

# Contracts BULLETIN

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## Bulletin # 1 – Modifying Construction Contracts

As an experienced subcontractor, you are aware of the problems associated with negotiating a subcontract. The prime contractor already has a contract, while you're still trying to secure the job. The prime contractor probably has copies of the contract documents which will also be binding upon you. You will typically not have seen those documents other than the plans and specifications.

The prime contractor will likely use its typical subcontract form, designed by its attorney to give the contractor the best conditions, while limiting your rights and remedies. You may be told that you have no option other than to sign the form agreement, and that there is nothing to negotiate.

In that situation, you have to make the most of any advantages you may have. The prime contractor wants your firm to do the job or it would not be asking you to sign the agreement. The contractor may not have time to find another competent sheet metal contractor who will agree to its terms and do the job for your price, if it cannot reach agreement with you. These circumstances will vary from situation to situation, but the one advantage that you can control is your knowledge of how a subcontract works and what alternate subcontract terms are available that will damage neither you nor the prime contractor, while improving your position.

These series of Bulletins are intended to alert SMACNA member contractors of their rights to modify unfavorable contract language found in many construction contract agreements.

### AGC/ASA/ASC Subcontract Form

Equally important, these Bulletins will inform members of the value of one of the most favorable subcontract forms developed through negotiations between the American Specialty Contractors (ASC)\*, the American Subcontractor Association (ASA), and the Associated General Contractors of America (AGC) – the AGC/ASA/ASC Standard Form Construction Subcontract. This new standard form of construction subcontract has been adopted and endorsed by all three construction groups. Its success in defining fair and equitable risk allocation, however, can only be measured by the extent of its use. We hope these Bulletins will further encourage the use of this document by the parties to the agreement by helping to educate you on the specifics of the new contract and its equitable treatment of contractor and subcontractor concerns. Having that information may assist you in getting prime contractors to accept and utilize the new forms.

### Your Contract Rights

Often the general contractor or prime contractor will include their contract as part of the plans and specifications. This is a first opportunity for you, the subcontractor, to review language which may ultimately prove damaging should you get the job. No greater emphasis can be placed on these three words;

Read the Contract. What are your options if the contract language contains provisions which are not acceptable to you?

You should consider:

1. Contacting the prime contractor and attempting to negotiate changes to the contract form which could be reflected in a joint markup of the contract; or
2. Marking up the proposed contract yourself, initialing the changes, and sending it back to the prime contractor with an indication in a cover letter of your willingness to execute the subcontract, as amended; or
3. Attaching an addendum to the proposed contract overriding the unacceptable provisions, adding a reference in the subcontract form to the addendum, and returning the signed subcontract and addendum with a cover letter indicating that the addendum is intended to a part of the contract terms; or
4. Returning the bid with an unsigned contract but with an indication of your willingness to perform in accordance with the specifications and the enclosed bid package, assuming that you are able to agree upon subcontract terms; or
5. Substituting your own form of contract (i.e., the new AGC/ASA/ASC form), completing that contract as necessary, signing it, and returning it.

Modifications of subcontract terms must be done properly to avoid creating a whole new set of problems. In order to avoid questions of interpretation and enforceability, a construction subcontract should be in writing and signed by authorized representatives of both parties. If a subcontract is signed by one party but not the other, either party may contest whether an agreement existed as to the terms of the contract and whether it is enforceable. If a subcontract is signed by one party and changed by the other party, without the first party acknowledging the changes, an issue is created as to whether the changed terms were actually agreed upon.

If an addendum is attached to a subcontract form by one party but never acknowledged or executed by the other party, an issue will exist as to whether the second party agreed to be bound by the addendum. You should make your best effort to get the prime contractor to acknowledge the changes you are requesting so you can prove that those changes were intended by both parties to be part of the contract.

So, where does that leave a subcontractor who has attempted to modify an unacceptable subcontract form, but receives no response from the prime contractor as to the changes? It is essential that you have some signed subcontract, even if it is your own mark-up of the prime contractor's form. You should send a confirming letter as to your understanding concerning the subcontract. If you are allowed to commence work on the project under those circumstances, you at least have the argument that the prime contractor implicitly agreed to your terms in instructing you to start work without objection to your changes.

In most cases the best option for the subcontractor would be the use of a fair and equitable form like the new subcontract form. If the general contractor cannot be persuaded to use the form, the most practical alternative for the subcontractor will be the use of an addendum (unless the required changes of the proposed contract are very limited in number and scope). The addendum can be used to neutralize the most objectionable terms of the subcontract, while leaving the form itself intact.

You must remember that if your subcontract ever becomes part of a dispute in arbitration, a lawsuit, a bond claim, or an argument with the prime contractor, the language of the contract is likely to dictate the outcome. You must understand the contract. You should try to eliminate unacceptable provisions. If questions arise, you should consult with a competent and experienced attorney. Simply "biting the bullet" on a bad subcontract is not your only option and is never your best option.

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