



Setting the Table for Successful Subcontract Negotiations

Presented by:

Daniel F. McLennon

June 9, 2020

SMITHCURRIE



About Your Presenter



DAN MCLENNON

415.394.6688
dfmclennon@smithcurrie.com

- Partner of the national construction law firm Smith, Currie & Hancock, LLP
- Over 30 years' experience as Counsel to the Construction Industry
- Represents owners, developers, general, subcontractors, suppliers and sureties
- Drafts, reviews, and negotiates contracts
- Resolves construction disputes of all kinds through work-outs, mediations, arbitrations, and lawsuits
- Makes insurance companies live up to their promises to contractors
- Serves as arbitrator and mediator for the courts of San Francisco and Marin Counties
- Writes and speaks for many trade associations, including the American Subcontractors Association of California, American Subcontractors Association, Bay Area Chapter, Associated General Contractors, National Association for the Remodeling Industry, and Marin Builders Association



Overall Peer Rating
5 out of 5

AV® Preeminent™
5.0 out of 5



Topics for Today

- Contract formation and impact of bid conditions
- Power of bid conditions in public works
- Power of bid conditions in private works
- Sample bid conditions discussed today are found in:
 - ASA Subcontractor Bid Proposal, including conditions of the bid proposal (2017) ("BP")
[Available to all ASA members on ASA's website <https://www.asaonline.com/>]
 - ASA Subcontract Addendum (2017) ("SA") *[Available to all ASA members on ASA's website <https://www.asaonline.com/>]*



Basics of Contracting with California Extra Rules for Public Works

- Contract = Offer + Acceptance + Consideration
- Bid = **OFFER**: Bid recipient has power to accept.
 - Sub bids “per plans and specs”
 - Specs include GC’s worst subcontract form
- Subcontract’s mutual promises = **CONSIDERATION**
- GC says “I accept” = **ACCEPTANCE*** =



CONTRACT FORMED

*Listing in successful bid is not “acceptance” in California, but does create certain statutory rights to perform work.



Basics of Contracting Considering California Listing Requirements

- If your bid is subject to certain conditions, then GC's sending its form subcontract is a "counter-offer," not an acceptance!
 - Bids should say "acceptance is expressly limited to the terms of this offer"
- In California, if you refuse to sign GC's form subcontract after conditioning your bid, you have not refused to sign a subcontract for purposes of the listing/substitution laws. (*Flintco Pacific, Inc. v. TEC Management Consultants, Inc.* (2016) 1 Cal. App. 5th 727.)

Public Works

“Non-Negotiable” Contracts?



Public Works Contracts

- Subcontract form is determined by Entity or GC
- Owner's subcontract = Non-negotiable
 - *But*, these are negotiable:
 - Price
 - Scope/Exclusions
 - Where scope ambiguous
 - Clarify with RFI?
 - Plan for change order?



Public Works Contracts

- Beware issuing same bid to multiple GCs.
 - If Owner does not specify subcontract form, different GCs = different terms.
- If GC determines subcontract, negotiation possible.
 - Condition bid on own term sheet.
 - E.g., **ASA SUBCONTRACTOR BID PROPOSAL (2017)**



Listing Requirements on California Public Works – 1/2 of 1% Rule

- Prime must list subcontractors for scope of 0.5%.
 - A prime contractor may not, other than in the performance of 'change orders' causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of 1/2 of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.



Listing Requirements on California Public Works – Self-Performed Work

- Prime contractor must self-perform scopes of 0.5% where no subcontractor is listed.



Listing Requirements on California Public Works – Duty to Use Listed

- Prime by statute must use listed subcontractor.
 - Unless one of nine statutory enumerated circumstances exist.
- This gives subcontractors leverage, when bid is properly conditioned!



Substitution in California Public Works – Duty to Use Listed

- Listed subcontractor has statutory right to perform the subcontract unless statutory grounds for a valid substitution exist.
- Unlawful removal or substitution is unenforceable.
- The listed subcontractor may recover the benefit of the bargain he would have realized.



Grounds for Substitution in California Public Works

- 1) Refuse to execute a written contract for the *scope of work specified* in the subcontractor's bid and at the *price specified* in the subcontractor's bid.
- 2) Listed subcontractor becomes insolvent or bankrupt.
- 3) Listed subcontractor fails or refuses to perform his or her subcontract.
- 4) Listed subcontractor fails or refuses to meet the bond requirements. [untested if excluded in bid]
- 5) Listed as the result of an inadvertent clerical error.
- 6) Listed subcontractor is not licensed pursuant to the Contractors License Law.
- 7) Awarding authority determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.
- 8) Listed subcontractor is ineligible to work on a public works project.
- 9) Awarding authority determines that a listed subcontractor is not a responsible contractor.



Need to Oppose Substitution Request

- **Warning:** If substitution is allowed, it constitutes a finding of “breach of contract” which binds later tribunal.
 - Failure to oppose Substitution Request may bar later defense by subcontractor seeking to deny claim for damages by general contractor for extra costs.
- Thus, need to:
 - Object to substitution *or*
 - Reach a deal that allows substitution, but bars later damages.



Public Bid Points to Remember

- Condition bid and make acceptance *expressly conditioned* on acceptance of terms of bid.
- Check that Contract *includes* items referred to in bid and/or *incorporates* bid into contract with language that in the event of inconsistent terms bid supersedes Subcontract.
- Refusing to sign contract **that does not match bid is not** refusal to sign a subcontract.
- *Respond to Request for Substitution in writing* to Public Entity, or failure to object waives later defense to breach of contract claim by general contractor for alleged additional costs to complete project.



Private Works

“Negotiable” Contracts



"Negotiable" Contracts

- Set up Negotiations – Bid Conditions
 - *Your bid is based on these conditions.*
 - *A contractor that refuses conditions should pay for the additional risk to bidder.*



ASA Subcontractor Bid Proposal (2017)

"Anti-Bid Peddling" Clause



"Subcontractor has devoted time, money, and resources toward preparing this bid in exchange for Customer's express agreement that the parties shall have a binding contract consistent with the terms of this bid proposal and Customer unconditionally and irrevocably accepts this bid proposal if it (A) in any way uses or relies on the bid proposal or information therein to prepare "Customer's bid" for the project at issue and Customer is awarded a contract for the work; or (B) divulges the bid or any information therein to others competing with Subcontractor for the work."

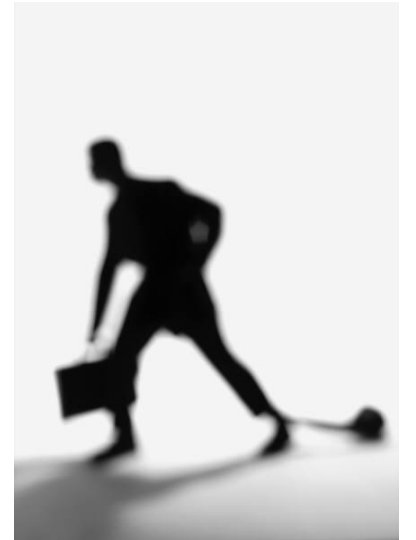
"BP" = ASA Subcontract Bid Proposal (2017) §1



The "Trap" Clause

"Asking or Allowing the Subcontractor to commence work or make preparations for work will constitute acceptance by Customer of this bid proposal. Subcontractor and Customer will execute a ConsensusDOCS 750 (2016) subcontract form to memorialize their agreement, supplemented and modified as provided by this bid proposal which shall be incorporated by reference into the final subcontract. In the event of any conflict between the terms of this bid proposal and any other documents stating terms of the final subcontract, this bid proposal shall govern."

ASA Subcontract Bid Proposal (2017) §2



Financing Conditions

- Owner Financials

- The subcontract is subject to approval of owner's credit by Subcontractor
- Subcontractor shall be provided the following information:
 - Legal description of the property
 - The name, address and representative of the project owner
 - Evidence of adequate owner project financing



ASA Subcontract Addendum ("**SA**") §4 *Financial Information* (2017)

Financing Conditions

- A copy of GC's payment bond for the project, if any
- Notice of any material changes in the project owner's identity or financial arrangements
- Subcontractor shall not be obligated to commence or continue Subcontract Work absent adequate assurances of payment.

ASA Subcontract Addendum §4



Price Conditions



- Price adjustment if 5% materials increase before start (BP §3)
- Payment and equitable price adjustments during contract term (BP §6) – *need to add pandemic clause [Available on ASA website]*

Changes in Schedule	Acceleration
Owner Delays	Third Party Delays
Out of Sequence Work	Force Majeure



Payment Conditions

- Subcontractor's Schedule of Values shall be used to determine progress payments (BP §5)
- Interest at 1 1/2% (BP §5)
- Subcontractor does not assume risk as to source of payment (SA §5)
- Right to stop work on 7 days' notice after non-payment and terminate after 21 additional days (SA §5)
- Equitable adjustment for time and cost of delay, demob, remob after suspension (SA §19)



Retention Conditions

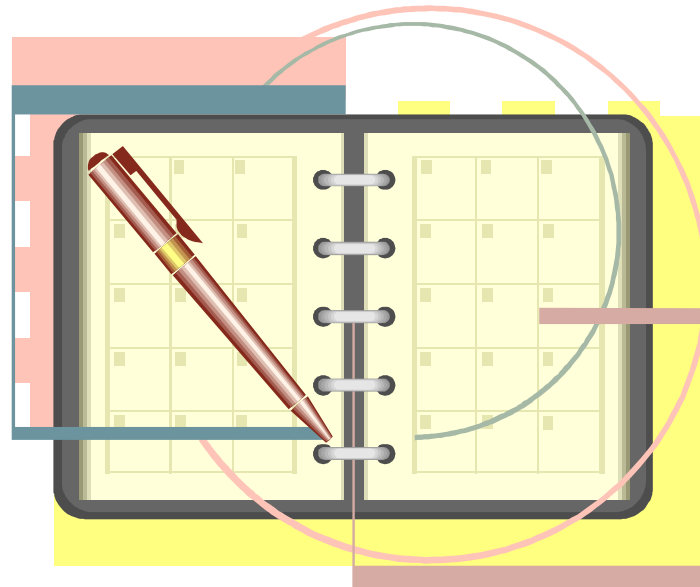
- Customer shall not deduct retainage from Subcontractor's payments except to the extent of retainage held by project owner on Subcontractor's Work.
- Within seven (7) days after receiving any retainage relating to Subcontractor's work, Customer will pay the same to Subcontractor or interest shall accrue as provided for late payments.

ASA Subcontract Addendum §6



Schedule Conditions

- Schedule – Subcontractor input required (SA §8)
- Equitable adjustments (BP §6)



Change Orders & RFIs

- Change orders
 - Turn around time
 - Owner requested change – 15 days for pricing
 - Sub requested change – 15 days for approval
 - BP suggests 30 days (BP §6)
 - What markups are allowed?
- RFIs
 - Contractor shall respond within 3 days



Insurance Conditions

- Insurance
 - Limit to own insurance program (BP §4)
 - No additional insured status (BP §4)
 - No waivers of subrogation (BP §4)
 - Subcontractor shall not participate in a consolidated insurance program ("CIP") except if Subcontractor specifically agrees and ASA Wrap-Up Insurance Bid Conditions [on ASA website] are accepted. (BP §11)



Builder's Risk Insurance

- Subcontractor's right to procure
- Sufficient limits/coverage – including Subcontractor's interest

Finish demolition and remove the debris	Full value of the work performed
Materials delivered to the jobsite	Materials stored away from the site
And materials in transit	

ASA Subcontract Addendum §16 (2017)



Indemnity Conditions

- Remind GC of SB 474 (effective 1/1/13). *Many states have own anti-indemnity rules.*



- Includes any “construction contract” broadly defined in the extreme
 - (E.g., includes any “structure” including improvements to real or personal property)

SB 474 – Overview

- General Rule: Type I indemnity not allowed in any construction project in California. Owners (except homeowners and self-performing), GCs, CMs, and subcontractors may not obtain **indemnity** for their own active negligence.
- 13 exceptions, including: Owners can, but GCs, CMs, and subcontractors may not obtain **defense** against allegations of their active fault.



SB 474 – Overview

- Owners, GCs, CMs, and subcontractors may require others to name them as **additional insureds** on their insurance policies,
 - *Many states have anti-additional insured rules.*
- BUT, they may obtain coverage only for the “acts or omissions of the promisor”
 - What does this mean?



Indemnification Conditions

“Any indemnification or hold harmless obligation of Subcontractor extends only to claims relating to bodily injury and property damage (other than to Subcontractor’s work), and then only to that part or proportion of any claim caused by the negligence or intentional acts of Subcontractor, its sub-subcontractors, their employees, or others for whose acts they may be liable. Subcontractor shall not have a duty to defend.”

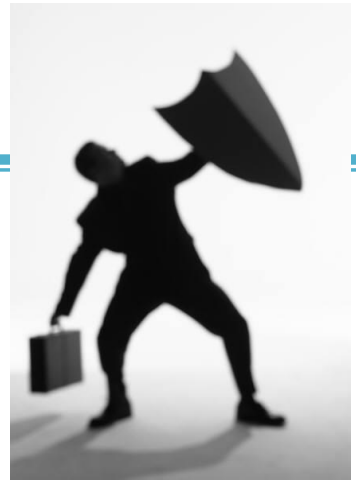
ASA Subcontract Addendum §13 Hold Harmless Restriction (2017)



Liability Conditions

- Limitation on Liability (BP §7)

7. THE EXPRESS WARRANTIES SET FORTH IN THE SUBCONTRACT DOCUMENTS ARE PROVIDED IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, AND THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED BY SUBCONTRACTOR. Subcontractor is not responsible for **special, incidental or consequential damages**, and Subcontractor's liability for delay damages **shall not exceed 5%** of the original subcontract amount. Subcontractor is not responsible for **damage to its work** by other parties, and any **repair work** necessitated by such damage is extra work. All materials shall be furnished in accordance with the respective **industry tolerance** of color variation, thickness, size, finish, texture and performance standards. All warranty claims must be received by Subcontractor not more than **one (1) year after completion of subcontractor's work**, and Subcontractor must be provided a **reasonable opportunity to inspect and make corrections**, or such warranty claims are **barred**.



Payment and Performance Bonds

“To the extent that performance and payment bonds are required by the subcontract to be provided by Subcontractor, the bond forms must be the ConsensusDOCS 706 (2007) and ConsensusDOCS 707 (2007) published by ConsensusDOCS.”

ASA Subcontract Addendum §23 Performance Bond Restriction (2017)



Site Facilities



- Customer shall furnish (except within Sub's contract) all (BP §8)
 - Temporary site facilities, including but not limited to site access, storage space, hoisting facilities, guard rails, covers for floor, roof and wall openings,
 - Security, parking, safety orientation,
 - Break and lunch facilities, toilet and wash facilities, drinking water and other water facilities,
 - Electrical service, telecommunication service, lighting, heat, ventilation,
 - Weather protection, fire protection, and trash and recycling services.



Public Private Partnerships

- PPPs
 - No lien rights – public property
 - Stop notice useless – private funding dries up
- ASAC's SB 164 requires payment and performance bonds just like public works



Design Errors

“Subcontractor’s obligation to examine documents, the project site and materials and work furnished by others is limited to notification of the Customer of any defects or deficiencies that a person in the trade of Subcontractor would discover by reasonable visual inspection. No testing beyond reasonable visual inspection shall be required. Subcontractor is entitled to rely on the accuracy and completeness of plans, specifications and reports of site conditions provided to Subcontractor.”

ASA Subcontract Addendum §2 *Scope of Work* (2017)



Design Services

“Any design services provided by Subcontractor will be reviewed by Designer to assure acceptability when integrated with the entire work. Customer is entitled to rely on the accuracy and completeness of design services or certifications provided by Subcontractor only to the extent that design responsibility is specifically delegated to Subcontractor by agreement in writing and all design and performance criteria are furnished to Subcontractor.”

ASA Subcontract Addendum §2 Scope of Work (2017)



Termination

- Termination other than for fault of subcontractor (SA §21)
 - Costs incurred, plus overhead and profit on work completed
 - Overhead and profit on unperformed work
 - Expenses, attorney fees, interest incurred for recovery

TERMINATED



Private Bid Points to Remember

- Condition bid and make acceptance *expressly conditioned* on acceptance of terms of bid.
- Check that Contract *includes* items referred to in bid and/or *incorporates* bid into contract with language that in the event of inconsistent terms, bid supersedes Subcontract.
- Refusing to sign contract that does not match bid *is not* refusal to sign a subcontract (*to avoid promissory estoppel*).
- GC that refuses bid terms is subject to *increase in price*.





Questions?

Thank you for
participating!

Daniel F. McLennon

415.394.6688

dfmclennon@smithcurrie.com

