ASA's THE CONTRACTOR'S Compass

THE OFFICIAL EDUCATIONAL JOURNAL OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

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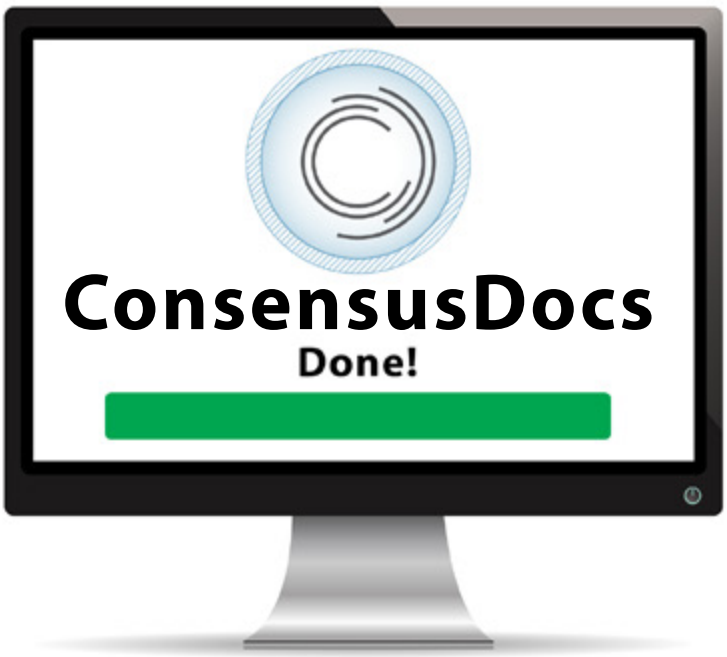

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March 2019

THE CONTRACTOR'S Compass

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EDITORIAL PURPOSE
The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to *The Contractor's Compass* do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

EDITORIAL STAFF
Editor-in-Chief, Marc Ramsey

MISSION
FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

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ABOUT ASA
ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@ASA-hq.com, or visit the ASA Web site, www.asaonline.com.

LAYOUT
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ASA PRESIDENT'S LETTER

Dear ASA Members:

ASA recently submitted a "friend-of-the-court" brief in California, encouraging the Court of Appeal to affirm a trial court ruling, citing the importance of maintaining current law on mechanic's liens, stop notices, and payment bonds in the State of California. These laws provide meaningful security for payment for all interested parties involved in public and private construction.

The brief in the case, *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America*, states that arguments to the contrary conflict with the assurance of a bond as a primary obligation independent of the contract "the very intention of payment protection."

ASA is actively involved in the promotion of legislative action across the nation and has regularly intervenes in legal actions that affect the construction industry at large. The issues at hand in the *Crosno* case could not be more relevant to our mission in California and across the nation, affirming subcontractor rights to timely payment for work in construction.

For details about the *Crosno* case and ASA's position, see the related article in this edition of *The Contractor's Compass*.

Each year, courts across the country hand down hundreds of decisions on federal and state laws, as well as court-made or "common law" or "case law," that apply to subcontractors' businesses. Many of the decisions impacting subcontractors interpret the contract provisions of subcontract agreements—provisions like pay-if-paid, hold-harmless, duty-to-defend, and no-damages-for-delay. Some of these decisions are precedent-setting and carry significance for subcontractors across state lines when other courts look to those decisions for guidance.

ASA's Subcontractors Legal Defense Fund supports ASA's critical legal activities in precedent-setting cases to protect the interests of all subcontractors. ASA taps the SLDF to fund amicus curiae, or "friend-of-the-court," briefs in appellate-level cases that would have a significant impact on subcontractor rights. These briefs offer ASA the opportunity to educate the courts about the effects of their decisions on subcontractors across the nation.

From its inception, the SLDF has been involved in many landmark decisions, starting with its first case in 1997, *Wm. R. Clarke Corporation v. Safeco Ins.*, which prohibited pay-if-paid clauses in California. Many people have supported the fund over the years and we invite you to join us in supporting those efforts.

Best Regards,

Courtney Little, 2018-19 President
American Subcontractors Association

FEATURE

ASA Files SLDF Brief in Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America

by American Subcontractors Association

ASA submitted a "friend-of-the-court" brief in California, affirming the Superior Court's judgment which voided a surety's reliance on a "pay when paid" provision to withhold payment from a subcontractor. The case, *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America*, is currently on appeal to the 4th Appellate District in California.

At issue is a 2014 Public Works Project for construction of an arsenic water treatment plant in North Edwards, Calif. The North Edwards Water District entered into a contract with Clark Brothers as general contractor. Crosno Construction, Inc. was hired by Clark to fabricate, erect and coat two 250,000-gallon welded steel water reservoirs for the project, work that is was within one week of completing when a dispute arose between the owner and contractor and the subcontractor was instructed to stop work. Subcontractor Crosno made a payment bond claim for its work, but because the contract stated that the surety "shall have reasonable time to make payment to Subcontractor" and defining that time as not less than the time the required to pursue conclusion of legal remedies against the owner, Travelers Casualty and Surety denied the claim.

In granting summary judgment on behalf of Crosno, the court voided as unenforceable the surety's reliance on this "pay when paid" provision that defined "reasonable" time for payment as the period of time it took for legal disputes to be resolved. The trial court held that the obligation of the bond is enforceable without reference to any contract between the contractor and the materialman. As such, the contract's definition of "reasonable time" was unreasonable and unenforceable because it impairs the subcontractor's right to timely payment under the bond. The court added that the primary focus of the surety should have been on whether the subcontractor furnished material and performed labor that was used in construction, not on the rights of the general contractor or owner. The surety is appealing, arguing that almost four years after the subcontractor stopped work on the project, there is still no money due them because of continuing litigation.

In its amicus brief, ASA encourages the Court of Appeal to affirm the trial court, citing the importance of maintaining current law on mechanic's liens, stop notices, and payment bonds in the State of California. These laws provide meaningful security for payment for all interested parties involved in public and private construction. The brief states that arguments to the contrary conflict with the assurance of a bond as a primary obligation independent of the contract—"the very intention of payment protection."

The brief addresses the contract language in question as an impermissible waiver of payment rights and affirms the bond claim as an independent obligation of the surety. As such, it maintains, the language of the contract cannot be used to delay Crosno's payment bond claim. The brief continues, "There is simply no legal or public policy basis to require subcontractors situated like Crosno to wait until after the conclusion of litigation … to be entitled to payment on a payment bond."

ASA is actively involved in the promotion of legislative action across the nation and has regularly intervenes in legal actions that affect the construction industry at large. The issues at hand in the Crosno case could not be more relevant to our mission in California and across the nation, affirming subcontractor rights to timely payment for work in construction. ASA encourages the judgment of the trial court to be upheld, preserving the legal and public policy securities of interested parties throughout the construction industry.

E. Scott Holbrook, Jr., Esq., Crawford & Bangs, LLP, Covina, Calif., prepared the brief for ASA. ASA's Subcontractors Legal Defense Fund financed the brief. Contributions to the SLDF may be made online.

ASA Working on Draft Proposed Retainage Legislation

As ASA continues to craft its legislative agenda for the 116th Congress, we are focusing our efforts on draft proposed retainage legislation that would lower the maximum retainage rate used by the federal government to 5 percent from 10 percent. In construction contracts, retainage is a sum of money earned by a contractor or subcontractor for satisfactory work, but held until the contract, or a certain portion of the contract, is complete. Retainage generally is held as an assurance for the timely completion and quality of a contractor or subcontractor's work. It is calculated as a percentage of the total contract price or a progress payment. In most states, retainage is a typical practice in both public and private construction contracts.

On Sept. 19, 2018, the Foundation of ASA, the educational arm of ASA, issued a revised publication by Donald Gregory, Esq., and Eric Travers, Esq., of Kegler, Brown, Hill and Ritter, ASA's general counsel, designed as a summary of the retainage laws in the 50 states. Retainage Laws in the 50 States is available by logging into your Info Hub account, clicking on Resources in the Index on the left-hand side of the screen, and choosing Contracts & Project Management in the "Show only…" drop-down menu.

The FASA publication became the impetus for this proposed retainage legislation and per Gregory and Travers, "while most subcontractors oppose the practice, some owners and prime contractors believe the practice is necessary. Though retainage arguably serves as a type of 'insurance' for owners and prime contractors, it can have the unfortunate effect of requiring contractors and subcontractors to complete work without full payment, in essence 'financing the job,' and making it difficult to timely pay their own creditors. In some cases, contractors and subcontractors are burdened with sizable retainage receivables long after the contract has been performed."

This "retainage reality" has prompted ASA, along with the members of the Construction Employers Association, a joint initiative coordinating action on labor, workforce, and construction issues facing our industry, to draft this proposed legislation. Currently, we are crafting a legislative action plan to get this legislation introduced and ultimately passed in this Congress.

Trump Delivers State of the Union Address

On Tuesday, Jan. 5, President Trump delivered the third State of the Union address of his presidency, where he stressed the need for a new era of bipartisanship and compromise. A significant portion of the President's speech was dedicated to the ongoing budget battle with Democratic leadership over his $5.7 billion federal funding request to construct a wall along the southern border. Lawmakers are negotiating to avoid another partial government shutdown as the Feb. 15 deadline approaches. President Trump has shown no signs of backing down on his border wall request, stating in his address that "I'll get it built." Democratic leadership continues to stand firm in opposition to border wall funding. Other priorities outlined by President Trump included:

- **Infrastructure Funding:** The President stated that "infrastructure legislation is not just an option, it's a necessity." Though the President didn't provide any details on how to pay for a public works package, he stated, "I know Congress is eager to pass an infrastructure bill—and I am eager to work with you on legislation to deliver new and important infrastructure investments, including investments in cutting edge industries of the future."
- **Lowering the Cost of HealthCare and Prescription Drugs:** President Trump offered lowering the cost of prescription drugs as a "major priority" in 2019. Specifically, President Trump stated that he wanted to work with Congress on "lowering the cost of healthcare and prescription drugs—and to protect patients with pre-existing conditions."
- **Trade Deals:** The President urged Congress to approve the United States-Mexico-Canada Agreement (USMCA) which was reached on Sept. 30, 2018, and signed by President Trump and his Mexican and Canadian counterparts at the Group of 20 summit on Nov. 30, 2018. President Trump also set a March 1, 2019, deadline for the United States and China to reach a satisfactory solution on trade before the administration increases tariffs on Chinese goods.

As President Trump adjusts to working with a divided federal government, the fate of many of the priorities outlined in his address will be determined by his ability to work across the aisle in Congress.

OSHA Releases Guidance on Silica Rule

The Occupational Safety and Health Administration issued a Frequently Asked Questions that applies to all occupational exposures to crystalline silica. The FAQ raises and answers 64 questions, which were developed in consultation with

representatives from construction industry to provide guidance on the standard's requirements such as exposure assessments, regulated areas, methods of compliance, and communicating silica hazards to employees. This document comes after OSHA began enforcing the silica rule on June 23, 2018. The OSHA mandate lowered the allowable silica exposure level by 50 percent. To meet this requirement, OSHA expects work sites where airborne silica is common to reduce exposure levels by making changes such as improving ventilation, installing filters on vacuum cleaners and air circulators, separating work areas, and as a last resort, providing respirators. Inhaling high levels of silica dust can lead to silicosis, a life-threatening lung disease. OSHA estimates that 2.3 million workers are exposed to silica dust each year. While the FAQ does provide clarity, it remains unclear how OSHA defines "feasible" as a requirement for what building and production changes must be made to comply with the new exposure limit. Other topics addressed in the FAQs include acceptable methods for cleaning silica dust off floors and other surfaces, and allowing employers to use objective data, such as air monitoring data from industrywide workplace surveys, to assess whether their workers are exposed to silica at levels triggering the requirement to take protective actions.

OSHA Proposes Final Rule on Beryllium Exposure

On Jan. 9, 2017, OSHA issued a final rule adopting a comprehensive general industry standard for occupational exposure to beryllium and beryllium compounds. In the proposed final rule, OSHA sought to modify the general industry standard to clarify certain provisions, simplify and improve compliance, and enhance worker protections. Specifically, the rule established a new permissible exposure limit of 0.2 micrograms of beryllium per cubic meter, measured as an eight-hour-time-weighted average concentration. The rule also established an action level, which is the level of concentration of harmful or toxic substances that when exceeded, remedial action is required, and a short-term exposure limit. Under this rule, employers were also required to use engineering and work practice controls to reduce airborne concentrations of beryllium to levels below the PEL and STEL.

Following OSHA's publication of the 2017 beryllium rule, industry stakeholders raised concerns with several definitions within the rule, citing them as broad in nature. Concerns were also raised regarding the possibility of varying interpretations of these definitions, which may have led to unintended enforcement issues. In response to these criticisms, OSHA signed a settlement agreement in federal court on April 24, 2018, requiring the agency to issue clarifications to the rule. On Dec. 11, 2018, OSHA released a new proposed rule on beryllium to amend certain parts of the beryllium standard for general industry "to clarify or simplify certain provisions of the general standard." While the rulemaking is pending, compliance with the proposed rule will be accepted as compliance with the standard.

The proposed final rule modifies several of the general industry standard's definitions, along with the provisions for methods of compliance, personal protective clothing and equipment, hygiene areas and practices, housekeeping, medical surveillance, communications of hazards, and record keeping. Per OSHA, "the proposed changes would maintain safety and health protections for workers and enhance worker protections overall by ensuring that the rule is well-understood, and compliance is more straightforward."

OSHA Rescinds Change in Job Injury Reporting Requirements

On Jan. 25, OSHA rescinded an Obama-era requirement for establishments with 250 or more employees to electronically submit every year information from OSHA Form 300, an annual report of injury and illness cases, and Form 301, which requires a detailed report on each case. Employers are still required to electronically submit Form 300A, which summarizes the information from the other two forms, including the percentage of workers injured and the number of cases. While the rule, which took effect on Feb. 25, doesn't require Forms 300 and 301 to be electronically submitted, these two forms, along with Form 300A must still be completed and available if requested by the agency.

The OSHA rule change has been met with mixed review. Those who support the change, including the U.S. Chamber of Commerce, argue that injury and illness cases are sensitive information, which should not be made public. Rep. Bobby Scott (D-VA), chairman of the House Education and Labor Committee, is opposed to the rule change because he believes it "shields employers from accountability for the health and safety of their employees." Legal experts expect to be challenged in federal court. We will continue to track developments on the rescinded rule as it is phased in next month or in the event it meets a legal challenge.

FEATURE

Grossly Unfair Insurance Clauses Can Put Subcontractors Out of Business: Predatory OCIPs, CCIPs and Builder's Risk Insurance Flow-Downs

by Jonathan Mitz, Ennis Electric

Are you too busy to read an Owner or Contractor Controlled Insurance (wrap-up) document? No problem. That is, it's no problem if there isn't a loss event, and if the insurance terms are fair and reasonable. This article focuses on grossly unfair terms found in some wrap-up programs that subcontractors should avoid signing at all costs.

The purpose of insurance is to reduce your business' exposure to the effects of risks. Predatory wrap-ups work in an opposite way by placing the risk on subcontractors at levels so high that a single claim could put them out of business, even if they are not at fault.

Here are some insurance clauses from actual wrap-up programs in my local area. (I'm not making this stuff up.)

Guilty by Association

*In the event that an **unidentified subcontractor** is responsible for a covered loss, and it is not possible to determine who was responsible, then **all subcontractors** working on site at the time **will be responsible** for a pro-rated share of the deductible based on subcontract volume.*

This reminds me of the way the Nazis reacted to an act of sabotage. They would round up a bunch of villagers and, if no one fingered the culprit, the Nazis would shoot them all.

Responsible for God

*In the event of a covered loss due to an Act of God **all subcontractors** working on site at the time **will be responsible** for a pro-rated share of the deductible based on subcontract volume.*

What's interesting to note here is that neither the owner nor the general contractor are at risk for an angry God.

Fix it for Free

*In the event of repair or replacement work due to a claim, **subcontractors** will **not be reimbursed** for profit, tax, interest, overhead, insurance or bond costs.*

All the subcontractors, whether they were at fault for the loss or not, are obligated to do the rework at less than cost.

Subcontractors Pay Supersized Deductibles via Flow-Down Clauses

Predatory wrap-up programs can save a pant load of premium money for the owners and general contractors when they establish sky-high deductibles. The owners and general contractors save another pant load by flowing down these outrageously high deductibles to the subcontractors—instead of maintaining a contingency fund.

General Liability:

*$50,000 for each occurrence. But that's not all. Subcontractors are **also responsible** for investigative fees, court costs, attorney fees.*

I'll bet your regular GL policy doesn't have a deductible or a similar requirement to pay for separate investigation, attorney or court costs.

Builders Risk:

*$100,000 for each claim unless the loss was due to water, then multiply the deductible by five so it's **$500,000**.*

Owner's Property that's not part of the construction project:

$100,000 for each claim.

Pollution Liability:

$250,000 for each claim.

Spin Doctor at Work

What one owner said in defense of super high deductibles:

*The deductible "serves as an **incentive** to encourage contractors to exercise the highest level of safety on the job."* Okaaaay ... Try to manage for that hurricane or another subcontractor's incompetence across the jobsite!

Applying These Predatory Clauses: A True Worst-Case Scenario

Let's pretend that a project is nearing completion. The weather has been perfect for construction—it hasn't rained for a couple of months. It's just down to the mechanical subcontractor doing air balancing and the painter doing touch-ups. Suddenly a gully washer thunderstorm unloads over the jobsite. Water starts streaming into the finished space because some skylight flashing had been damaged weeks ago by one of the many trades that had worked on top of the roof. A million dollars of damage occurs. Who is obligated to pay what, based on the wrap-up conditions described above? First, the $500,000 deductible would have to be paid by the only two subs working at the time of this Act of God—the balancing contractor and the painter. Secondly, the repair and reconstruction would have to be done by all the finish trades but at a reimbursement rate less than their cost. How many of these subs do you think will end up going out of business from this claim?

Don't Sign Predatory Change Order Mark-Up Clauses!

In addition to wrap-up clauses, don't forget to look at the owner and contractor mark-up clauses. One owner

not only had a creative way with insurance, it also established terms for extra work that will put subcontractors out of business.

In this project there are 10 classes of change orders, with my favorite being for the remedying of design defects. Keeping in mind that the project is not design-build, the mark up to subcontractors for fixing the designer's errors and omissions is a whopping 3 percent for overhead plus 3 percent as profit.

Find the Flow-Down Documents—Especially on Public School Projects

Sometimes it's not that easy to ferret out all the unfair insurance flow-downs. My experience is that public school construction projects are the exception: most school districts will provide subcontractors access to insurance and flow-down clauses.

- Where a single construction manager or a short list of general contractors is selected before the public school project is bid by the subcontractor community, the CM or GC solicitation document will contain the school district's requirements for insurance, particularly builder's risk.
- Most school districts mandate the CM or GC to buy a builder's risk policy with a **zero deductible**. Watch out for CMs and GCs who then try to save money by buying a builder's risk policy with a **$10,000 deductible**. Their subcontract agreement will then **flow-down the $10,000 deductible to the subcontractors** instead of honoring the school district's contract requirement for a zero deductible. Since the school districts don't see the subcontracts, they don't realize this subcontractor abuse is occurring. However, when it is discovered, we have had good success in having the school district set the general contractor straight. School districts as clients of construction services respect the role and value of subcontractors.

Me First?

Let's say you read all the bid documents and validate that the project you are considering has favorable builder's risk terms that cover material in transit, material stored, and the labor and material for work installed, all at no deductible. You submit a competitive bid and are awarded the project. You celebrate and sign the general contractor's agreement. Then something happens at the jobsite which causes damage to your work, equipment or materials. At this point in time the GC informs you that in the subcontract agreement you signed it says that it is **your insurance that pays first** before any insurance purchased by the GC kicks in. Gotcha!

How Do Good Subcontractors Get Caught in a Bad Wrap-Up?

The answer is simple and sad.

- Subcontractors assume that nothing is going to go wrong on a project.
- Subcontractors assume that the general contractor and owner will be fair and reasonable if something does go wrong. (Yeah, right!)
- Subcontractor estimators are too rushed to dig into the bid documents looking for insurance and mark-up land mines.
- Some subcontractors, especially lower tier subs, might not have even been given access to the complete set of bid documents.

Avoiding Predatory Terms and Conditions

How do you bid a project that has predatory wrap-up or insurance terms? Simply condition your bid by specifically excluding or modifying all the terms that are not fair. You can do so with a blanket statement or with both blanket and specific statements. Let GCs know that your price will go way up if you must accept higher risks or low change order mark up rates.

Will there be a competitor who needs work so badly they'll sign anything? Who is too rushed to read the fine print? Who has such a long relationship with the GC they don't need to condition their bid? (Ha, ha!) Sure. So let them gamble by signing these outrageous wrap-up, mark-up, and flow-down clauses. You're in business to make money, not go broke.

Who Can Help You Review the Documents?

You've heard it before—review all the documents before bidding and read the entire subcontract agreement, including all that small print, before signing.

- Good **insurance brokers** will be happy to read all the insurance requirements in advance of every bid you prepare. Have a simple checklist that forces you to ascertain what the deductibles and change order mark-ups are before you bid. Bidding a new GC and haven't seen their standard subcontract agreement? Then condition your bid to negotiating mutually acceptable terms and conditions.
- When you see a project with predatory insurance or unreasonable mark-ups, let your **local subcontractor association** know. Let them advocate and educate the GC or owner about being fair to subcontractors.
- Network with other subcontractors and share information.

Jonathan Mitz is vice president of Ennis Electric, an employee-owned company in Manassas, Va.

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ASA's SLDF supports critical legal activities in precedent-setting cases to protect the interests of all subcontractors.

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ASA underwrites the legal costs of filing "friend-of-the-court" briefs to inform the Court regarding the broader impact of relevant cases throughout the country. We have won dozens of these cases since 1997, vindicating subcontractor rights today and into the future!

WE NEED YOUR SUPPORT

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Your financial support keeps the SLDF in operation - PLEASE DONATE TODAY

To make a contribution to this vital fund, visit http://www.sldf.net or send an email to soscar@asa-hq.com for more information!

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FEATURE

Consolidated Insurance Programs: Using ASA Tools to Address Costs and Hidden Risks

by Richard B. Usher, Hill & Usher, LLC

The debate over the perceived benefits of consolidated insurance programs (CIPs)—popularly referred to as "wrap-ups"—has evolved over the past several decades into one of the most contentious issues within today's construction industry. Originally designed to reduce overall insurance costs on large, single-site projects involving significant labor and considerable workers' compensation premium costs, wrap-ups have changed with the industry to apply to almost any project with a high number of contractors and subcontractors. Wrap-ups have become widely regarded as perilous for subcontractors, particularly when used on smaller or multi-site projects.

In its simplest form, a wrap-up is a centralized insurance and loss control program intended to protect the project owner, prime contractor and subcontractors under a single set of insurance policies. While the wrap-up concept has been around for more than 60 years, variations in the original plan's design make many contemporary programs seem like comparatively new insurance models. Indeed, the concept of a wrap-up program is a departure from the traditional insurance format in which each contractor and subcontractor purchases and negotiates its own insurance program to address liability and the risk of accidents and claims. Wrap-ups often are inappropriately marketed as providing the same or better insurance coverage, at the same or less financial risk and cost to the subcontractor.

Ideally, a wrap-up would provide fully-paid comprehensive general liability, workers' compensation, excess liability and builder's risk coverage for all enrolled parties for the entire construction process and completed operations hazard period. All contractors are generally held liable for defects in construction and any resulting damage to property or persons arising from defects. Many states have enacted statutes of repose that establish a time limit after which claims against contractors for defective construction resulting in property damage are barred. State laws vary allowing claims to be attached for up to four to 10 years after construction is completed.

Today, most subcontractors that have experienced owner-controlled insurance programs (OCIPs) or contractor-controlled insurance programs (CCIPs) have come to realize that all wrap-ups are indeed not the same, and that they often are not as comprehensive as the sponsor implies. In fact, many wrap-ups have inadequate coverage and frequently burdensome procedures that can significantly increase risk and administrative costs.

Evaluating the risk, predicting the total cost impact, and properly bidding an OCIP, CCIP or project-specific insurance program (PSIP) project requires an understanding of the wrap-up coverage's extent and quality. To help subcontractors facing the rising tide of projects with wrap-ups, the *ASA Subcontract Documents Suite* includes two documents, the *ASA Wrap-Up Insurance Bid Conditions* and the *ASA Wrap-Up Insurance Subcontract Conditions*, which are geared toward helping specialty trade contractors obtain favorable terms and an understanding of coverage under wrap-up insurance programs.

What to Watch Out For

The most important issues for a subcontractor considering an OCIP or CCIP are:

1. How the subcontractor will be protected by the program.
2. What impact the program will have on its costs and administrative burden.

Many benefits of consolidated insurance programs are marketed to the construction industry, but these benefits often favor the owner or whoever is sponsoring the wrap-up program.

Broader coverage is one of the selling-points touted to subcontractors. For some subcontractors, a wrap-up may provide broader insurance coverage than they would ordinarily procure. As a rule, though, subcontractors should not assume wrap-ups provide such broader coverage. While broader coverage may be used as a reward or an incentive for uninsured or under-insured subcontractors to join a wrap-up, subcontractors need to find out what additional or broader coverages will be incorporated. Examples of additional coverage may include asbestos and mold abatement, exterior insulation finish systems (EIFS), higher liability limits, pollution liability, professional liability, subsidence or the removal of certain standard exclusions.

Another benefit that proponents of wrap-ups cite is cost savings. This can be tricky for subcontractors because wrap-ups, by nature, inherently save the owner/prime contractor/policy sponsor money through one centralized insurance program that includes large deductibles, economies of scale, and minimized or "efficient" project administration. Subcontractors, on the other hand, must be aware that just because a sponsor's broker claims the policy will save them money doesn't mean it's necessarily true.

The numerous ways in which a wrap-up can increase subcontractor costs include:

- Increased administrative costs and paperwork preparation due to monthly payroll and loss reports to the wrap-up administrator.
- Requirements for additional payroll reporting, early-return-to-work and other safety programs at the administrator's sole discretion.
- The failure of the bid documents to detail administrative costs.

- Worksheets that calculate too large a deduction from the subcontractor's bid for the subcontractor's actual net "cost of insurance" given the insurance package being provided on the project.
- Extra compensation the subcontractor must provide to its normal broker/agent for working with the wrap-up administrator.
- Lack of reimbursement to the subcontractor for the cost impact on its non-CIP insurance program.
- The impact of large deductibles and uncovered losses.
- Lack of *pro rata* sharing in retrospective premium adjustments on the wrap-up.

Reduction of the subcontractor's mark-up on its original insurance costs is another sponsor-friendly benefit that can be marketed as a cost savings under a wrap-up. However, many subcontractors find that the administrative burdens experienced under wrap-ups can become extremely costly. Not having the ability to mark-up insurance costs to compensate for the burden should, therefore, not be perceived as a benefit for the subcontractor.

One of the easiest ways a subcontractor can avoid some of these problems is to condition its bid using the *ASA Subcontractor Bid Proposal*. By conditioning its bids on this document, a subcontractor can increase the leverage it needs to secure less onerous terms and conditions. A bid proposal can help level the playing field in contract negotiations, making explicit the level of risk upon which a subcontractor's prices are conditioned.

In addition, the *ASA Wrap-Up Insurance Subcontract Conditions* can be attached to a client's proposed subcontract to modify it.

ASA members can adapt and incorporate specific provisions or language from each of these model documents within their own documents. Both are part of the *ASA Subcontract Documents Suite*.

To find out exactly how financial burdens are added in a wrap-up, a subcontractor must closely read the wrap-up plan's manual. The wrap-up manual is where subcontractors will discover blatant financial pitfalls. Unfortunately, some wrap-up manuals focus on marketing the plan and fail to adequately disclose important details. For example, riggers liability may not be a covered exposure and any mention of the missing coverage may be completely omitted from the plan's manual. The policies themselves, including all endorsements and all of the incorporating contract provisions must be considered as a whole to understand the coverage protections afforded by the wrap-up program. Missing coverage elements or program and contract pitfalls may be identified only after a careful review by experienced risk and insurance specialists.

Another sometimes benefit, often hidden within the wrap-up manual, is the implementation of comprehensive safety programs. Proponents of OCIPs and CCIPs suggest that such safety programs are a benefit because they regulate all participating parties under one set of rules, and because they help reduce insurance costs through larger deductibles. However, the manual may not disclose that wrap-up safety officers can mandate means and methods, including directives that deviate from the subcontractors' best interests in safety and productivity. The program's administrator also may not explain that some safety rules could have nothing to do with a subcontractor's specific trade and will end up creating extra costs it did not factor into its initial bid.

Other factors that wrap-up sponsors market as benefits include low loss ratios and reduced cross-litigation. Loss ratios, which are the dollar amounts paid out for claims as a percentage of premiums paid, generally tend to occur on large wrap-up programs on which claims are below 35 percent to 40 percent. Realistically, they only benefit the owner or sponsor, and not subcontractors, because return premiums often are not shared with all participants. Big return premiums indicated from loss-sensitive programs can cause a significant incentive for the sponsor to exercise early termination to capture the credits and close out the program from further losses. Such termination can, in turn, create a significant problem for specialty trade contractors that planned on having the wrap-up insurance available through the completion of the project, as well as for its coverage for completed operations hazard risk.

Cross-litigation is not good for anyone, particularly owners and prime contractors that are trying to manage a project. However, having to employ the plan sponsor's lawyer could make or break a subcontractor's decision to join a wrap-up insurance program.

How to Prepare for Success within the Wrap-Up Arena

It goes without saying that before someone enters into any agreement with another party, he or she needs to understand that contract and ask questions about topics he or she does not understand. When the impact from a contract term is not fully understood, it pays to seek independent advice from experienced specialists before accepting the opinion of the other party to the agreement. OCIPs and CCIPs are no different. Wrap-up administrators should encourage full transparency of their program details before subcontractors bid. If a subcontractor can't have an open dialogue with the plan's administrator, including participation of its insurance, risk and legal advisors, during the pre-bid period, it might not want to waste its time, money and energy participating in the project. For help with this dialogue, see related article on "Risk Transfer: 30 Questions for Consolidated Insurance Programs." This resource provides subcontractors with a list of questions that need to be answered to help them evaluate their risks and properly price their work.

Once a subcontractor decides to bid a job with a wrap-up, it is essential that whoever is handling that bidding process request all available information about the sponsor's plan. Some of the most important documents include the wrap-up manual (or overview of coverage), all related policy forms, the named-insured endorsement, and any language regarding deductibles/self-insured retentions

(SIRs). In addition, the contract provisions for incorporating and regulating the wrap-up terms should be identified and carefully reviewed. Often, one will find information about deductibles and termination in the incorporating language.

A subcontractor also should consider involving its insurance agent or broker as early in the process as possible, in order to assist in the analysis of any wrap-up that it hasn't seen before—regardless of whether the subcontractor is familiar with the respective builder. In order to receive the proper help and advice, subcontractors should arrange to pay their agents/brokers, especially since the wrap-up will not provide any compensation. Such costs can be factored in when completing a wrap-up's enrollment form. Simply add a line on the form adjusting the deduction to reflect your specified professional representation. A reasonable fee would generally be 15 percent of the subcontractor's premium credit.

In summary, it is essential that a subcontractor exercise due diligence when it comes to the details of any wrap-up program. Ultimately, the subcontractor is responsible for evaluating and pricing risk and for putting together an informed bid proposal after identifying limits or conflicts within the plan.

Walk This Way or Just Walk Away?

Evaluating risk is an essential part of the pre-bid process for any subcontractor. As with other bid factors, wrap-up requirements sometimes can be too risky for a subcontractor to take the work. Before any subcontractor can conclude whether it should enroll in a program or walk away, it should first be able to answer the following important questions:

Does the CIP have sufficient limits to protect all insureds? Wrap-ups often are intended to provide protection for the owner, contractor and all subcontractors (some wrap-ups might also apply on a rolling basis to many projects, which might be located at various sites). How does a subcontractor determine whether there will be enough insurance to take care of its potential liability? Many risk managers will expect limits of 70 percent or more of the total project costs to be available during construction and for many years after completion. A subcontractor may need assistance from its broker or agent to evaluate such program limits.

Does the plan include a termination for convenience clause? Subcontractors need to know if there is a termination for convenience clause within the plan. If so, does the subcontractor have the ability to replace its coverage in the event that a termination occurs? If the plan sponsor terminates for convenience, does the subcontractor have the right to terminate the subcontract if its own coverage is not available? In order to prevent any gap that may arise resulting from termination, a subcontractor may want to incorporate the language in paragraph 4 of the *ASA Wrap-Up Insurance Bid Conditions* or the *ASA Wrap-Up Insurance Subcontract Conditions*.

Is the subcontractor's commercial general liability coverage eliminated if it participates or enrolls in a wrap-up? Many providers of commercial general liability (CGL) coverage suspend or eliminate a client's right to coverage when it enrolls in an OCIP/CCIP. The standard wrap-up endorsement stipulates that coverage does not extend to bodily injury or property damage arising out of any project subject to a wrap-up, thus excluding all coverage for ongoing and completed operations and excess coverage. This exclusion applies whether or not the wrap-up: provides coverage identical to that provided by the subcontractor's existing coverage, has adequate limits to cover all claims or remains in effect. The effect of the wrap-up endorsement could leave the subcontractor exposed and without any coverage if the wrap-up fails to provide coverage or is terminated. Therefore, a subcontractor that chooses to participate in a wrap-up needs to know if its own policy will provide ongoing and completed operations coverage in the event the wrap-up fails to provide adequate coverage, exhausts its limits or terminates. If not, the subcontractor should attempt to obtain a coverage endorsement providing that its policies will provide excess, difference in conditions, and full coverage in the event of termination of a wrap-up project. A subcontractor may want to obtain terms such as those included in paragraphs 3 and 4 of the *ASA Wrap-Up Insurance Bid Conditions* and the *ASA Wrap-Up Insurance Subcontract Conditions*.

What are the effective dates of coverage and claims reporting available from the wrap-up? A subcontractor needs to know whether the completed operations coverage provided by a wrap-up coincides with or extends through the duration of the statute of repose in the state where the project is located. A statute of repose is a law that bars claims against contractors for defective construction after a specified period of time has elapsed after post-final completion of a project. Subcontractors should know what the applicable statute of repose is in the state where the project is located. If the wrap-up manual does not provide adequate information about the coverage term, subcontractors should address this issue with the plan's administrator during the pre-bid period. Subcontractors should also consider incorporating provisions similar to those outlined in paragraph 3 of the *ASA Wrap-Up Insurance Bid Conditions* and the *ASA Wrap-Up Insurance Subcontract Conditions* that allow a subcontractor to procure additional insurance.

Is the subcontractor properly protected by a waiver of subrogation? A subcontractor should pay close attention to waivers of subrogation in its subcontracts. This can be particularly significant in relation to the builder's risk insurance when damage occurs during a project. When builder's risk insurance is provided by the owner (with or without a wrap-up), it should be the sole source of recovery for damage to the work sustained until the project is completed. Waivers of subrogation need to be properly coordinated so that subcontractors,

which intend to derive benefits from the builder's risk policy when work is damaged, are not later subject to lawsuits for damage they cause. However, subcontractors need to know whether injuries to their employees caused or contributed to by other wrap-up insureds will be subrogated to the wrap-up's CGL policy to protect their experience. Will damage to a subcontractor's work caused by other wrap-up insureds and not paid by builder's risk be covered as liability claims under the wrap-up? Will a subcontractor be properly treated as a third-party claimant with regard to damage to its work? To address potential conflicts regarding this issue, a subcontractor should consider insisting that the owner/plan sponsor waive rights of recovery by subrogation by incorporating paragraph 3 of the *ASA Wrap-Up Insurance Subcontract Conditions* into its subcontract. Another option is to insure one's property using language such as that contained in paragraph 3 of the *ASA Wrap-Up Insurance Subcontract Conditions*, which addresses the scope of the builder's risk coverage included within the wrap-up. These issues present another compelling argument for the subcontractor to have professional help before deciding whether or not to enroll in the wrap-up.

Will the wrap-up confer additional insured status for subcontractor's rental equipment? When it comes to rental equipment, subcontractors generally must arrange coverage for the rental provider through the wrap-up. They also must find out whether the wrap-up administrator is prepared to provide specific evidence of insurance that will satisfy the rental company. If additional insured status is not granted to the rental equipment provider by the wrap-up, there could be a problem because of the likely endorsement mentioned above. Another risk a subcontractor may inadvertently be exposed to will arise from the use of its on-site equipment and scaffolding by another sub that may not be properly enrolled in the wrap-up and not insured by its own insurance program.

Are the plan's self-insured retentions (SIRs) fully funded or collateralized by the sponsor? For how much? For how long? A self-insured retention (SIR) is an amount of money that an insured must expend in its own defense prior to a carrier assuming financial responsibility and/or administrative control over the claim. Subcontractors should understand the terms and amounts of SIRs since coverage may not be available to them until the SIR is fully funded. Many SIRs are very large—$250,000, $1 million, $3 million or higher—and well beyond the anticipated level that subcontractors are prepared to fund. SIRs often are not disclosed in wrap-up manuals and can only be found by reviewing the wrap-up policies. When large SIRs are applicable to wrap-ups, a subcontractor will be subject to the financial capacity of the plan sponsor to fund the SIR. When there are multiple claims there may be multiple SIRs. Some plan sponsors are single-project LLC developers that may not retain the financial capability to fund the SIR after project completion. This can put the subcontractor at considerable risk. Solving this problem requires the subcontractor to arrange for its own coverage for the difference in conditions and excess over the wrap-up, as previously discussed. Another option is for subcontractors to protect themselves against these unplanned liabilities through the incorporation of paragraph 5 of the *ASA Wrap-Up Insurance Bid Conditions* and the *ASA Wrap-Up Insurance Subcontract Conditions*.

Conclusion

The challenges a subcontractor faces in determining its risk and burden relating to wrap-ups cannot entirely be identified or described in this white paper because they are so numerous and because there are so many differences from one wrap-up to another. The prudent subcontractor will exercise care and obtain assistance in evaluating the risk of enrollment, as well as manage its own program where any wrap-up leaves off.

At the end of the day, a subcontractor should have an understanding of the quality and scope of the wrap-up insurance program it is considering. Sweating the details and exercising due diligence during the pre-bid period will enable one to obtain the necessary information—the extent and quality of the coverage, the length and details of the program's coverage, the experience and background of the policy's administrator, etc.—and position itself to make a well-informed decision on whether to enroll in a controlled insurance program. Once a subcontractor makes the decision to bid a project with wrap-up insurance, conditioning its bid is a good way to avoid potential pitfalls or hidden costs associated with these types of insurance policies. Above all, a subcontractor must never forget that it can always walk away from a deal that is too risky.

This article is adapted from a 2016 white paper published by ASA, the Foundation of ASA, and Richard B. Usher, principal managing member, Hill & Usher, LLC, an insurance and surety firm in Phoenix, Ariz. Usher can be reached at (602) 956-4220 or rbu@hillusher.com.

Disclaimer: *This publication does not contain legal advice. The discussion is intended to provide information and guidance to individual subcontractors. Specific circumstances vary widely, so subcontractors may need to consult their insurance and legal advisors before acting on the premises described herein. Each subcontractor should decide for itself the contract terms and conditions which it believes will best protect its interests. Subcontractors should not agree among themselves as to the form of contract terms and conditions they will use. Such agreements may violate federal or state antitrust laws and could result in the imposition of civil and/or criminal penalties.*

ASA Subcontract Documents Suite Includes Wrap-up Insurance Bid Conditions and Wrap-up Insurance Subcontract Conditions

by American Subcontractors Association

ASA's Subcontract Documents Suite reflects the improvements made in recent revisions to the ConsensusDocs standard subcontract documents. In late 2016, ConsensusDocs revised its documents to reflect evolving technology and insurance products and to assure consistency and clarity among all the documents in the ConsensusDocs portfolio.

The *ASA Subcontractor Bid Proposal* offers a subcontractor and its client an opportunity to establish the standard terms of the ASA-endorsed ConsensusDocs 750, *Standard Agreement Between Constructor and Subcontractor* as the basis for their subcontract. If a client accepts the subcontractor's bid that has been properly conditioned with this form, a binding contract exists based on the terms of the ConsensusDocs Form 750.

Other documents in the *ASA Subcontract Documents Suite* help subcontractors deal with complicated issues like payment, indemnity, extra work and claims that force them to shoulder the risks best borne by others. If not already obligated to sign a particular subcontract, a subcontractor can use the *ASA Subcontract Addendum* to ask a client to modify its proposed subcontract to eliminate a wide range of potentially harmful provisions. In more limited negotiations, a subcontractor can use the *ASA Short-Form Subcontract Addendum*, which would modify the client's subcontract in four key areas: hold harmless, insurance, payment, and changes and claims.

Both the bid proposal and subcontract addenda state that the subcontractor will not participate in a wrap-up insurance program. For projects that require wrap-up insurance, the *ASA Subcontract Documents Suite* includes *Wrap-up Insurance Bid Conditions* and *Wrap-up Insurance Subcontract Conditions*. These tools give subcontractors the right to supplement the insurance provided by the wrap-up; limit their own insurance to not apply to the work covered by the wrap-up; limit their contractual indemnity to the coverage and limits provided by the wrap-up; indemnify against paying wrap-up deductibles; and procure replacement insurance or terminate the subcontract agreement at the client's cost if the wrap-up insurance is discontinued.

ASA members can access the *ASA Subcontract Documents Suite* in the Info Hub, ASA's members-only library of tools and resources, by logging in using the Member Login button at www.asaonline.com, then choosing "Contracts & Project Management" in Resources.

Risk Transfer: 30 Questions

by American Subcontractors Association

1. Will all subcontractors be "named insureds" for the CIP-provided coverages?
2. What limits will be available to subcontractors, by line of coverage?
3. What are the deductibles per line of coverage, and who is responsible for payment?
4. Is there a reinstatement of liability limits if they are exhausted?
5. Are all the excess layers of coverage "follow-form" of the primary?
6. How will losses greater than the excess liability limit be handled?
7. The Statutes of Repose with regard to construction defect claims can be eight to 10 years or longer. How will contractors and subcontractors be guaranteed coverage for completed operations?
8. Will the completed operations coverage provided by the CIP match the duration of the statute?
9. Will subcontractors be indemnified if CIP coverage lapses or is inadequate?
10. Will products liability coverage be included for contractors and subcontractors performing work for their products which are manufactured, assembled or otherwise worked upon away from the project site?
11. If a CIP-insured contractor is responsible for causing an injury claim to another on-site contractor's employee, will the loss be allocated to the responsible party via subrogation to the CIP liability policy?
12. How will high experience modifications be handled? High EMRs and high insurance costs that result in greater insurance cost credits, favor the less safe contractor.

for Consolidated Insurance Programs, aka Wrap-Ups

and Richard B. Usher, Hill & Usher, LLC

13. Will contract indemnity be "limited form"?
14. Will "additional insured" requests be prohibited?
15. Will subcontractors' insurance costs be adjusted to include compensation for their brokers and their administrative costs?
16. Will subcontractors' insurance costs be adjusted to include reimbursement for cost impact to their insurance program outside the CIP?
17. Will subcontractors be reimbursed from CIP funds to support early-return-to-work and modified-duty cost reduction programs?
18. Will all contractors and subcontractors share in retrospective premium adjustments? Will sharing be *pro-rata*?
19. Who is responsible for uninsured Builder's Risk losses?
20. How is the Builder's Risk coverage structured in terms of coverage and exclusions such as:
    a. "soft cost" coverage provided? Is "delay in opening" coverage provided?
    b. What are the limits for construction materials in transit or at a temporary storage location?
    c. Are flood and earthquake coverages provided? Are the limits high enough to cover both the hard and soft costs of complete construction?
    d. Is there pollution cleanup and removal coverage for losses resulting from covered Builder's Risk perils? If so, what is the limit?
    e. Does the policy cover resulting loss caused by faulty or defective:
        i Design or specifications?
        ii. Workmanship, repair, construction, renovation, remodeling or grading and compaction?
        iii. Materials used in repair, construction, renovation or remodeling?
    f. Are the labor and materials (including land) involved in grading or other site preparation covered? Is water covered, when used in the construction process? Are grass, plants, shrubs or trees covered for their full replacement cost?
    g. Is coverage provided for increased cost due to ordinances, regulations or laws?
    h. Is the interest of the architect/engineer included? Is there a professional services exclusion? Does coverage include reasonable compensation for architect's services and expenses required as a result of an insured loss?
    i. Does the policy permit beneficial occupancy?
    j. Is there a mutual waiver of subrogation including subcontractors? A coinsurance clause?
    k. Is coverage included for contractor's and subcontractors' profit and overhead?
    l. Is testing coverage provided?
    m. Is coverage provided for damage to existing or adjoining properties?
    n. Are expediting expenses covered? Does this include extra expense to continue the project?
    o. When does coverage end for the construction team?
21. How will the discovery and cleanup of on-site pollution be handled?
22. Will the CIP issue "additional insured" status for subcontractor's rental equipment?
23. Who will manage claims during the project? After project completion?
24. How often will claims reviews take place during the project? After project completion? Will the entire construction team participate in the claims reviews?
25. How often will loss runs be issued? After project completion?
26. Who will consolidate and distribute safety statistics?
27. Who is responsible for reporting loss and payroll information for unit statistical reports? Will all subcontractors receive copies prior to filing?
28. Who is responsible for monitoring certificates of insurance?
29. Will there be a full-time CIP administrator dedicated to the project?
30. When will individual contractors receive complete copies of all insurance policies provided by the CIP?

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Pay Attention to the Indemnification Clause in the Subcontract

by Timothy Woolford, Esq., Woolford Kanfer Law, P.C.

Most subcontracts contain indemnification clauses, also sometimes referred to as "hold harmless clauses." Their purpose is to transfer the risk of certain losses or expenses on construction projects from the GC to the subcontractor. Usually (but not always), the losses or expenses which trigger the subcontractor's duty to indemnify are those involving bodily injury or property damage. Because they are often composed of complex language or "legalese," these clauses are sometimes overlooked by subcontractors during the negotiation stage. Or, the parties assume that they are boilerplate clauses which do not require careful scrutiny or revision to their language. Failing to appreciate the significance of these clauses can be costly and perilous. Indemnification clauses often require the subcontractor to defend and reimburse (indemnify) the GC against certain losses or expenses. Indemnification clauses often originate in the owner/contractor agreement and the GC attempts to push down to the subcontractors as much of the indemnification risk that he has assumed toward the owner as possible.

Standard industry contract forms like those prepared by the AIA and ConsensusDocs contain what is often referred to as a "narrow indemnity obligation" in which the duty to defend and indemnify arises only if the subcontractor's *negligence* caused the injury or damage. Clauses like this often state that the subcontractor shall defend and indemnify the GC for claims, losses, damages and expenses incurred by the GC due to claims made against the GC by third parties for bodily injury or property damage, *but only to the extent caused by the subcontractor's negligence*. First, language of this type requires a subcontractor to indemnify the GC only for loss or damage caused by the subcontractor's negligence. It also involves a comparison of the degree of the subcontractor's fault in causing the damage. Many losses are caused by multiple different causes with various entities at fault and contributing to the loss or damage. If the subcontractor is adjudged to be 50 percent responsible for the loss or damage under this type of clause, it will be responsible for half the damages. If the subcontractor is only 10 percent responsible, it will be liable for 10 percent of the defense costs and 10 percent of the loss or damage, and so on.

Unfortunately, these and other standard subcontracts do not always reflect actual industry practices in many areas. Many subcontracts do not track the AIA and ConsensusDocs language and contain much broader defense and indemnity obligations. These broader types of provisions typically require the subcontractor to defend and indemnify the GC if the claim, loss, damage or injury arises out of or is related to the subcontractor's work. In other words, the subcontractor does not have to be at fault or negligent in any respect in order to be required to defend and indemnify the GC. This type of clause usually has language using words stating that the subcontractor is required to defend and indemnify the GC for losses and damages which *arise out of the subcontractor's work*, or *in connection with the subcontractor's work*, or similar phrases. Note how it differs from the narrower defense and indemnity obligation described above which limits the duty to the subcontractor's negligence and only to the extent of that negligence. Under this type of clause, if a person is injured at the site and if it has any connection whatsoever to the subcontractor's work, and the GC incurs costs, losses or damages, the subcontractor must defend and indemnify the GC. The duty arises regardless of whether the subcontractor is negligent. This type of clause clearly presents more risk for subcontractors. For example, when a subcontractor's employee is injured on the job site, that injury usually is connected to the subcontractor's work. Who or what caused the injury does not matter—the subcontractor is still required to defend and indemnify the GC under a clause like this.

Another common indemnification clause is one which requires the subcontractor to indemnify the GC for damages caused "in whole or in part" by the subcontractor's negligence. These are often referred to as "intermediate indemnity clauses." Under them, the subcontractor is required to indemnify the GC for all the GC's damages if the subcontractor was at fault in any way. Even a small percentage of subcontractor fault requires the subcontractor to pay all the GCs defense costs and reimburse all its losses. If the subcontractor was only 10 percent at fault, it must indemnify for 100 percent of the loss or damage.

Some clauses go even further and require the contractor to indemnify the GC for all the loss or damage "*even if such injury or damage is caused solely by the GC's negligence*" or contain words to that effect. These types of clauses are often referred to as

"broad indemnity clauses" (although they won't be labeled as such in the subcontract). The category into which they fall can only be determined by carefully studying the entire clause and determining the scope of the duty it requires. Under these broad clauses, the subcontractor is required to indemnify the GC even though the subcontractor is without fault and the GC's negligence caused all the damage. The expense of defending and reimbursing the GC when the GC or others were entirely at fault and you were not can be hard to swallow and very expensive. These clauses run counter to the widely accepted principal that liability typically follows fault. About two-thirds of the states have enacted so-called "anti-indemnity" laws to prevent such an inequitable result. These anti-indemnity laws state that a party cannot be required to indemnity another party for the latter's own negligence. If the subcontract attempts to require the subcontractor to indemnify the GC for loss or damages caused by the sole negligence of the GC, it might not be enforced in one of these states. Check with your attorney to find out if your state has an anti-indemnity statute.

Subcontractors might consider insisting on the inclusion of the following language in the subcontract in order to make it more likely that the subcontractor's obligation will be narrowly tailored to the subcontractor's negligence and only to the extent of its negligence:

Notwithstanding anything to the contrary, Subcontractor's duty to defend, indemnify or hold the Contractor harmless for any claim, loss, damage or expense, etc. shall exist only to the extent caused by the negligent acts or omissions of the Subcontractor.

Subcontractors should also seek to remove the word "defend" from the provision. If the GC refuses, propose a compromise by offering to modify the provision requiring you to pay the attorney fees incurred by the GC in defending the claim in proportion to your percentage of fault. Thus, if it is determined that you were 30 percent responsible, you pay only 30 percent of the attorney's fees. You might also seek to limit your obligation to indemnify the limits of your insurance coverage to the amount of the subcontract (e.g. "Subcontractor's obligation to indemnify contractor shall not exceed the limits of subcontractor's actual insurance coverage for such claim or loss, or the amount of this subcontract, whichever is less").

Subcontractors should not assume that because the subcontract does not contain an indemnification clause, no obligation exists. So-called "flow down" or "incorporation by reference" clauses have the effect of making all provisions of the prime contract applicable to the subcontract, including indemnification. Look for language in the subcontract that contains language such as "… *Subcontractor assumes all obligations and responsibilities that the Contractor assumes toward the Owner*." Failing to spot this language or mistakenly assuming your subcontract is the only source of duties can be a costly oversight.

Do not assume your general liability policy will always cover your defense and indemnity obligations. It might, but general liability insurance policies contain a whole host of exclusions, which may operate to deny coverage leaving the subcontractor having to pay the defense and indemnity obligations out of its own pocket. In other words, the fit between a subcontractor's insurance and its indemnity obligation is not precise. Subcontractors need to understand the coverage they have under their general liability insurance policies and try to avoid or close gaps in the coverage. Likewise, do not assume that naming the GC as an additional insured will ensure insurance covers any loss that the GC might incur so that it will not seek indemnification from the subcontractor. Prudent subcontractors will have their insurance brokers and attorneys review the indemnification language in the subcontract during the bidding stage to evaluate the likelihood that insurance will cover any defense and indemnification obligations you are undertaking in the subcontract. Finally, it should be noted that indemnity provisions are not always limited to loss or damage relating to bodily injury or property damage. The duties to defend and indemnify sometimes apply to loss or damage relating to other things. This article only scratches the surface and we recommend that you consult experienced legal counsel to review these clauses before entering into the subcontract.

Timothy Woolford, Woolford Law, P.C., is a construction attorney in Pennsylvania that represents subcontractors and other construction professionals. He is also an adjunct professor of law at the Penn State Law School where he teaches construction law to second- and third-year law students. He can be reached at (717) 290-1190 or twoolford@woolfordlaw.com.

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ASA/FASA Calendar

April 9 Webinar

12 p.m. to 1:30 p.m. Eastern Time

How to Avoid Predatory OCIPs, CCIPs and Builders Risk Insurance Flow-Downs

A complimentary ASA webinar on April 9, "Avoiding Predatory OCIPs, CCIPs and Builders Risk Insurance Flow-Downs," will expose the hidden costs and dangers to subcontractors on projects with Owner or Contractor Controlled Insurance Programs, also known as wrap-ups. "You will be surprised at the risks being pushed down to subcontractors on some projects," said presenter Jonathan Mitz, Ennis Electric, Manassas, Va. Mitz will also discuss how to protect yourself from unfair deductibles if you have a builder's risk claim against a general contractor's policy. "If you are responsible for bidding work or risk management in your company, then you really must attend this program," Mitz added.

Register online.

May 2019

14 — Webinar: Corporate and Individual Tax Planning Under the New Tax Law, presented by Thomas B. Bailey, CPA, CVA, Councilor, Buchanan & Mitchell, P.C.

June 2019

11 – Webinar: **"**A Small Business' Guide to Human Resources**"** presented by Jamie Hasty, SESCO Management Consultants

July 2019

9 – Webinar: **"**Emerging Technologies—Smart Tools, UAVs and Others—and How They Relate to the Internet of Things" presented by Maxim Consulting Group

August 2019

13 – Webinar: **"Trade Shortage"** presented by Michael Brewer, The Brewer Companies

Coming Up

in the April 2019 Issue of ASA's

THE CONTRACTOR'S Compass

Theme:

How the New Tax Law Affects You

- Corporate and Individual Tax Planning Under the New Tax Law
- Navigating the Modern Tax Landscape
- Construction Companies May Use a Different Method to Lessen Truck Order Backlog Entering 2019
- Legally Speaking

Look for your issue in April.

PAST ISSUES:
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JUNE 5TH, 11:08 A.M.

A STAGGERING STATISTIC INSPIRES A LIFESAVING RULE

IN AN INSTANT,
CALVIN BERGER SAW THE VALUE OF IN-CAB BEHAVIOR TRAINING FROM CNA

When a recent safety webinar revealed that 280,000 drivers are involved in serious accidents every year, Calvin Berger of Calberg Contracting took CNA's recommendation to heart and posted placards restricting cell phone use in each of his company's vehicles. Now Calberg Contracting is filing fewer claims, and Calvin's enjoying a handsome bonus for worker safety and performance.

When you're looking for risk control programs that keep workers dialed into relevant industry trends … **we can show you more.®**

To learn more about CNA's coverages and programs for building contractors, contact your independent agent or visit www.cna.com/construction.

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