and often are incorporated into and made a part of the subcontract by reference.

You’ll generally find the “inclusion clause” right up front under the “Contracts Documents” section.

Here’s how the A401 reads: The Contract Documents for the Subcontract consist of this Agreement and any Exhibits, attached hereto, the Agreement between the Owner and Contractor dated as of the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Conditions), the Drawings, the Specifications, all Addenda issued prior to and all Modifications issued after execution of the Agreement between the Owner and Contractor and agreed upon by the parties to this Subcontract. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein."

Needless to say, there is more involved in a subcontract than the single piece of paper upon which the sub representative affixes his signature.

Obviously, therefore, in preparing supervisory personnel for commencement of work on a new project, all documents must be considered. In each one of these various documents — subcontract, general contract, general conditions, supplementary conditions, plans, specs — a check must be made where notice would be required.

When a subcontract requires a change order to be issued in writing by the general contractor prior to the performance of the work as changed, the sub involved should be careful to follow the contract procedures of obtaining an appropriate written order. This should come from the general contractor or his authorized representative prior to the performance of the changed work in order to avoid problems in subsequently obtaining payment for the performance of changed work.

Reality does rear its problem-causing head. Because of a personal situation, a sub might really want to go along on a change order following a verbal request. In these cases, he might not wish to adhere firmly to the contractual procedure.

In these cases — although following the contract is still the best alternative — the sub might go ahead with the work after sending the general contractor an “unless you stop me . . .” letter.

This letter, drafted by a competent attorney . . . generally tells the general contractor that “Pursuant to your verbal instructions issued to me on (date), and unless notified by (date) to the contrary, ABM Subcontractor will . . .”

In many cases, this fulfills the obligations of a legal contract and can be enforced when it comes time for collection.

Be Careful On Authorization

In no cases, though, should field personnel be authorized to do this.
The sub or his designated representative should be the one to authorize work that is not in conformance with the procedure set out in the contract. It’s just too easy for the general contractor later to dispute the fair value of the work performed, or he may even reject the Claim entirely because it was not authorized in advance in writing by the proper person . . . or a host of other reasons.

One attractive tactic to guard against unnecessary problems in changes is to supply field supervision with extra work authorization forms with instructions that their field personnel should not perform any extra or changed work without obtaining the signature of an authorized representative of the party ordering the extra or changed work.

There are other times when a subcontractor receives oral instructions from a representative whom the contractor is not certain has the appropriate authority. Here, it’s just about axiomatic that the subcontractor quickly get off his “unless you stop me . . .” letter.

The sub should write the general or the owner reporting the field instructions and stating that these instructions require extra work for which the sub, if required to perform, will claim an extra.

This gives the general or owner the responsibility to respond, but more importantly, the confirming letter protects the sub’s right to relief. Written confirmations avoid disputes as to the issuance and scope of the instructions.

Notices should also be given for extensions of time needed to perform changed work within the specific time limit for completion included in the contract. When a sub runs past this limit he can be liable for liquidated delay damages.

**Time Extension Claim Important**

When an owner or general verbally orders a change or extra, which will delay completion of the project, the sub should claim an extension of time within the time limit after he receives the order.

One letter containing two statements should be sent to the owner or general stating:

1. The sub has been ordered to do extra work (state the work ordered) for which there will be extra costs — and a claim for extra costs will be forwarded later, and
2. The extra work may delay completion, and the sub claims an extension of time to cover the extra work.

Construction firms are extremely vulnerable to liquidated damages because the money can be taken from his progress payments or retention. So, when a project is delayed, two claims are required — one for the extension of time and one for the extra cost.

A common error among subs who perform extra work is to claim only an adjustment of the contract price and neglect to claim an extension of time.

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**iaWCC/GDCI’s Jerry Wykoff Wins Management Award**

Jerry Wykoff, center, editor/publisher of iaWCC/GDCI’s magazine, Construction Dimensions, was named one of the six most outstanding professional association executives at the mid-year meeting of the American Society of Association Executives in Washington, D.C., last month. Presenting the annual Professional Performance award were William Luca, left, awards chairman, and Sam Goldsmith, ASAE Board Chairman and chief executive officer of the Aluminum Association. Wykoff as one of the top professionals in the industry joins Joe M. Baker, Jr., iaWCC/GDCI’s Executive Vice President, who last year earned ASAEs Key Award as one of the top six association heads in the industry. No other association in the world has two such top management award winners.