Construction Dimensions asked a random sampling of contractors who are members of The Association of the Wall and Ceiling Industries—International about which provisions of a subcontract bother them the most. Wall and ceiling contractors listed a variety of the most dreaded contract provisions that are thrown at them by general contractors.

Penalty clauses, “pay-when-paid” provisions, hold-harmless clauses and lien right waivers all made the short list of the most bothersome contract items. Many AWCI members also pointed out a disturbing trend—general contractors are growing far less willing to accept their fair share of risk on a project.

Indemnification Clauses

Many subcontractors say indemnification or hold-harmless clauses, designed to shift the risk of injuries or losses, are the portion they dislike the most.

Steve Winn, a contract administrator for Marek Brothers of Houston, objects to many indemnification clauses, as well as the larger concept of shifting the risk from the general contractor and others onto the subcontractor. Winn believes that general contractors should accept some risk on the job. After all, he says, the contractor makes the decision of which subcontractors to hire. Subcontractors simply should not have to bear the risk of an unsafe subcontractor who may have been hired strictly because of their bottom line, he says.

Winn adds that he normally approaches a hold-harmless clause with a red pen. “If I can’t eliminate it, then I try to limit it to the responsibility for negligence on our part.” He says he likes to stick closely to contract language developed by the American Institute of Architects, which holds the owner, architect and contractor harmless for claims, damages, losses and expenses caused in whole or in part by the negligence of the subcontractor.

Kenneth Baker of Southwest Commercial Interiors, LLC, Dallas, sees indemnification in much the same way. “If someone else is responsible for an accident, we should not have to assume the liability,” he says. “I try to scratch it out.”

Winn agrees that lien rights may serve as powerful leverage for wall and ceiling contractors. “The threat of a lien can be one of the strongest motivators available to expedite your payment,” he says. Winn also advises wall and ceiling contractors to review and clearly understand the lien law of their state. Winn suggests considering how lien rights may be affected by “pay-if-paid” or “paid when paid” clauses. After all, he says, if a subcontractor is not entitled to payment, then an affidavit claiming a lien for money cannot be filed.

Pay-When-Paid Clauses

Another bone of contention among wall and ceiling contractors revolves
around “pay-when-paid” or “pay-if-paid” clauses.

Jerry Turano of Turano Plastering, Inc., Fort Myers, Fla., says that pay-if-paid contingencies are the contract item that bothers him the most.

“I can’t imagine how you could get away with that in any other business,” Turano says. “I hate that the responsibility rests with us.”

Baker says payment language is usually difficult to resolve because most general contractors will refuse to strike it. “More than likely a general contractor probably won’t work with an owner if he thinks they are financially questionable,” Baker says. “But you still have to do some homework to find out about the owner and whether the money is there to complete the project. If not, I wouldn’t sign the contract.”

Baker worries less about completing public projects since, he says, the money is normally available to complete them.

Winn says of payment contingencies that if he can’t get the language stricken, then at least he goes for a modification. He believes that the standard language in form AIA-A401 offers needed protection for wall and ceiling contractors. The form says the contractor will pay the subcontractor within three working days after payment is received from the owner. It adds that if the contractor does not receive payment through no fault of the subcontractor, then the subcontractor must be paid.

Winn says there are less desirable forms of contingencies that general contractors may try to build into a contract.

One form might say, “A contractor will pay the subcontractor within ‘X’ days after the contractor receives payment from the owner.” Worse yet, the contract may stipulate that the subcontractor agrees that the owner’s payment to the contractor is a precedent to the contractor’s obligation to pay the subcontractor.

Or even worse, Winn says, language may specify that the subcontractor...
accepts the risk of non-payment if the contractor is not paid for any reason.

In the end, Winn suggests, “If you can't simply strike the contingent pay clause, then at least shorten the time for payment to five or 10 days, and amend the risk of the nonpayment clause to read, ‘Subcontractor accepts the risk of non-payment only if the contractor is not paid due to the fault of subcontractor.’”

“I try not to let our right to get paid depend on the performance of someone beyond our company’s control,” he says.

**Contractor as an Insured**

Winn says many contractors shift the loss risk on a project by requiring subcontractors to include the contractor as an additional insured on a liability policy.

Stephen Tyler of Tyler Taping, Kirkland, Wash., says that adding the contractor as an additional insured is the contract item that irks him the most. “Insurance agents will tell you these requirements are not as bad as they sound,” Tyler says. However, he adds, while some requirements may be stricken from the contract, the insurance requirement protecting the general contractor from liability is not usually one of the items that is easily removed.

The problem, Wurn says, is that many subcontractors may be insured for too low a limit that doesn’t adequately cover them for a workplace injury. He advises contractors to check with their insurance agent to make sure adequate limits and overall coverage have been obtained.

**Penalty Clauses**

Arnold Wurst of Region South Enterprises, Maitland, Fla., says the most important item to consider is not what’s in the contract, but who is behind it. “As long as the contractor is straight, then there should not be a problem with the contract,” Wurst says.

After weighing a contractor’s reputation, Wurst zeroes in on the penalty clause of a contract. “If it’s not favorable, I would walk away from it,” he says.

Wurst believes it’s important to keep an
eye on a contract schedule and completion dates, as well as the penalty clause. He also recommends that if a project appears headed for trouble, that documenting your company’s activities may be a help in the long run.

“If there’s a steep penalty clause, you bet-}

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Forms of Indemnity: Lowering Your Liability

The broad form of indemnity includes losses due to

- Other party’s sole negligence.
- Other party’s partial negligence.
- Subcontractor’s own negligence.

The intermediate form of indemnity includes losses due to

- Other party’s partial negligence.
- Subcontractor’s own negligence.

The limited form of indemnity includes losses due to

- Subcontractor’s own negligence.

Source: ASA

Cleanup Charm

Tyler says that it’s more efficient for his firm to clean up once every several days rather than every day. But, he says, if it comes down to being assessed for clean up, he avoids those charges by instructing his workers to clean up every day.

Winn says clean-up charges bother him, too and that contractors often like to add these charges at the end of a project, when there’s little recourse but to accept them.

Winn tries to minimize the damage here, by specifying that his firm requires 24 hours written notice of an assessment for clean-up charges. He also specifies that these charges must be billed within 30 days.

Baird says one general contractor he worked with tried to add charges of 25 cents a day for the use of a telephone and 50 cents a day for a portable toilet. “I couldn’t believe it,” Baird says, laughing, “I told him I’d install my own.”

About the Author

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