When You Modify a Subcontract, BE CAREFUL

AWCI’s General Counsel Provides Some Much Needed Advice For Subcontractors When Faced With the Need to Modify a Subcontract Form

In previous issues we have explored the various strategies used in developing fair payment terms, and methods of documenting subcontract forms. Once strategies for obtaining equitable payment terms have been developed and specific subcontract provisions have been identified, any modifications made to the subcontract document must be worded as clearly as possible.

The following examples of payment terms are typical of the language contained in forms developed by contractors. These are neither better nor worse than most contractor written payment provisions. The suggested modifications (appearing in italics) represent changes used by ASA members. There is obviously no guarantee that these are optimum modifications of contractor language. In any event, consultation with your attorney is highly recommended.

Example 1

Upon receipt of payment from the Owner with respect to the work performed by the Subcontractor hereunder, such receipt of payment from the Owner by the Contractor being a condition precedent to the obligation of the Contractor to make payments to the Subcontractor hereunder, the Contractor agrees to pay the Subcontractor for the performance of his work the sum of subject to additions or deductions, as herein provided, and such sum shall be paid in current funds by the Contractor to the Subcontractor on certificates as called for in the contract between the Contractor and the Owner on the 25th day of each month; in monthly payments on account, equal to 90 percent of the value under this Agreement of the work actually erected in the building during the preceding month, provided that the Subcontractor furnishes to the Contractor a written requisition not later than the 25th day of the month, it being understood that the final payment shall be made to the Subcontractor, after payment has been received from the Owner within 30 days after this Agreement has been completely performed and all Contract Documents have been returned by the Subcontractor.”

“Our acceptance of the progress payment terms is conditioned on the following understanding:
—Payment by the owner is a condition precedent to the obligation of the Contractor to make payments only with respect to monies withheld by the owner due to some deficiency by the Subcontractor.
—Monthly progress payments are to include the value of material delivered to the job site or approved off site storage.
—The 10% retainage is the maximum percentage to the withheld and shall not exceed the percent of retainage held back by the Owner in his payments to the Contractor.”

Example 2

“Progress payment for work performed during any calendar month shall be payable within 10 days after payment therefore is received by the first party from the owner, provided that the second party has delivered to
“Once strategies for obtaining equitable payment terms have been developed and specific subcontract provisions have been identified, any modification made to the subcontract document must be worded as clearly as possible.”

the first party in proper triplicate form a requisition by the twenty-fifth day of the month during which the work covered was done and which shall be audited and approved by the first party. The estimate of the architect as to the value of the work performed shall be binding on the second party for the purpose of computing the value of the work performed by him at such ratio to the contract price herein as the value so fixed bears to the price upon which the architect based his computation. The balance shall be payable thirty days after the general contract is completed and accepted and the last payment received from the owner, and all drawings, plans and specifications returned to the first party, but in the event any portion of such balance is retained by the owner as guarantee covering the work involved herein, the first party may retain from the second party an equivalent amount until payment thereof is released by the owner, it being understood that the second party shall guarantee the labor and material installed by him, for such period and to the same extent as the first party is required by the general contract to guarantee the same. No payment to be made until the second party shall have done sufficient work to fully equal in value the amount of said payment.”

“Our acceptance of the progress payment terms is conditioned on the following understandings:
—Monthly progress payments are to include the value of material delivered as well as for work performed within 30 days of billing.
—Payments to the second party shall not be conditioned on owner payments to first party except for money withheld by owner due to some deficiency of the second party.
—Retainage is not to exceed 10% and be no higher percentage than the percent withheld by the owner in his payments to the first party.
—Final payment is due for payment no later than 60 days after substantial completion of work by second
“On or before the 20th day of each month, the Subcontractor shall submit in quadruplicate, to the Construction Manager, a written requisition for payment, which shall set forth the value of the Work, performed by the Subcontractor during the period from the 20th of the preceding month to the 20th of the current month.”

“Our acceptance of the progress payment terms is conditioned on the following understandings:
—Monthly progress payments are to include the value of material delivered as well as for work performed.
—Construction Manager is to pay subcontractor on or before the last day of the month following the month of billing by the subcontractor. Payments to subcontractor and rights of suit under payment bond are not contingent on owner payments to Construction Manager except for money withheld by owner due to deficiency by subcontractor.
—Retainage withheld by Construction Manager is not to exceed the percent withheld by the owner in his payments to the Construction Manager.
—Final payment is to be made to subcontractor within 30 days after substantial completion of subcontractor’s work and submission of required documents except that the reasonable value of uncompleted punch list work may be retained by Construction Manager pending final completion.”

Example 4

“It is understood that the total amount to be paid hereunder as specified above represents the basic price to which has been added by separate computation all sales or use taxes to the extent that same may be applicable. The subcontractor is to be paid within ten days after the contractor receives payment from the owner and in the same proportion as payments are made to the contractor by the owner, provided, however, whenever required by the General Contractor, prior to the making of any payment the subcontractor shall submit evidence to the extent requested that satisfies the General Contractor that all payrolls, material bills, and other indebtedness connected with the work have been paid in full.”

“Our acceptance of the progress payment terms is conditioned on the following understandings:
—Payments are to be made to the subcontractor each month including the value of material delivered as well as installed.
—Retainage is not to exceed 10% and in no event be a higher percentage than the percent withheld by the owner in his payments to the General Contractor.
—Payments to subcontractor are not to be contingent on owner payments to General Contractor except for monies withheld by owner due to deficiency by subcontractor.
—Final payment to subcontractor is to be due and payable within 30 days after substantial completion of subcontract less the reasonable value of uncompleted punch list work.”