



CONTRACT REVIEW CHECKLIST



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1. SCOPE OF WORK

- In any contract, there should be a paragraph which describes what the subcontract is comprised of, including pricing, line items, quantities, etc. This should match the Subcontractor's quote or estimate. A lot of times, Subcontractor will include some 'small print' or qualifying language into the quote which sets out what is included or excluded from pricing. Often times the Contractor won't include that language.
- Incorporating the quote into the contract can help to eliminate any misunderstandings in the scope of work.
- Sometimes, customers refuse to allow this. In that case, Subcontractor can request for customer to include all of the inclusions/exclusions/ clarifying language from the quote in the scope of work section of the contract.

II. Scope of Work. The Subcontractor agrees to furnish and deliver to the job site, free from all claims, liens, and charges, all the labor, materials, equipment, services and incidentals necessary to fully complete the Work identified in the attached Schedule 1 which is incorporated by reference ("Work"). All Work shall be performed in accordance with the Contract Documents and in accordance with the terms of Subcontractor's quote which is attached hereto and incorporated herein.

2. PAYMENT TERMS

A. Timing of Payments

- Most state department of transportation (DOT) specifications will have a maximum time the prime can wait to pay the Subcontractor after receiving payment from the DOT. The contract should not provide more time to the Contractor for payment to Subcontractors than the state specs allow.
- Most states have a prompt payment statute for both public and private projects. These statutes provide for timing of payments from Owner to Contractor, Contractor to Subcontractor, and Subcontractor to Sub-Subcontractor as well as penalties such as attorneys fees or interest.

EXERCISE:	
What is my State Prompt Payment Statute for Public Projects?	
What is my State Prompt Payment Statute for Private Projects?	
What Section of the State DOT Specifications governs payment and how long do I have to wait to get paid?	

- "Pay-if-Paid" language will usually appear pretty clear. Sometimes this type of clause may be camouflaged in legal ease. For instance, "payment by the Owner is a 'condition precedent' to payment to the Subcontractor." (*This is a pay-if-paid clause.*)
- A "Pay-if-Paid" clause is a payment clause that states that the Contractor is obligated to pay its Subcontractors *only if* the Contractor receives payment from the Owner. In other words, if the Owner never pays the Contractor, the Contractor has no duty to pay the Subcontractor – at times, regardless of circumstances. **For example, if a GC defaults on a project and the Owner stops making payments, a Pay-if-Paid clause may allow the GC to withhold payment to Subcontractor even though Subcontractor's work didn't cause the Owner to withhold payment. BEWARE:** In the event a Subcontractor is forced to pursue a payment bond claim against the Contractor's surety, the surety can use a pay-if-paid clause in a contract as a defense to payment of a claim.

- A “Pay-when-Paid” clause is more of a timing mechanism. If Owner doesn’t pay Contractor, then Contractor isn’t off the hook. Generally, Contractor still has to comply with prompt payment act and/or pay Subcontractor within a reasonable time.
- The difference between these two types of payment clauses is significant. Where there is a “pay if paid” clause in a subcontract, the Subcontractor and the Contractor share the risk that the Owner will fail to pay.
- **Best Practice – eliminate or add limiting language to “pay-if-paid” provision:**

5.1.2.5 To the fullest extent permitted by Law, Contractor shall have no obligation to pay Subcontractor for any Work performed under this Subcontract until Contractor has been paid for such Work by Client and such payment by Client is hereby deemed to be an express condition precedent to any obligation owing by Contractor to Subcontractor to pay for any Work, including changed and extra Work performed by Subcontractor under this Subcontract, except to the extent the failure to receive payment is due to the fault of Contractor.

B. Retainage

- Determine if the prime is allowed to retain a certain percentage – typically set forth in the state DOT specifications. ***Whatever is allowed by the specs should match the subcontract.***

EXERCISE:	
Does my state law allow retainage? (Yes/No)	
Do the State Specifications allow retainage? If so, how much? (%)	

3. DELAY/LIQUIDATED DAMAGES

- Refer to the state specifications which should outline what liquidated damages are assessed based on the amount of the contract, working vs. calendar days, type of delay, etc.
- If the project is going into liquidated damages (LDs), the Contractor should be required to provide a written notice and an opportunity to the Subcontractor to cure any delay, deficiency or default.
- Most subcontracts are going to provide for a drop down of liquidated damages from the Owner to the Contractor to the Subcontractor. Sometimes Contractors include language allowing for the assessment of liquidated damages in excess of what Owner assesses. Subcontractors should only accept liquidated damages that are instituted from the Owner for the Subcontractor’s direct delay – no extra LDs from the Contractor.
- Subcontracts should include a caveat that excuses Subcontractor delay for circumstances outside of the Subcontractor’s control, i.e., “*Subcontractor shall not be liable for delays caused by Owner, Contractor, other Subcontractors and/or circumstances outside of Subcontractor’s control*”.

To the fullest extent permitted by the law, as between the Subcontractor and Contractor, the Subcontractor assumes the risk of all suspensions of or delays in the performance of the Subcontract Work, regardless of the length thereof, arising from all causes whatsoever, whether or not relating to this Agreement, including wrongful acts or omissions of the Owner and Contractor, their respective officers, agents, employees and contractors, except only to the extent, if any, an extension of time may be due as expressly provided from elsewhere in this Agreement and except to the extent, if any, that compensation may be agreed to by the Owner. Subject only to such exceptions, the Subcontractor shall bear the burden of all costs, expenses, and liabilities which he may incur in connection with such suspensions or delays, and all such suspensions, delays, costs, and liability of any nature whatsoever, whether or not provided for in this Agreement, shall conclusively be deemed to have been within the contemplation of the parties. Sub shall not be liable for delays caused by Owner, Contractor, other subcontractors or circumstances beyond Subcontractor’s control.

4. WARRANTY

- A Subcontractor should not be obligated to provide a warranty which exceeds that required by the State Specifications; i.e. *"in no event shall Subcontractor be obligated to warrant labor, equipment or materials in excess of that which is required by the State DOT Specifications"*.
- If the contract involves striping or other services involving manufacturer warranty and the state specification does not address a warranty provision, pass on or assign the manufacturer's warranty.
- Some contracts may include a requirement for a time certain – *"One year from the date of completion or acceptance by Owner..."* The warranty in the contract should apply to the actual scope of work and/or what is required by the state and/or manufacturer specifications.

VII. Performance. The Subcontractor warrants that all materials and equipment furnished and incorporated by it in the Project shall be new unless otherwise specified, and that Work under this Subcontract shall be of good quality, free from faults and defects, and in conformance with the Contract Documents. Subcontractor shall not be obligated to warrant materials and/or equipment beyond the State DOT Specifications or outside of manufacturer's specifications. All Work not conforming to these standards may be considered defective. The warranty in this Paragraph shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents.

5. DEFENSE & INDEMNIFICATION

- Nearly all states have an anti-indemnity statute that outlines what type of indemnity is permissible and what is prohibited. If the law is favorable, citing the actual law when negotiating the contract can be compelling: ***"To the extent set forth in Arizona Section 34-226 Subcontractor shall not be obligated to defend, indemnify or insure Contractor for Contractor's negligent acts or omissions..."***
- If the law in the state where the work is being performed is not favorable, Subcontractors may still negotiate language that limits defense, indemnity and/or additional insured coverage to the extent of Subcontractor's negligence.

XVIII. Indemnification The Subcontractor assumes entire its proportionate share of the responsibility and liability for any and all damages or injury of any kind or nature whatever, including death, to all persons, whether employees of the Subcontractor or otherwise, and to all property, to the extent caused by, resulting from, arising out of, or occurring in connection with the Subcontractor's or any subcontractor or materialman of subcontractor's, execution or performance of the Work under this Subcontract.

If any claims for such damage or injury, including death, are made or asserted, the Subcontractor agrees to indemnify and save harmless the General Contractor and the Owner, and their respective officers, agents, and employees (the "Indemnitees"), from and against any and all such claims and, further, from and against any and all loss, cost, expense, liability, damage, or injury, including reasonable attorney fees and costs, that the Indemnitees may directly or indirectly sustain, suffer, or incur as a result, but only to the extent caused in whole or in part by the negligent acts of omissions of the Subcontractor.

Upon demand, the Subcontractor agrees to and does assume, on behalf of the Indemnitees, the defense of any action at law or in equity which may be brought against the Indemnitees by reason of such claims. The Subcontractor further agrees to pay, on behalf of the Indemnitees, upon demand, the amount of any judgment that may be entered against the Indemnitees, in any such action.

~~In the event that any such claims, loss, cost, expense, liability, damage, or injury arise or are made, asserted, or threatened against the Indemnitees, the General Contractor shall have the right to withhold from any payments due or to become due to the Subcontractor under this Subcontract an amount sufficient, in the General Contractor's judgment, to protect and indemnify the Indemnitees from and against any and all such claims, loss, expense, liability, damage, or injury, including reasonable attorney fees and costs.~~

ARTICLE 12 – INDEMNIFICATION

To the fullest extent permitted by law, the Subcontractor shall indemnify, defend and hold harmless Owner and Contractor, its officers and its employees from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, monetary loss, interest, attorney's fees, costs and expenses of whatsoever kind or nature arising out of or in connection with Subcontractor's performance of this Subcontract, including those arising out of injury or death of Contractor's employees or subcontractors, whether arising before, during or after completion of the services hereunder and in any manner directly or indirectly to the extent caused, occasioned or contributed to in whole or in part, by reason of any negligent act, omission, fault or negligence of Subcontractor or its employees, agents or subcontractors. The indemnity set forth in this Section shall not be limited by insurance requirements or by any other provision of this Subcontract. Sub shall not be obligated to provide defense, indemnity or additional insured coverage for the negligent acts or omissions of any party indemnified hereunder.

EXERCISE:			
What is the Citation to your State's Anti-Indemnity Statute (i.e., <i>Arizona Revised Statutes 34-226</i>)			
What type of indemnity is permitted by my state? (Circle one)	Broad	Intermediate	Limited
	Sub can indemnify Contractor for Contractor's own negligence	Sub indemnifies Contractor 100% unless Contractor is solely at fault	Sub only indemnifies Contractor the extent of Subs own negligence
Did my state close the Loophole? (<i>Is Additional Insured coverage for the negligence of upstream entities prohibited?</i>)	YES NO (Circle One)		

6. INSURANCE

- The Insurance Section is tricky. Insurance brokers are a great tool. They can review contract language and tell a Subcontractor what is or isn't included in their casualty program.
- Additional Insured Status is sought from Subcontractors by Contractors, Owners and other upstream entities to provide insurance coverage for losses and claims caused by Subcontractor.
- If a Subcontractor isn't careful, it can get stuck providing coverage for losses caused by the negligence of upstream entities. These losses can negatively affect a Subcontractor's claims history resulting in premiums increases and other negative implications.
- Additional Insured coverage is accomplished through the use of endorsements coupled with contractual language. Different policies contain different endorsement forms and those different endorsement forms provide different levels of coverage. Most contracts will want Additional Insured coverage for ongoing and completed operations.
- If a Subcontractor carries a more limited form endorsement, a Contractor may ask the Subcontractor to request a different form endorsement from the insurer. Contractors generally want the broader forms because they are required in the prime contract or state DOT specifications or because the Contractor is looking for broader coverage up to and including their own negligence.

- The most common types of endorsements are as follows:

Endorsement	Arising Out of	Caused in whole or in part by	Notes
11/85	X		Very broad. Has been construed by courts as providing AI coverage for the negligence of the additional insured party.
10/01	X		Very broad. Has been construed by courts as providing AI coverage for the negligence of the additional insured party.
07/04		X	Introduction of the caused in whole or in part by language which requires a more casual connection between the actions of the named insured in order to trigger coverage for the additional insured.
04/13		X	Attempts to eliminate coverage for liability for which indemnity is prohibited by the applicable state anti-indemnity statute
12/19		X	Adds additional limitation based on contractual requirements.

1. Commercial General Liability:

\$1,000,000 each occurrence limit for bodily injury, personal injury and property damage;
 \$2,000,000 General Aggregate Limit;
 \$2,000,000 Products - Completed Operations Aggregate Limit;
 No XCU exclusion (\$5,000,000 XCU Aggregate required for blasting operations)

- If the CGL coverage contains a General Aggregate Limit, such General Aggregate shall apply on a per project/per policy hybrid basis.
- CGL coverage shall be written on ISO Occurrence form CG 00 01 1001 or a substitute form providing equivalent coverage and shall cover liability arising from premises, operations, independent contractors, products-completed operations, and personal and advertising injury.
- General Contractor, Owner and all other parties required of the General Contractor, shall be include as insureds on the CGL, using ISO Additional Insured Endorsements CG 20 10 (~~40 04 13~~) and CG 20 37 (~~40 04 13~~) or an endorsement providing equivalent coverage to the additional insureds. This insurance for the additional insureds shall be as broad as the coverage provided for the named insured subcontractor.
- Subcontractor shall maintain CGL coverage for itself and all additional insureds for the duration of the project and maintain Completed Operations coverage for itself and each additional insured for at least 3 years after completion of the Work.

*****Any modifications to the insurance provision should be consistent with the scope of coverage and limits contained in the Subcontractor's own casualty program.**

EXERCISE:

What Insurance and Limits do I carry?

General Liability

\$

Automobile Liability

\$

Workers Compensation

\$

Umbrella/Excess

\$

Professional Liability

\$

Pollution Liability

\$

What Additional Insured Endorsements are included in my casualty program?
 (11/85, 10/01, 07/04, 04/13, 12/19)

***Broker can complete this section.

7. ATTORNEY'S FEES

- Sometimes a contract will provide a Contractor with the right to recover its attorneys' fees costs and expenses in the event of litigation. This is referred to as a 'one-sided attorneys' fees provision'. A good compromise is to make the paragraph reciprocal, in other words, that Subcontractor would be entitled to recover its attorney's fees, too, i.e., the "most prevailing party" shall receive their attorney fees and costs.

~~If CONTRACTOR believes it is necessary to institute litigation to enforce the CONTRACTOR'S rights against the SUBCONTRACTOR hereunder and the CONTRACTOR is successful in said litigation, then SUBCONTRACTOR shall pay all the expenses incurred by the CONTRACTOR in the said litigation, The most prevailing party in any action hereunder shall be entitled to recover its costs of litigation, including but not limited to (1) attorneys' fees, (2) court costs, (3) witness fees and (4) other general expenses of litigation, together with interest on any monies recovered by the CONTRACTOR through such litigation.~~

8. TAXES/PERMITS

- Whether or not a contract is sales and/or use tax exempt should be clearly spelled out, ***"sales tax shall be charged to the Contractor unless a tax exempt cert is provided"***
- The permitting process can be both expensive and onerous. Subcontractors should clarify with the Contractor whose responsibility it is to both procure and pay for any required permits.

9. MISCELLANEOUS

- Clause which provides for working overtime, nights, weekends, holidays, want to include ***"subject to additional charges as required by Contractor."***
- Lump Sum Pricing. Often times Subcontractors will present a Contractor with a quote or estimate that provides for a lump sum rental or a rate for a service/material/equipment that is good for the life of a contract. If, for example, the project goes 3-6-9 months late, Subcontractor is stuck honoring that initial pricing. Make sure to include a limitation, i.e., ***"Pricing only valid through ____"*** (Pick a date certain) or ***"Pricing only valid for the original contract term or through calendar completion date after which additional charges or pricing escalation may apply."***
- "To the extent permitted by law, Subcontractor agrees to be a signatory to all union contracts necessary for the completion of the Work required under this Agreement without interruption, strikes, work stoppages or similar events." Add: ***"Provided it is limited to this project and does not impinge on any other existing union agreement of Subcontractor."***
- The Right to "Set-off" is the ability of the Contractor to deduct amounts it believes the Subcontractor owes it from pay estimates or sums otherwise due to the Subcontractor. Sometimes, Contractors will use this language to withhold payment to a Subcontractor in the event there is a claim or lawsuit. Best practice is to limit withholding by Contractor only for labor, equipment or materials, i.e., if Subcontractor doesn't pay a supplier.

The General Contractor may withhold the whole or any part of any payment due the Subcontractor to the extent required to cover (1) defective work or material not remedied by Subcontractor; (2) claims filed or reasonable evidence indicating the probable filing of claims against the Subcontractor, but only for claims for labor, equipment, or materials; or (3) failure of the Subcontractor to make prompt payment for material, labor, supplies, or equipment used by the Subcontractor under this Agreement.