



FEATURE

Well-written, Clearly-defined Contracts Make for Successful Outcomes

by *Walter J. Adams, Berkley Alliance Managers*

Once again, the American economy is in flux. We're all now in a wait-and-see game with a virus that is endangering the wellbeing of both individuals and businesses worldwide.

For some contractors, the projects scheduled before COVID-19 will move forward without delay. Others will be placed on hold or cancelled which will jeopardize the incomes and livelihoods of our nation's contractors, subcontractors, engineers and architects.

As a result, the written contracts agreed upon between all parties have never been more important. Given the unpredictability shadowing the entire construction industry, plus state and federal regulations and mandates changing daily, every detail of every project should be clearly defined. Agreements that carefully state the risks, roles, responsibilities and rights of every participant, including subcontractors, are essential for ensuring successful, profitable outcomes during the best of times, let alone when circumstances are uncertain at best.

It's All in the Details

In order to avoid discrepancies, primes and their subcontractors should consider the standard form contracts published by reputable and credible organizations like the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC). These forms are carefully integrated, cross-referenced and coordinated with other agreements to provide

basic form agreements that outline the parameters of most projects. However, it must be remembered that even these documents often require the thorough review of industry experts as well as the possible modification of terms and conditions made under the guidance of qualified professionals.

In addition, when working with non-standard agreements, always make sure subconsulting agreements are consistent with the wording of other contracts outlining specific project responsibilities, services and deliverables. And, regardless of the relationship with the prime, subcontractors should never start work without a signed, written contract or interim agreement.

In fact, here are some of the terms and conditions that subcontractors should consider before entering into their next contractual agreement:

The Scope of Services

All of the services performed by the subcontractor during the scope of the project should be clearly-defined within the agreement. This includes the basic fees for these activities as well as the costs for completing additional mutually-agreed services.

Scheduling

A detailed schedule of services and deliverables is essential for ensuring positive, mutually-agreed upon outcomes. The ability to flexibly accommodate new circumstances and requests should also be carefully worded and added into the contract with as much forethought as possible.

Billing and Payment

Billing and payment issues are the sources of major disputes. All agreements should define payment schedules, billing cycles, the invoice approval and payment process, due dates, and interest and penalties in the event of late payments.

Dispute Resolution

All agreements should include dispute resolution terms. This includes spelling out how the dispute will be resolved by the parties as well as within the courts. Clauses should also be written carefully to define the terms of termination and the subsequent financial and liability responsibilities.

Indemnities Should be Mutual and Based on Comparative Fault

In other words, the prime and the subconsultant should agree that each party will reimburse the other party "to the extent that each party is responsible for such damages, liabilities, or costs to the extent caused by such party's negligent errors, omissions," or breach of the agreement.

Legal Action Time Limits

The length of time by which a claim can be filed against the subcontractor should be clearly defined in the contractual agreement. Three-to five-year time periods are typical for most projects.

Furthermore, when in doubt seek the consult of reputable, certified

professionals that possess in-depth construction industry experience as well as a deep knowledge of your firm's specific services and specialties. Unfortunately, there's often no going back after the agreement is signed and the challenges start to mount.

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About the Author



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Contracts in a Nutshell

Select prime consultants with care

When you contract with a prime contractor, that firm becomes your "client." And just as primes should prudently select their clients and projects, subcontractors also need to answer some key questions about a prospective prime contractor:

- What is the prime's reputation for providing high quality projects and technical expertise?
- Is the prime known for fair treatment of its subcontractors?
- Does the prime have the necessary technical qualifications, staff resources and leadership to successfully complete the project?
- Is the prime financially stable? Does the firm pay its bills on time?
- Does the prime have a good relationship with the client?
- Does the prime communicate openly and frequently?

Find out as much as you can about the project and the owner

Your contract may be with the prime, but it's critical for you to understand key factors that will likely impact you and your ability to be successful:

- Does the owner have experience with this type of project?
- Are the owner's project requirements, goals and expectations realistic and clearly defined?

- Does the owner develop quality projects?
- Is the owner financially viable?
- How is the project being funded?
- Does the owner have a reputation for being litigious?
- How was the prime contractor be selected?

Billing and payment terms

- When should you invoice and how soon can you expect to be paid?
- Will the prime require a pay-when-paid or even a pay-if-paid arrangement?
- What happens if the project is delayed?
- What is your recourse if the prime doesn't pay you on time...or at all?

Review the related agreements

Obtain and review other contract documents referenced by your subconsulting agreement—the owner-prime agreement in particular. The terms should be unambiguous, consistent and not written to pass along the prime's risks or responsibilities onto subcontractors.

Communicate and document

Engage in ongoing communication with the prime and other project team members, as appropriate. Seek and give continuous feedback. Have a plan to memorialize in writing anything that pertains to the quality, schedule, or cost of a project. Retain those records in a safe place.

Be a team player

Cultivate good relationships with the prime and other subconsultants. Foster a collaborative, problem-solving approach that facilitates common goals.

Lean into problems

If you run into trouble, if you're not going to meet a deadline or if you become aware of an issue on the project, advise the prime as soon as possible (and your insurer, if the situation could evolve into a claim), so you can work together to resolve it. If a problem related to your services becomes a dispute, vow to actively participate in the defense of your professional actions. If you stand with the prime in tough times, the more likely the prime will want to work with you again.

Use a checklist to review subconsultant agreement terms and conditions Key areas should address the project's:

- Flow-down of obligations and rights of the owner-prime agreement
- BIM, CAD, digital practice protocols, if any
- Schedule
- Compensation, payment terms
- Insurance requirements
- Dispute resolution
- Suspension and termination
- Waiver of consequential damages