

# **RISK MANAGEMENT BEGINS WITH YOUR CONTRACT**

Gerald I. Katz, Esq.  
KATZ & STONE, L.L.P.  
8230 Leesburg Pike, Suite 600  
Vienna, Virginia 22182  
(703) 761-3000  
(703) 761-6179 - fax  
[www.katzandstone.com](http://www.katzandstone.com)

# **RISK MANAGEMENT BEGINS WITH YOUR CONTRACT**

## **I. INTRODUCTION**

A successful project is one in which the “learning curve” is achieved by workers early on so that production and efficiency are maximized. This happens when the related trades learn the job, repeat the necessary steps in production and become more efficient as the job proceeds. Repetition is what makes for good production and a financially successful contract.

While the repetition of activities is good for production and, thereby, the bottom line, when problems are repeated, the impact on production and the bottom line is exactly the opposite. Contractors, therefore, should strive to avoid problems which affect the bottom line.

Unfortunately, certain legal problems are “facts of life” in today’s construction industry. They are facts of life because they are likely to occur on any job. But because they are facts of life, the contractor who is prepared to deal with these frequent legal problems can successfully manage them so that they do not have a serious impact on his performance. There is a learning curve for problem management, just as there is a learning curve for production. The challenge, therefore, is to identify problems as soon as they appear and to manage them until they are resolved, or at least minimized.

Upon close inspection, contractors will see that typical construction legal problems share certain characteristics. An appreciation for these characteristics, as well as a basic understanding of how contracts operate, will enable the contractor to easily develop a coordinated problem response system that has as its goal the early identification and resolution of legal problems. The goal should not be to bring attorneys into the process immediately upon discovering a problem, but rather to try to avoid the problem in the first instance, to detect it early if it cannot be avoided, and to manage it carefully so that it goes away. How can this be done?

Contractors essentially have two opportunities in which to identify, manage and resolve construction legal problems. The first, and best, opportunity is in the pre-contract or negotiation stage, while the second opportunity is in the contract administration or performance stage. How much effort the contractor must devote to problem identification, management and resolution in the second stage, that is, during the job, will depend upon how successful he has been in the first stage, in negotiating his contract. The smart, careful contractor will realize that he can make job performance far easier and much less risky if he pays careful attention to his contract before he signs it. Otherwise, he is likely to “buy-in” to perhaps unnecessary, and

certainly risky, legal problems once the job begins. The contract, therefore, is the first line of defense in dealing with construction legal problems.

## II. KNOW YOUR CONTRACT AND HOW IT WORKS

Construction contracts are not always “fair” in the abstract sense and are not always the result of equal bargaining power. Often contracts are presented on virtually a “take it or leave it” basis. This does not mean, however, that the contractor must surrender and merely sign the document that is put in front of him.<sup>1</sup> The smart contractor knows the hand-full of vital contract provisions to look for, how they work, the exceptions and loopholes. He will know from his understanding of the contract what provisions can be negotiated to mutual satisfaction, and how to spot those provisions which may appear harmful on their face but are not as bad as they seem. The prudent forward-looking contractor will also know what to do once the job begins in order to manage the risks created by those contract provisions which he does not like but, nonetheless, must accept. In three words, therefore, the approach the contractor should take is: ANALYZE, RESPOND and MANAGE.

**Analyze** means to review the contract to discover the troublesome clauses and negotiate them as best you can. **Respond** means to watch out for the troublesome clauses once the job begins by detecting problems early and giving prompt written notice. **Manage** means to monitor problems once they have detected, in order to reduce the risk or maximize the recovery.

Reviewing a construction contract before it is signed requires more than merely verifying that the designated contract sum is the price that was agreed between the contractor and his customer. Contract review requires that the contractor focus on those several provisions which appear in almost all construction contracts and which have potentially the most drastic impact on the bottom line. These provisions include “no damage for delay” clauses, condition precedent payment clauses, indemnification clauses, disputes procedures, notice provisions and claim submission procedures. While the entire contract should be carefully reviewed, there are many provisions which are of a routine nature and, except in extraordinary cases, pose virtually no risk to the contractor. By focusing on the several key provisions, understanding how they work and negotiating them effectively, the contractor can do a lot to minimize the construction legal problems he is likely to face once the job begins.

There are several common sense rules or principals which ought to guide the contractor in his review and negotiation of the proposed contract. First, know the exceptions. A case in point is the “no damages for delay” clause. Understanding what this clause typically covers and knowing what the exceptions are may be enough to satisfy the contractor that he can live with the clause as long as he effectively manages the risk during job performance.

---

<sup>1</sup>Of course, knowing when to say “No” to a proposed contract can be the best way to avoid legal problems.

Second, know local variations in the interpretation of troublesome contract provisions. Construction contracts often (though not always) are governed by the law where the project is located. Out-of-state contractors, therefore, should be familiar with local law because this may provide favorable exceptions or even render onerous contract provision void against public policy. Such is the case, for example, with “condition precedent” payment in a number of states.

Third, once troublesome clauses have been identified, seek a “win-win” solution in negotiations. By understanding what the clause is intended to do for the other side, the contractor sometimes can fashion a compromise which offers his customer protection without risking the contractor’s basic rights. For example, offering the general contractor a “covenant not to sue” may be enough to convince him to delete a condition precedent payment clause.

Fourth, if the clause cannot be deleted or negotiated, try to allocate the risk it presents to a lower-tier. Make sure that the subcontracts you let do not expose you to greater obligations than your customer has assumed toward you.

The contractor who ignores the proposed contract and will sign anything is buying-into substantial risks that could be avoided. On the other hand, the contractor who requires a negotiation over every paragraph of the contract is likely to infuriate his customer and, in any event, is wasting valuable time and effort. The prudent contractor takes the middle course: he knows those provisions that could harm him, he understands how they work, he tries to negotiate them, he knows the exceptions, and, once he has accepted what he absolutely must, he prepares to deal with the risks which remain in the next phase, project performance.

Set forth below are a number of standard construction contract provisions. These clauses, or clauses very similar to them, appear in virtually every written construction contract. These are the contract provisions which should be the focus of the contractor’s review and negotiation.

In reviewing and understanding these contract clauses, it is important to remember that while most of these provisions are not beneficial to the contractor's (or subcontractor's) interests and should be deleted from the construction agreement whenever possible, as a practical matter, the general contractor, and more likely the subcontractor, may not be able to negotiate the removal of these clauses from the contract documents. Thus, the goal is to recognize the potentially harmful clauses, to understand the situations or conditions under which these clauses apply, to avoid those circumstances whenever possible, and where avoidance is not possible, to manage the risks presented. In most cases, the law recognizes defenses to these troublesome clauses, and if the contractor or subcontractor identifies the problem and is prepared from the outset of the project to manage the risk, this foresight will be rewarded by significantly diminished liability.

## **A. The Spearin Doctrine**

To understand how contract provisions work and, generally, construction law, you need to understand the Spearin doctrine. Under the Spearin doctrine, adopted by most if not all of the states, the owner warrants the accuracy and adequacy of the contract document issued to the contractor. A similar warranty is given by the general contractor to the subcontractor. If the contract documents are followed, therefore, and if there is a problem with the work owing to a design in the contract documents, under the Spearin doctrine, the contractor (of subcontractor) is not responsible for the design.

The law has created a “gap” between the duty owed by the contractor to the owner, as defined by the Spearin doctrine, and the duty owed by the designer to the owner which is defined by the law of professional malpractice. As a result of this “gap,” extra work may be needed to correct design errors which may not be recoverable from the designer.

Contract provisions are often aimed at shifting the allocation of risk under the Spearin doctrine from the owner back to the contractor.

## **B. Flow-Down or Pass Through**

### **TIPS:**

Often, flow-down clauses are interpreted to apply only to the technical specifications of the contract documents which deal with the contractor’s scope of work. Forfeiture provisions found in the general conditions, for example, waiver of lien clauses or condition precedent payment clauses usually don’t “flow down” to the subcontractor.

- R FLOW-DOWN RELATIONSHIP. Subcontractor is bound to the Contractor in the same way and to the same extent Contractor is bound to Owner by the terms of the Contract Documents and shall bear all rights and liabilities with respect to the Contractor as the Contractor has with respect to the Owner, except that the terms of this Subcontract shall govern any inconsistent provision herein and in the Contract Documents. Subcontractor shall not deal directly with or work directly for Owner, Architect or Engineers.
- R PASS THROUGH OBLIGATIONS. In respect to work covered by this Subcontract, Subcontractor shall have all rights which Contractor has under the Contract Documents, and Subcontractor shall assume all obligations, risks and responsibilities which Contractor has assumed towards Owner in the Contract Documents, except as may be expressly modified herein. In case of a conflict between this Subcontract and the Contract Documents, the Subcontract shall govern.

## **C. Contract Documents Review and Site Inspection**

### **TIPS:**

It is essential that the contractor conduct a pre-bid site investigation to protect his rights and a possible later claim in the face of site investigation clauses. Without a site investigation, it will be very difficult to challenge the risk allocation provisions of site investigation disclaimer clauses.

- R 1.3 The Subcontractor represents and agrees that it has carefully examined and understands this Agreement and the other Subcontract Documents, has investigated the nature, locality and site of the Work and the conditions and difficulties under which it is to be performed, and that it enters into this Agreement on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of the Contractor, or the Owner, or of any of their respective officers, agents, or employees.

(§ 16.2, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley (Supp. 1994)).

- R (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or

agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(48 C.F.R. § 52.263-3).

**EXAMPLE:**

A subcontractor sued the general contractor for additional sums expended after it encountered wet soil while sinking piers for a foundation. The contract contained a provision in which the general contractor "disclaim[s] any responsibility for the accuracy, true location and extent of the soils investigation," including data concerning "the presence, level and extent of underground water." Additionally, the contract stated "the [soil] report is not a warranty of subsurface conditions, nor is it a part of the contract documents." The subcontractor chose not to investigate the site independently but instead relied on the soil reports furnished by the contractor to assist in bid preparation which did not reveal the wet soil condition. The court held that the soil report disclaimer effectively barred the subcontractor's ability to recover for the unforeseen conditions. See Millgard Corp. v. Mckee/Mays, 49 F.3d 1070 (5th Cir. 1995).

**D. Scheduling**

**TIPS:**

Scheduling clauses need to be evaluated in the context of the implied duties to schedule and coordinate the work, and other implied duties, which the courts will read into a contract. These other duties include the duty to act in good faith, the duty to cooperate and the duty to not interfere with the contractor's performance.

Often, the implied duties trump written scheduling clauses where the contractor can show that the other party breached an implied duty.

- R 2.6.4 The construction schedule shall be in a detailed precedence-style critical path method (CPM) or Primavera-type format satisfactory to the Owner and the Engineer, and shall also: (1) provide a graphic representation of all activities and events that will occur during the performance of the Work; (2) identify each phase of construction and occupancy; and (3) set forth dates that are critical in insuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as Milestone Dates). Upon review and acceptance by the Owner and the Engineer of the Milestone Dates, the construction schedule shall be deemed part of the Contract Documents and attached to the agreement as Exhibit \_\_\_\_\_. If not accepted, the construction schedule shall be promptly revised by the Contractor in accordance with the recommendation of the Owner and the Engineer and resubmitted for acceptance.

R (a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(48 C.F.R. § 52.236-15).

**EXAMPLE:**

A masonry subcontractor sued the general contractor for delay damages and acceleration costs based on the general contractor's breach of its duty to cooperate with the subcontractor and avoid delay to the project. The contract contained a paragraph which stated "Subcontractor shall proceed with the work according to a progress schedule furnished by the Contractor, without interference of the work of Contractor . . . so that the Contractor . . . can complete the work in accordance with the project schedule . . . . Subcontractor acknowledges that it has been informed that the Contractor must complete the general contract [by a date certain] and it is therefore, understood and agreed that the work shall be entirely completed on or before . . . CPM schedule. Time is of the essence in this subcontract." This schedule of work provision obligated the general contractor to properly schedule and coordinate the subcontractor's work, and its failure to do so supported a judgment in favor of the subcontractor. See **Bat Masonry Company, Inc. v. Pike - Paschen Joint Venture III**, 842 F. Supp. 174 (D. Md. 1993).

**E. Changes****TIPS:**

- Changes and change orders present a number of potential legal problems which should be considered and addressed if possible in the contract review and negotiation stage. These problems include the following:
  - Duty to proceed with disputed work
  - Change order as an "accord and satisfaction" of price, time and impact issues
  - Reservation of rights regarding impact costs in change order proposals
  - Quoting proposal language in the change order itself
  - Ensure that change orders are signed by the other party's authorized representative who is empowered to do so
- Always look for the word "waiver" in clauses dealing with change orders and extra work. Use of the word "waiver" will make it harder to recover in the event of a dispute if you did not get written authorization for the extra work.
- Beware of "tickets" signed in the field:
  - Tickets might be considered as separate contracts
  - Tickets might contain harmful, boiler-plate language on the back, for example, an indemnification clause
  - Tickets might be signed by field personnel who are not thinking about risk management

- Adopt a policy for field personnel when they are asked to sign someone else's ticket so their signature merely verifies quantities or hours and they are taught to cross-out all other language on the ticket
- Develop your own ticket which makes the work subject to the terms of your contract

R 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

7.1.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

**EXAMPLE:**

A contract for the erection of various site buildings stated "[Owner] reserves the right to make any changes in the specifications and plans which may be deemed necessary either before or after beginning any work under this contract, without invalidating this contract; provided that if alterations are made, the general character of the work as a whole is not changed thereby. If such alterations increase the quantity of work to be done, where unit prices are specified, such increase shall be paid for according to the quantity of work actually done at the unit price specified under this contract . . . ." It was held that notwithstanding numerous changes and alterations made by the owner which greatly increased the general contractor's cost in completion of the project, since the end product of the project had not changed, the alterations and changes were

permitted, and did not constitute breach of contract. See Mellon Stuart Constr., Inc. v. Metropolitan Water Reclamation District, 1995 WL 239371 (N.D. Ill).

**F. Change Orders**

R 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment in the Contract Sum, if any; and
- .3 the extent of the adjustment in the Contract Time, if any.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

**EXAMPLE:**

Where a change order was signed by church officials who, by themselves, did not have the power to bind the church, the court held that the instrument executed was not a "change order." The contract defined change order as "a written order to the Contractor signed by the Owner and the Architect . . . authorizing . . . an adjustment in the contract sum, [which] may be changed only by change order." The court held that the change order was not executed by the "owner", therefore, the instrument failed to fill the requirements of change orders set forth in the contract, and was invalid. See Asbury United Methodist Church v. Taylor and Parrish, Inc., 452 S.E.2d 847 (Va. 1995).

R 13.1.2 CHANGE ORDER. When the Contractor orders in writing, the Subcontractor, without nullifying this Subcontract, shall make any and all changes in the Subcontract Work which are within the general scope of this Subcontract. Adjustments in the Subcontract Price or Subcontract Time, if any, resulting from such changes shall be set forth in a Subcontract Change Order or a Subcontract Construction Change Directive pursuant to the Subcontract Documents. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Subcontract Work, adjustment in the Subcontract Price and/or Subcontract Time. A Subcontract Construction Change Directive is a written instrument prepared by the Contractor directing a change in the

Subcontract Work and stating a proposed adjustment, if any, in the Subcontract Price or Subcontract Time or both. A Subcontract Construction Change Directive shall be used in the absence of agreement on the terms of a Subcontract Change Order.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

**EXAMPLE:**

A subcontractor sued the general contractor for monies due on various change orders which had been initiated by the subcontractor's "letters of claim" for extra work. The subcontractor and general contractor formalized the extra work in a change order which read: "This change order represents full and final payment and obligation for any and all additional work by [subcontractor] on this contract including, but not limited to [subcontractor's] letters of claim . . . . This change order represents an accord and satisfaction of all claims for additional work and delays . . . pertaining to this project." The court applied the "four corners rule" of contract interpretation and held that the agreement was unambiguous, thus the subcontractor had no claim for monies above the change order amount. See **Vulcan Painters, Inc. v. MCI Constructors, Inc.**, 41 F.3d 1457 (11th Cir. 1995).

- R EXTRA WORK. No additional or extra work of any kind shall be performed by Subcontractor except upon prior written authorization by Contractor. In the event that Subcontractor proceeds without such written authority, it shall be deemed a waiver by Subcontractor of any and all claims for additional payment therefor. In the event that Subcontractor encounters circumstances giving rise to a claim for extra work, it shall within ten (10) days give notice of same to Contractor in sufficient detail for Contractor to provide notice to the Owner as prescribed in the Contract Documents. The notice shall include a proposal for costs and time extensions, if any, to perform any extra work. Failure to give such notice, or failure to give such notice in sufficient time for Contractor to provide notice to the Owner as required in the Contract Documents, shall constitute a waiver of claim.

(§ 9A.12, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley (Supp. 1994)).

**G. Claims and Disputes**

**TIPS:**

- Owners and general contractors often use claim notice and claim submission requirements to defeat claims on technicalities. To avoid this, you must carefully comply with claim notice and claim procedure requirements.

- Distinguish between timely notice of a claim and when your pricing must be submitted. The two are not necessarily the same.
- Again, beware of the word “waiver”
- If you are a subcontractor, keep in mind the difference between claims which could be pass-thrus to the owner (for example, an error in the contract documents) versus claims that are the responsibility of the general contractor (for example, failure to manage the other trades). Often, subcontract claim provisions attempt to restrict subcontractor claims if they have their origin in something done by the owner. You can avoid this depending upon how you give notice of, and describe, the claim so that it does not automatically become a pass-thru to the owner.
- Even if the claim becomes a pass-thru to the owner, keep in mind that the general contractor has the implied duty to act in good faith in his prosecution of the claim on your behalf.

R 4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Decision of Architect. Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

4.3.3 Time Limits on Claims. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An

additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

**EXAMPLE:**

A contractor did not waive the right to arbitrate even though it failed to bring its claims to the "architect" as required by the contract. The contract contained a section which stated "the Architect will interpret and decide matters concerning performance under and requirements of the contract documents on written request of either the Owner or the Contractor. The Architect will make initial decisions on all claims, disputes, or other matters in question between the Owner and the Contractor . . . all other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon written demand of either party." The owner and the architect were defined as the same entity, however, and the owner was not a licensed architect. The court determined that submittal of change orders to the owner and the owner's rejection of the change orders fulfilled the contractor's requirement to bring claims to the attention of the "architect" as condition precedent to arbitration. See Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc., 874 S.W.2d 526 (Mo. App. S.D. 1994).

R 13.2.1 CLAIM. A claim is a demand or assertion made in writing by the Contractor or the Subcontractor seeking an adjustment in the Subcontract Price and/or Subcontract Time, an adjustment or interpretation of the Subcontract terms, or other relief arising under or relating to this Subcontract, including the resolution of any matters in dispute between the Contractor and Subcontractor in connection with the Project.

13.2.2 CLAIMS RELATING TO OWNER. The Subcontractor agrees to make all claims against the Contractor for which the Owner is or may be liable in the same manner and within the time limits provided in the Contract for like claims by the Contractor against the Owner and in sufficient time for the Contractor to make such claims against the Owner in accordance with the Contract. The Contractor agrees to permit the Subcontractor to prosecute a claim in the name of the Contractor for the use and benefit of the Subcontractor in the manner provided in the Contract for like claims by the Contractor against Owner. The Contractor shall make available to the Subcontractor, prior to the execution of this Subcontract Agreement, copies of all Contract provisions pertaining to claims by the Contractor against the Owner.

13.2.3 CLAIMS RELATING TO CONTRACTOR. The Subcontractor shall give the Contractor written notice of all claims not included in Subparagraph 13.2.2 or 16.7.3 within seven (7) calendar days of the date

when the Subcontractor knew of the facts giving rise to the event for which claim is made; otherwise, such claims shall not be valid.

13.2.4 UNRESOLVED CLAIMS, DISPUTES AND OTHER MATTERS. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor, not relating to claims included in Paragraph 12.5, shall be resolved in the manner provided in Article 15 herein.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

#### **H. Additional Costs**

R 4.3.7 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

#### **I. Additional Time**

R 4.3.8 Claims for Additional Time

4.3.8.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.8.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

## J. Differing Site Conditions

### TIPS:

- Distinguish between a Type 1 and Type 2 condition.
- Is the unknown condition a subsurface condition or elsewhere?
- Is there a remedy clause in the contract?
- Written notice is essential.
- Look for disclaimers throughout the contract documents, for example, in the geotechnical reports, technical specifications, etc.
- Look throughout the contract documents for references to the geotechnical report which, it can be argued, incorporate the geotechnical report as a contract document.
- Consider “superior knowledge” and/or misrepresentation.
- Remember, for a differing site condition claim to have any chance of success, you must have conducted a pre-bid site inspection.

- R 4.3.6 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

- R (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of

an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(48 C.F.R. § 52.236-2).

## **K. Delay Claims**

### **TIPS:**

- In contract review and negotiation, be careful to identify and try to remove “no damage for delay” clauses.
  - Know the exceptions, state-by-state.
  - Give notice of delay in the context of one or more of the recognized exceptions and avoid use of the word “delay.”
  - Understand the difference between delay damages and damages due to disruption, lost productivity and/or inefficiencies.
  - Be familiar with the generally-recognized exceptions: active interference, bad faith, beyond contemplation at the time of contracting and abandonment.
  - Remember that if the no damage for delay clause limits your remedy to a time extension, the time extension must be timely granted.
  - If you are using the 1997 AIA General Conditions, keep in mind Article 4.3.10 which provides for a waiver of consequential damages.

R Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Times, to the extent permitted under Paragraph 12.1, shall be the sole and exclusive remedy of the Contractor for any: (1) delay in the commencement, prosecution or completion of the Work; (2) hindrance or obstruction in the performance of the Work; (3) loss of productivity; or (4) other similar claims (collectively referred to in this paragraph as Delays) whether or not such Delays are foreseeable. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling or correction of the Work or terminating this agreement for its convenience), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as active interference to the Contractor's performance of the Work. If the Contractor submits a progress report indicating, or otherwise expressing an intention to achieve, completion of the Work prior to any completion date required by the Contract Documents or expiration of the Contract Times, no liability of the Owner to the Contractor for any failure of the Contractor to so complete the Work shall be created or implied.

(§ 9A.14, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley (Supp. 1994)).

**EXAMPLE:**

Under Illinois law, exceptions to "no damages for delay" clauses exist for delays caused by bad faith, delays that were not in the contemplation of the parties, delays of unreasonable duration or delays attributable to the inexcusable ignorance or incompetence of the engineer. Thus, where the contract as a whole obligated the contractor to coordinate and work with the subcontractors, the general contractor could not prevail on summary judgment based on a "no damages for delay" clause when the subcontractors alleged the contractor's fault as the cause of the delay. See **J&B Steel Contractors v. C. Iber & Sons, Inc.**, 642 N.E.2d 1215 (Ill. 1994).

**EXAMPLE:**

But see **Marriott Corp. v. Dasta Constr. Co.**, 26 F.3d 1057 (11th Cir. 1994), where the court refused to grant the contractor relief even though evidence showed the owner had been responsible for delays, because the contract contained a "no damages for delay" clause which stated "to the fullest extent permitted by law, Owner . . . shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner . . . or [its] agents or

employees, or any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time." The general contractor's failure to request an extension of time constituted breach of contract which barred recovery against the owner.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

## **L. Condition Precedent Clauses**

### **TIPS:**

- Know the difference between pay "when" paid and pay "if" paid.
- Look for condition precedent payment language throughout the contract: progress payments, final payment, change orders, claims, extras, delays.
- Know your options:
  - Just say no.
  - Covenant not to sue.
  - Variations in state law.
  - Add language to preserve lien rights.
  - Is there a bond?
  - The implied duty of good faith.

R Payment to the Contractor by the Owner shall be a condition precedent to the right of the Subcontractor to final payment from the Contractor, unless failure of the Contractor to receive payment is solely the fault of Contractor. Final payment shall be made ten days after receipt of same by the Contractor from the Owner.

(§ 16.13, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley 1990).

### **EXAMPLE:**

The U.S. Court of Appeals for the Second Circuit certified a question to the New York State Court of Appeals whether the provision of the New York lien law providing that any contract waiving the right to file or enforce a lien is void against public policy prohibits a clause in a subcontract that makes payment by the owner a condition precedent to the subcontractor's payment. The effect of this case is to illustrate that the federal law, at least in the Second Circuit, is in flux regarding the enforceability of condition precedent payment clauses. See **West-Fair Electrical Contractors v. Aetna Cas. & Sur.**, 49 F.3d 48 (2nd Cir. 1995).

### **EXAMPLE:**

In a bankruptcy action, a secured creditor supplier sought funds retained by the project owner and due the bankrupt debtor contractor. The surety

who provided the contractor's performance bond prevented the turnover of funds by demonstrating that the contractor's failure to pay its subcontractors/suppliers breached the contract with the owner and precluded the contractors' entitlement to the funds. The contract between the owner and the contractor contained a final payment clause that stated "neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the work . . . have been paid or otherwise satisfied," in addition to a provision that provided for contract termination if the contractor "failed to make payment to subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors." See **In Re Modular Structures, Inc.**, 27 F.3d 72 (3rd Cir. 1994).

**EXAMPLE:**

See **Melton Welding and Fab. Co., Inc. v. Triple E Constr. Co., Inc.**, 1994 WL 85956 (Tenn. App.). The court ruled that a subcontractor had no claim for additional work after project completion, where the subcontractor accepted two checks bearing the notation "for [project] retainage and all contracts paid in full" and where it executed a final payment certification and lien release which provided that the subcontractor "releases [general contractor] from any and all claims for any sums or amounts due or claimed to be due or which may in the future be claimed to be due for future work."

**EXAMPLE:**

Construction contractors sued the owner for breach of contract under various theories, and the owner defended based on a release clause which stated "In consideration of payments made heretofore, or to be made based upon this invoice for labor, material, equipment, subcontract work, and any and all costs incurred for the performance of the contract work thus far, the contractor hereby unconditionally and without reservation releases and indemnifies [the owner] . . . from any and all liens, claims, demands, penalties, losses, costs, damages and liability in any manner whatsoever." The court held that this provision applied to all work, including extra work and work not invoiced, and that the waiver defeated the contractor's claim for additional compensation. See **Galin Corp. v. MCI Telecommunications Corp.**, 12 F.3d 465 (5th Cir. 1994).

At the end of these materials, you will find a chart which summarizes the law regarding the enforceability of condition precedent payment clauses in each of the states. This chart is believed to be accurate, however, you should consult your legal advisor to ensure that there have been no new cases or statutory changes in your state, or where the project is located, since the chart was prepared.

## **M. Indemnification**

### **TIPS:**

- Beware of “sole” negligence indemnity clauses.
- Understand the meaning of intermediate indemnity clauses.
- Try to add language providing for indemnity “to the extent” as used in the AIA and AGC standard form documents.
- Is the indemnity clause overbroad and void as a matter of public policy and, therefore, unenforceable?
- What work is covered by the indemnity clause?
- Revise the indemnity clause to state that you will not be responsible for OSHA violations by others.
- Beware of the arbitration of indemnity claims.
- Be sure that the indemnity provisions in your contracts are “reciprocal.”

- R 12.1 INDEMNIFICATION. The Subcontractor shall indemnify and hold the Contractor, Owner, Architect, their agents, consultants and employees harmless from and against all claims, losses, costs and damages, including but not limited to attorneys' fees, pertaining to the performance of the Subcontract and involving personal injury, sickness, disease, death or property damage, including loss of use of property resulting therefrom but not damage to the work itself, but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, or any of the Subcontractors' subcontractors, suppliers, manufacturers, or other persons or entities for whose acts the Subcontractor may be liable. This indemnification agreement is binding on the Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor is obligated to provide indemnification. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

## **N. Subcontractor Liability**

- R Subcontractor shall be liable to Contractor for all costs Contractor incurs as a result of Subcontractor's failure to perform this Subcontract in accordance with its terms. Subcontractor's failure to perform shall include the failure of its suppliers and/or subcontractors of any tier to perform. Subcontractor's liability shall include, but not be limited to (1) damages and other delay costs payable by Contractor to Owner; (2) Contractor's increased costs of performance, such as extended overhead and

increased performance costs resulting from Subcontractor-caused delays or improper Subcontractor work; (3) warranty and rework costs; (4) liability to third parties; (5) excess costs; and (6) attorney's fees and related costs.

Subcontractor's liability for Contractor's costs under this Article 6, and under Articles 3.d., 10 and 14, shall include a 10% markup. This markup is not a penalty but is established as liquidated damages to compensate Contractor for its administrative costs and/or to allow Contractor a reasonable profit on work which Contractor must perform as a result of Subcontractor's failure to properly perform.

## **O. Resolution of Claims and Disputes**

### **TIPS:**

- In reviewing language dealing with the resolution of claims and disputes, look for the following:
  - Arbitration versus litigation
  - Forum selection clause
  - Waiver of right to jury trial
  - Controlling law clause
  - Exhaustion of administrative remedies
  - Notice requirements
  - Is the architect's decision a condition precedent?
  - Distinguish between claims which are pass-thrus and claims which are not.
- Be aware of state laws which may trump forum selection clauses.
- Mandatory mediation in the 1997 AIA General Conditions.
- For general contractors, ensure you have reciprocal remedies provisions.

R 4.4.1 The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

4.4.2 If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

4.4.3 If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data

requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

4.4.4 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

**EXAMPLE:**

A general contractor and owner executed a contract with a claim/dispute resolution provision which stated "that the Engineer shall in all cases decide every question of an engineering character which may arise relative to the execution of the work under this contract on the part of the Contractor, and his decision shall be final and conclusive on both parties hereto: and such decision, in case any question which may arise, shall be a condition precedent to the right of the Contractor to receive any money or compensation for anything done or furnished under this contract." In construing this provision, the court held that the engineer had the power to evaluate the sufficiency and quality of materials furnished and work performed under the contract, that the engineer could determine all questions of an engineering character relating to the general contractor's performance, and that the engineer's decision was a condition precedent to the contractor's right to receive payment. Although the term "engineering character" was interpreted broadly, the court said that the engineer did not have authority to evaluate the owner's performance or lack of performance and that the owner's performance was a jury question. See Mellon Stuart Constr., Inc. v. Metropolitan Water Reclamation District, 1995 WL 239371 (N.D. Ill).

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

- R a. In case of any dispute between Contractor and Subcontractor, due to any action of Owner or involving the Contract Documents, Subcontractor agrees to be bound to Contractor to the same extent that Contractor is bound to Owner, by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board or court so authorized in the Contract Documents or by

law, whether or not Subcontractor is a party to such proceedings. In case of such dispute, Subcontractor will comply with all provisions of the Contract Documents allowing a reasonable time for Contractor to analyze and forward to Owner any required communications or documentation. Contractor will, at its option, (1) present to Owner, in Contractor's name, or (2) authorize Subcontractor to present to Owner, in Contractor's name, all of Subcontractor's claims and answer Owner's claims involving Subcontractor's work, whenever Contractor is permitted to do so by the terms of the Contract Documents. Contractor will further invoke on behalf of Subcontractor, or allow Subcontractor to invoke, those provisions in the Contract Documents for determining disputes. If such dispute is prosecuted or defended by Contractor, Subcontractor agrees to furnish all documents, statements, witnesses, and other information required by Contractor, and to pay or reimburse Contractor for all costs incurred in connection therewith. The Subcontract price shall be adjusted by Subcontractor's allocable share determined in accordance with Article 9 hereof.

b. With respect to any controversy between Contractor and Subcontractor not involving Owner or the Contract Documents, Contractor shall issue a decision which shall be followed by Subcontractor, without interruption, deficiency, or delay. If the Subcontractor is correct as to the controversy, Subcontractor shall be entitled to an equitable adjustment in the contract price as its sole remedy. Notification of any such claim for equitable adjustment must be asserted in writing within ten (10) days of Subcontractor's knowledge of the claim.

**P. Arbitration**

R 4.5.1 Controversies and Claims Subject to Arbitration. Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.3.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.

(©AIA Document A201, General Conditions of the Contract for Construction, 1987).

**EXAMPLE:**

A general contractor sued the owner for additional sums in connection with change orders on a construction project. The owner sought arbitration but the general contractor resisted on the basis that it had never signed the standard AIA form contract incorporating AIA Document A201 by reference. The court held that notwithstanding the general contractor's failure to sign the contract, arbitration could still be compelled since the general contractor engaged in conduct which clearly evidenced its willingness to be bound by the General Conditions contained in AIA Document A201 which included the duty to arbitrate. See **Liberty Manage. & Const. v. Fifth Ave. & Sixty-Sixth Street Corporation**, 620 N.Y.S. 2d 827 (A.D. 1 Dept. 1995).

**EXAMPLE:**

The contract between the owner and the architect contained an arbitration provision which stated in part "no arbitration arising out of or relating to this agreement shall include, by consolidation, joinder, or in any other manner, an additional person or entity not party to this agreement, except by written consent containing a specific reference to this agreement signed by the Owner, Architect, and any other person or entity sought to be joined." In partially overturning the arbitrator's award, the court held that the provision prevented the arbitrators from considering the architect's subcontractor's claim. Additionally, the arbitrators did not have authority to arbitrate the architect's claim for work performed under a subsequent, unexecuted agreement for the "second phase" of the same project. See **Wild West Trading v. gbs&h Architects**, 881 P.2d 1070 (Wyo. 1994).

**EXAMPLE:**

The owner sued the contractor for breach of contract even though the contract compelled arbitration. The owner claimed that potential third-party claims against parties who were not bound by the arbitration agreement and the fact that the contractor did not file for arbitration until after the owner had filed suit, and the lapse of three years between signing the contract and the initiation of the action all constituted waiver of the right to arbitrate. The court disagreed, and stated that the only issue before a court on a hearing to compel arbitration is whether the parties agreed to arbitrate the dispute in question: if they did, absent a clear intent to waive the right of arbitration, courts should compel arbitration. The court also noted that the parties had spent the intervening three years attempting to resolve their disagreements. See **City of Centralia v. Natkin & Co.**, 630 N.E.2d 458 (Ill. App. 1994).

**EXAMPLE:**

In an action brought by general contractor to consolidate arbitrations under four separate contracts with its subcontractors, the court held that

the existence of individual arbitration clauses in each subcontract plus the fact that all the arbitration provisions were silent as to consolidation demonstrated an intent among the parties not to consolidate. Thus, the court refrained from ordering consolidation of all the separate claims into a single arbitration. See **Bateman Construction, Inc. v. Haitzuka Bros. Ltd.**, 889 P.2d 58 (Hawaii 1995).

**Q. Liquidated Damages**

R 13.3.3 LIQUIDATED DAMAGES. If the Contract provides for liquidated or other damages for delay beyond the completion date set forth in the Contract, and such damages are assessed by the Owner against the Contractor, then the Contractor may assess such damages against the Subcontractor in proportion to its share of the responsibility for such delay and damage, but no more. The amount of such assessment against the Subcontractor, if any, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay and damage and shall never exceed the amount assessed against the Contractor by the Owner.

Nothing in Subparagraph 13.3.3 shall limit the Contractor's right to claim all actual damages sustained by the Contractor as a result of Subcontractor delay.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

**R. Attorneys' Fees**

R 7.4 ATTORNEYS' FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interests in any manner arising under this Subcontract, or to recover on a surety bond furnished by a party to this Subcontract, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses expended or incurred therein.

(©AGC Document No. 640, Standard Form Construction Subcontract, 1994).

**EXAMPLE:**

In a subcontractor's action on a Miller Act bond, the court held the subcontractor was entitled to its attorneys' fees incurred both in trying the action and in fees incurred prior to bringing suit where the language in the payment bond stated "In case suit is brought upon this bond [the surety] will pay, in addition to the face amount [of the bond], costs and reasonable expenses and fees, including reasonable attorneys' fees incurred . . . in successfully enforcing such obligation . . . ." The court held that the term "obligation" was broad enough to include not only attorneys' fees incurred during trial, but also those spent in pre-trial efforts against the general

contractor since all fees were expended to enforce payment for the subcontractor's project work. See **Granite Constr. v. American Motorists Ins.**, 34 Cal.Rptr.2d 835 (Cal. App. 3 Dist. 1994).

**EXAMPLE:**

Under the law of Colorado, the term "prevailing party" means the party in whose favor the decision or verdict on liability is rendered. For the purposes of awarding attorneys' fees, a party can be a "prevailing party" if it establishes its right to recover, even if the right does not support the damages that the prevailing party originally sought. See **Dennis I. Spencer Contractor, Inc. v. Aurora**, 884 P.2d 326 (Colo. 1994).

**S. Waiver of Liens**

**TIPS:**

- Be sure you understand the required waiver and release form before you sign it.
- What is the extent of the waiver/release?
  - For money paid to-date?
  - For work performed to-date?
  - For all work to be performed?
  - Does it include claims and causes of action?
  - Does it include the surety?
- Be familiar with state law regarding waivers in the subcontract itself.
- Is there a waiver form in the contract documents which is different from the one you are asked to sign?
- The first waiver could be the deadly one — read it carefully and modify it if necessary.

R Subcontractor hereby waives and releases all liens or right of liens now existing or that may hereafter arise for any and all work or labor performed or material furnished under this Subcontract upon said facility, or monies due or to become due to Contractor, and agrees to furnish a good and sufficient waiver of lien in proper form for filing from every person or entity furnishing labor or materials for this Project under Subcontractor.

**EXAMPLE:**

Subcontractor executed a waiver of liens that stated, in part, that it would "look to and hold Contractor personally liable for all subcontracts, materials, furnished work and labor done so that there shall not be any legal or lawful claim of any kind whatever against Owner for any work done or labor or materials furnished under the contract . . . or any under contract for extra work or for work supplement thereto . . . ." The subcontractor sought to avoid the waiver of liens on the ground that the contractor was "one in the same" as the owner. The court held that the owner and the contractor had observed all required formalities between

related corporations, and the court gave the lien waiver was full effect. See **B&B Builders, Inc. v. TCR Byberry Creek LP**, 27 Phila. 556, 1994 Phila. Cty. Rptr. LEXIS 52 (Com. Pl. Phila. Cty. 1994).

**EXAMPLE:**

A lien waiver stated "This agreement waiving the right of lien shall be an independent covenant . . . and shall be enforceable by Owner and such other owners, or any of them, and their respective successors and assigns." In addition, the integration clause of the contract stated that all oral representations were superseded by the final contract. The general contractor sought to avoid the lien waiver on the ground that the owner had promised the general contractor that it would not transfer its interest to any new owners. The court held that the lien waiver was complete and binding, and that the parol evidence rule barred the general contractor from presenting any additional evidence of "false representations." See **HCB Contractors v. Liberty Place Hotel Associates**, 652 A.2d 1278 (Pa. 1995).

**T. Termination for Convenience**

**TIPS:**

- Generally, profit on unperformed work is not recoverable.
- Termination for convenience may be voided if there is bad faith, bad motive or failure to follow the requirements of the termination for convenience clause.

R TERMINATION FOR CONVENIENCE. Contractor shall have the right to terminate this Subcontract for its own convenience for any reason by giving notice of termination effective upon receipt thereof by Subcontractor. Termination for default under Paragraph 10, if wrongfully made, shall be treated as a termination for convenience. Settlement of the Subcontract upon termination shall be accomplished in accordance with a provision of the Termination for Convenience clause in the Contract Documents. If no such clause exists, the Subcontractor shall be paid only the actual cost for work and labor in place, plus fifteen percent (15%), or a pro rata percentage of the Subcontract price equal to the percentage of completion, whichever is less. Subcontractor shall not be entitled to anticipated profits on unperformed portions of the Work.

**EXAMPLE:**

A city housing authority elected to terminate a contract with the general contractor, although initially the housing authority did not rely upon the termination for convenience clause in the contract. The court held that the housing authority was entitled to the benefits of the termination for convenience clause under the doctrine of "constructive" termination for convenience, which arises when the circumstances between the

government and a contractor change such that the original termination for cause is "converted" to termination for convenience. In this case, changed circumstances were found to result from the deterioration of the relationship between the housing authority and the contractor. Absent proof of bad faith or unfair dealing, the contractor was limited to compensation for the value of "work performed" up to the point of termination. See Linan-Faye Constr. Co., Inc. v. Housing Auth. of Camden, 49 F.3d 915 (3rd Cir. 1995).

### III. THE IMPORTANCE OF PROMPT NOTICE

Notice requirements appear throughout construction contracts. They are found in those clauses which deal with changes or extras, claims, differing site conditions, delays, time extensions, adverse weather, and elsewhere. Important notice requirements are also found in payment and performance bonds. One purpose of notice requirements is to give the other party an opportunity to resolve a problem or a delay, or avoid a cost, before it is too late. Another purpose is to ensure that the other party knows that the contractor has a problem or a claim which he intends to pursue so that all parties are operating with the same degree of knowledge.

Perhaps more than any other requirement in construction contracts, contractors tend to ignore or disregard notice requirements. By doing so, they jeopardize their rights, reduce the likelihood of recovering their claims, and allow the other party to portray them as incompetent, deceitful or worse.

The careful contractor will identify all notice requirements before he signs the contract. Where the notice period is too short (for example, 24 hours), the contractor should negotiate a more reasonable time period for giving notice, for example, three days.

Once the contract has been signed, the contractor should ensure that those personnel who will administer the contract and manage the work are familiar with all notice requirements. He will also ensure that notice is given promptly according to the requirements of the contract. Merely knowing that notice must be given in a designated period of time does no good to the contractor who fails to give notice.

Just as important as giving timely notice is the contents of the notice. First, the contractor should review the notice requirement to see whether it defines what must be included in the notice. For example, some notice requirements require the contractor to identify the problem and to state an estimate of the probable impact of the problem on cost and schedule. Where this type of requirement exists, it is not enough merely to advise the other side that a problem exists without also estimating the cost and schedule impact of the problem.

Apart from any special requirements described in the notice clause, the notice should state clearly what the problem is, the source of the problem, how and when the problem was detected and its impact on the contractor's work. If the impact is ongoing, the contractor should so indicate in his notice. Where reference to a contract drawing or specification would be helpful in understanding the problem, the notice should include this information.

What ought not to be in the notice is any reference to personalities or speculation as to why someone has done something or failed to do something. The notice should be objective and factual. Giving notice is intended to comply with the contract's notice requirement and, also, to provide documentation for use at a later date. An otherwise effective notice letter could be less effective if it disparages somebody's motives or describes someone unfavorably.

In reviewing contract provisions for notice requirements, the contractor must be alert to the word "waiver." Where this word appears, the intent of the parties is that if the notice is not given, or given within the time stipulated, the claim is waived, that is, legally abandoned. Hence, failure to give timely notice where such failure is defined as a waiver could mean that the contractor loses the right to pursue claims which could be worth thousands of dollars. To paraphrase Shakespeare, "for want of a letter, a fortune was lost."

Prompt compliance with notice requirements is helpful for another reason, as well. Giving notice to the other side ought to result, at the same time, in internal notice, notice of the problem to upper management. This affords upper management an opportunity to monitor the effectiveness of the project team in dealing with the problem. While the temptation is to let project management run the job, senior management ought to remain aware of ongoing problems to ensure that they are adequately dealt with and resolved. Complying with contract notice requirements serves this purpose.

Arbitrators and judges have come to believe (and virtually require) that good contractors give notice. Many a construction claim has been lost, or at least weakened, because the contractor failed to give notice when his contract, and common sense, required him to do so. The sharp contractor will not let this happen to him.

#### **IV. GOOD DOCUMENTATION IS ESSENTIAL**

Just as arbitrators and judges have come to expect that contractors will give timely notice of their claims and problems, they also expect that the problem or claim will be well-documented by internal records prepared contemporaneously. Again, a good claim, or a defense to another's claim, can be lost where the documentation is non-existent or at best sketchy.

Contracts ordinarily do not require the contractor to maintain documentation. However, this should be done as a matter of good common sense and business

practice. When a problem is first detected and notice of the problem given, it should be a signal to start documenting the file. Indeed, prompt notice and good record-keeping go hand-in-hand.

Good documentation is important for a number of reasons. First, as previously noted, it is something which arbitrators and judges expect. Contractors who want to recover tens or hundreds of thousands of dollars for claims are expected to have good documentation of the event or events which gave rise to the claim and the costs incurred as a result.

Second, documentation is important because it creates a contemporaneous record of events that will remain long after memories fade and employees are gone.

Third, good documentation often can have important psychological effects on the other side. The party to a dispute who sees that his adversary has a well-documented claim may draw the conclusion that the claim is one which should be settled, rather than arbitrated or litigated. Conversely, the adversary who sees that the contractor did not give proper notice and did not maintain good documents may be inclined to resist a settlement knowing that the lack of notice and documentation will weigh in his favor.

As important as documentation is, it is something which field personnel, even at the project management level, often neglect to do because of other demands on their time such as ensuring production, and getting the job done. One solution to the ever-present conflict between doing a day's worth of work versus writing letters is to make it as easy as possible for people in the field to document problems without doing so at the expense of their many other responsibilities. Contractors can do this by providing project management and field personnel, with simple, easy-to-use forms to record the impact of changes, errors and omissions in the documents, schedule impacts and the like. Examples of such forms follow:

# CHANGE ORDER DATA SUMMARY

PROJECT: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NUMBER \_\_\_\_\_ OWNER/A/E NUMBER \_\_\_\_\_  
SCOPE OF CHANGE WORK \_\_\_\_\_

INITIATION DATE \_\_\_\_\_ INITIATION SOURCE \_\_\_\_\_  
(RFI, RFQ, etc.)

DATE PROPOSAL REQUESTED \_\_\_\_\_  
ORIGINAL PROPOSAL DATE AND AMOUNT \_\_\_\_\_  
ORIGINAL TIME REQUESTED \_\_\_\_\_

REVISED PROPOSAL DATE AND AMOUNT \_\_\_\_\_  
REVISED TIME REQUESTED \_\_\_\_\_  
NOTICE TO PROCEED DATE AND AMOUNT \_\_\_\_\_

DATE FORMAL CHANGE ISSUED \_\_\_\_\_ CHANGE ORDER NO. \_\_\_\_\_  
TIME EXTENSION GRANTED \_\_\_\_\_ (Calendar Days)

DATE FIELD WORK COMMENCED \_\_\_\_\_  
DATE FIELD WORK COMPLETED \_\_\_\_\_

FLOOR AND AREA AFFECTED \_\_\_\_\_  
CPM (IJ) ACTIVITY AND EVENT AFFECTED \_\_\_\_\_  
(Use IJ Code Numbers and Description)

IMPACT AND DISRUPTION TO BASE CONTRACT WORK \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Describe type of Base Contract Work impacted, the crew size and effect; *i.e.*, slow downs, stop work, or having to move crews to other work areas)

REMARKS \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PREPARED BY \_\_\_\_\_ DATE \_\_\_\_\_

**SHOP DRAWING AND MATERIAL APPROVAL  
DELAYS AND WRONGFUL REJECTION SUMMARY**

**PROJECT:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SUBMITTAL NUMBER: \_\_\_\_\_  
DESCRIPTION OF SUBMITTAL \_\_\_\_\_

DATE OF ORIGINAL SUBMITTAL \_\_\_\_\_  
DATE OF FIRST REJECTION \_\_\_\_\_  
REASON FOR REJECTION \_\_\_\_\_

DATE OF SECOND RESUBMITTAL \_\_\_\_\_  
DATE OF SECOND REJECTION \_\_\_\_\_  
REASON FOR SECOND REJECTION \_\_\_\_\_

Use additional forms attached hereto to record additional Resubmittals and Rejections)

DATE OF FINAL APPROVAL \_\_\_\_\_  
NUMBER OF CALENDAR DAYS BETWEEN ORIGINAL SUBMITTAL DATE AND FINAL APPROVAL  
DATE \_\_\_\_\_

DATE THAT APPROVAL WAS REQUIRED TO MEET ORIGINAL CONSTRUCTION SCHEDULE  
\_\_\_\_\_  
CALENDAR DAYS DELAY TO THE FIELD WORK PER ORIGINAL SCHEDULE CAUSED BY LATE  
APPROVAL \_\_\_\_\_

IMPACT AND DISRUPTION TO BASE CONTRACT WORK: DESCRIBE IN DETAIL  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PREPARED BY \_\_\_\_\_ DATE \_\_\_\_\_

## ERRORS AND OMISSIONS DATA SUMMARY

**PROJECT:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ERRORS & OMISSIONS NUMBER \_\_\_\_\_

CHARACTER OF ERRORS AND OMISSIONS \_\_\_\_\_

FLOOR AND AREA AFFECTED \_\_\_\_\_

SPECIFICATION SECTION REFERENCES \_\_\_\_\_

DRAWING REFERENCES \_\_\_\_\_

OTHER DOCUMENTATION AVAILABLE (Photos, special drawings, as-specified vs. as-built drawings, etc.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DATE OF NOTIFICATION TO GENERAL CONTRACTOR, ARCHITECT/ENGINEER, OWNER \_\_\_\_\_  
\_\_\_\_\_

METHOD OF RESOLUTION AND DATE (e.g., A/E issues Change Request; Clarification Memo, etc.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IMPACT AND DISRUPTION TO BASE CONTRACT WORK. DESCRIBE IN DETAIL (e.g., stopped work, moved to other work, lost hours, etc.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PREPARED BY \_\_\_\_\_

DATE \_\_\_\_\_

# IMPACT ANALYSIS OF CHANGE ORDERS ON CPM SCHEDULE

PROJECT:

---



---



---

DESCRIPTION	CHANGE ORDER NO.	CHANGE ORDER NO.	CHANGE ORDER NO.	CHANGE ORDER NO.	CHANGE ORDER NO.	CHANGE ORDER NO.
LABOR DATA						
Trade						
Crew Size						
Crew Days						
Manhours						
CPM DATA						
I-J Networks Affected						
Activity Description						
Duration						
Float						
Adjusted Duration						
Adjusted Float						
Adjusted End Date						

PREPARED BY \_\_\_\_\_

DATE \_\_\_\_\_

No contractor would undertake a project for a fixed price without first doing a take-off to determine the quantities of labor and materials he will be expected to provide for the payment he has agreed to accept. Likewise, no contractor can expect to resolve a construction legal problem without being prepared through timely notice and proper documentation.

C:\Core\MGMT\PRSNTATN\risk mgmt begins w your contract.wpd:hj



**STATE-BY-STATE SUMMARY ON CONDITIONAL  
PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS**

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Alabama	Majority <sup>2</sup>	<u>Crass v. Scruggs</u> , 115 Ala. 258, 22 So. 81 (1897).	"Payments based on engineer's estimates, and to be made on the 15th of each month, or as soon thereafter as said railroad company pays or causes to be paid the said J. T. Crass."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Alaska	Minority <sup>3</sup>	<u>Industrial Indem. Co. v. Wick Constr. Co.</u> , 680 P.2d 1100 (Alaska 1984).	"Final payment shall be made within five days after CONTRACTOR has received his final or complete payment involving SUBCONTRACTOR'S portion of work."	Clause enforced as creating a valid condition precedent to payment. Because the contractor was not required to pay the subcontractor unless and until the owner paid it, interest did not begin to accrue until the owner paid the contractor.	
Arizona	Majority	<u>Pioneer Roofing Co. v. Mardian Constr. Co.</u> , 152 Ariz. 455, 733 P.2d 652 (1986).  <u>Watson Constr. Co. v. Reppel Steel &amp; Supply Co.</u> , 123 Ariz. 138, 598 P.2d 116 (1979).	"Contractor shall not, however, be liable for a greater sum than Contractor obtains from the Owner for such additional work . . . and the recovery by Subcontractor for such work shall be conditioned upon a prior recovery therefor by Contractor from the Owner."  "THE CONTRACTOR AGREES . . . to pay the Sub-Contractor, promptly upon receipt thereof from the Owner, the amount received by the Contractor on account of the Sub-Contractor's work to the extent of the Sub-Contractor's interest therein . . . . At all times subcontractor shall be paid to the extent that the contractor has been paid on his account."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. Court looked for language specifying payment to be made "exclusively" or "only" from a particular area.  ". . . [P]rovisions such as those found in the subcontracts in question do not create a condition precedent in the absence of additional language which clearly shows that the payments were to be made "exclusively" or "only" from the specified fund and no other."	
Arizona (Cont.)		<u>Darrell T. Stuart Contractor of Arizona v. J.A. Bridges and Rust-Proofing, Inc.</u> , 2 Ariz. App. 63, 406 P.2d 413 (1965).	"The contractor shall pay the . . . subcontractor's pay estimate within ten days after receipt of payment by the Contractor . . . ."	"If the defendant did not receive all of its money from the contractor, the defendant nevertheless remained indebted to the [subcontractors] and the [subcontractors] were entitled to payment within a reasonable period of time following the completion of the performance of their contract obligation."	
Kansas	Majority	<u>Trinity Universal Ins. Co. v. Smithwick</u> , 222 F.2d 16 (8th Cir. 1955), <u>cert. denied</u> , 350 U.S. 837, 100 L.Ed 747, 76 S.Ct. 74 (1955).	Exact contract language not given in case.	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

For purposes of this handout, the majority rule is that, unless the parties explicitly and unambiguously provide otherwise, a general contractor must pay a subcontractor within a "reasonable time" after the subcontractor completes its work, regardless of whether the owner has paid the general contractor for the work.

For purposes of this handout, the minority rule is that contract language which provides that payment is due after receipt thereof from the owner, is an enforceable conditional payment clause and shifts the risk of owner nonpayment to a subcontractor.

California	Clause void as against public policy	<u>William R. Clark Corp. v. Safeco Ins. Co.</u> , 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (1997).	"Receipt of funds by Contractor from Owner is a condition precedent to the Contractor's obligation to pay Subcontractor under this Agreement, regardless of the reason for Owner's nonpayment, whether attributable to the fault of the Owner, Contractor, Subcontractor or due to any other cause. Subcontractor shall assume the risk that if [sic] the Owner does not, for any reason . . . pay Contractor money owing to it for the work provided by Subcontractor. Accordingly, Subcontractor agrees that: 1. Contractor shall have no obligation, legal, equitable or otherwise, to pay Subcontractor for Work performed by Subcontractor. Furthermore, in the event Contractor is never paid by Owner for Subcontractor's Work, then Subcontractor shall forever be barred from making, and hereby waives, in perpetuity, any claim against Contractor therefore. . . ."	Condition precedent payment clauses are not enforceable in California. The clauses are against public policy because they amount to a waiver of mechanic's lien rights. In California, mechanic's lien rights can only be waived under certain circumstances. Neither the general contractor nor its payment bond surety could rely on the clause.
Colorado	no cases - related case indicates	<u>Mularz v. Greater Park City Co.</u> , 623 F.2d 139 (10th Cir. 1980).	Architect to be paid final 20% of fee after completion of bidding and negotiations phase.	"An intent to create a condition [precedent] in a contract must appear expressly or by clear implication . . . . [S]uch rule of construction is founded on a policy of avoiding, if possible,
Colorado (Cont.)	application of quasi- majority rule			forfeitures . . . . It is logical to infer that [the architect's] agreement to defer the balance of his fee until the time that the construction financing became available was made as an accommodation to [the owner]. It was made in anticipation of the bidding and negotiation phase being carried out. There is not the slightest indication that [the architect] intended to risk a portion of his fee on the non-occurrence of events over which he had no control . . . . [W]here, as here, a debt constitutes an absolute rather than a contingent liability, and payment was agreed to be made on occurrence of an event which does not occur, payment must be made within a reasonable time . . . . The clause regarding payment was indeed facially ambiguous, and the trial court was correct in its ruling as to the admissibility of parol evidence."

Connecticut	Majority	<p><u>Star Contracting Corp. v. Manway Constr. Co.</u>, 32 Conn. Supp. 64, 337 A.2d 669 (1973).</p> <p>Related case: <u>Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.</u>, 239 Conn. 708, 687 A.2d 506 (1997).</p>	<p>"Partial payments by the Contractor to the Subcontractor hereunder shall be made only at such time or times as payments made by the Owner to the Contractor shall include work completed by the Subcontractor, and then only in the ratio that work performed by the Subcontractor bears to all work to be done by him under this subcontract or the extent that the Contractor has received payment for such work, whichever is the lesser. . . . payment will not be made . . . until the Owner has made payment to the Contractor for the work."</p> <p>"[P]ayment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Contractor of his payment from the Owner."</p>	<p>Clause enforced as creating a valid condition precedent to payment. The contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Subcontractor must allege that the condition precedent is fulfilled in order to recover from surety.</p> <p>Even if language constituted a condition precedent, that condition was satisfied. The general contractor was paid less money than it sought, but was nonetheless required to pay the subcontractor the entirety of the amounts owed to it: "[The general contractor] was paid</p>	
Connecticut (Cont.)				<p>for the work performed by the [subcontractor], albeit based on a different schedule of values than those agreed to by the [subcontractor] and [general contractor] in the subcontract. Although the project engineer for [the Owner] disallowed some of the value for the work performed, it is the subcontractual value that the [subcontractor] and [the general contractor] placed on the work performed that controls."</p>	
Delaware	Majority	<p><u>Acierno v. Worthy Bros. Pipeline Corp.</u>, 1996 Del. Super. LEXIS 347 (1996), <u>aff'd</u>, 693 A.2d 1066 (Del. 1997).</p>	<p>"Final Payment . . . shall be made . . . when the Subcontractor's work is completed. If an Architect and/or Engineer represents the Owner for the work and if the agreement between the Prime Contractor and/or Owner and/or Architect provides . . . that the Prime Contractor must receive payment from the Owner prior to paying the Subcontractor, neither the certificates of payment nor prior payment to the Subcontractor and final payment to the Subcontractor shall be made on demand by the Subcontractor."</p> <p>On the front of the contract, the subcontractor's representative had written: "Payment schedule: 30 day draws upon payment from Owner with 10% retainage till (sic) release &amp; payment from Owner."</p>	<p>Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.</p>	

strict of Columbia	Majority	<u>Urban Masonry Corp. v. N&amp;N Contractors, Inc.</u> , 676 A.2d 26 (D.C. 1996).	"1(a) Payments will be made to the Subcontractor promptly as they are received. Receipt of payment by Contractor shall be a condition precedent to payment being owed to Subcontractor . . . . 1(e) Invoices for work performed by Subcontractor will be paid within five (5) days after receipt of the corresponding payment from General Contractor. . . . Late payments shall bear an interest at the rate of ten percent (10%) per annum . . . ."	Although the court noted that it would normally enforce the clause as creating a valid condition precedent to payment, it refused to do so in this case because the contractor had failed to defend the subcontractor's interests in settlement negotiations with the owner. The court held that the contractor may only assert the pay-when-paid clause as a defense if it has not done anything to hinder the satisfaction of the condition precedent.	
orida	Majority	<u>OBS Co. v. Pace Constr. Co.</u> , 558 So.2d 404 (Fla. 1990).  <u>Peacock Constr. Co. v. Modern Air Conditioning</u> , 353 So.2d 840 (Fla., 1977).	". . . Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied . . . . receipt of Final Payment for Subcontractor's work by Contractor from Owner . . . ."by the Owner."  Final payment to be made "within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect and full payment thereof by the Owner."	Although the subcontract clearly made payment from the owner a condition precedent, the general contract required the general contractor to submit an affidavit certifying that its subcontractors had been paid before final payment became due. The court found that the conflict between the subcontract and the general contract created an ambiguity. In these circumstances, "the intent to shift the risk of nonpayment is not clearly expressed, the payment provision must be interpreted as establishing a reasonable time to pay by the contractor rather than creating a condition precedent to the Contractor's obligation to pay the subcontractor."  "[The] intent in most cases is that payment by the owner is not a condition precedent to the general contractor's duty to pay the subcontractors . . . . There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor."	SURETY: FLA STAT. § 713.245 (1996) "[i]f the contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the bond contains on the front page, in at least 1 point type, the statement:  THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT."
orgia	Minority	<u>St. Paul Fire &amp; Marine Ins. Co. v. Georgia Interstate Electric Co.</u> , 187 Ga. App. 579, 370 S.E.2d 829 (1988).  <u>Sasser &amp; Co. v. Griffin</u> , 133 Ga. App. 83, 210 S.E.2d 34 (1974).	". . . no payment shall be due Subcontractor for such changed or extra work until Contractor has received payment from the Owner for said changes or extra work performed by Subcontractor."  Subcontractors to be paid "as the work progresses, based on estimates and certificates of the Architects or Contractor and payments will be made from money received from the owner only and divided Pro Rata amount [sic] all approved accounts of subcontractors labor and material."	Clause enforced as creating a condition precedent to payment. Court noted that the condition precedent to payment was clearly expressed in this subcontract.  "A provision in a contract may make payment by the owner a condition precedent to a subcontractor's right to payment if 'the contract between the general and the subcontractor should contain an express condition clearly showing that to be the intention of the parties' . . . . The condition is clearly expressed in this subcontract."	
orgia (Cont.)		<u>Peacock Constr. Co. v. West</u> , 111 Ga. App. 604, 142 S.E.2d 332 (1965).	"Final payment shall be made within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect, and full payment thereof by the Owner."	"[A]s we construe the plain and unambiguous language of the agreement, there are clearly expressed conditions precedent to defendants' liability for the final payment of the contract price."	

waii	No cases				
aho	Minority	<u>Hoff Cos. v. Danner</u> , 121 Idaho 39, 822 P.2d 558 (1991).	Language not given: Court concluded that parties, through their language and conduct, had impliedly agreed that the contractor's payment obligation was conditioned on its first receiving payment.	Pay-When-Paid terms of the parties' agreement created a valid condition precedent to payment. However, this is only the case when the payment by the Owner is <u>not</u> under the control of the Contractor.	
nois	Minority	<u>Premier Elec. Constr. Co. v. American Nat'l Bank of Chicago</u> , 276 Ill. App. 3d 816, 656 N.E.2d 157 (1st Dist. 1995), <u>modified</u> , 213 Ill. Dec. 128, 658 N.E.2d 877 (1st Dist. 1995).  <u>A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.</u> , 132 Ill.App.3d 325, 477 N.E.2d 30 (1985).	"The amount retained by the General Contractor shall be disbursed to the Subcontractor upon the last to occur of . . . the Owner has paid the General Contractor the entire balance related to the work due to the General Contractor . . . ."  "Final payment shall be held no more than the stated three months in the event that other subcontractor's [sic] or the General Contractor [sic] not completed their work . . . ."  "Material invoices submitted before the 25th of the current month will be paid by the 28th of the following month . . . if payment for invoiced material has been received . . . . [I]f the work has been satisfactorily performed and invoice as rendered is approved and if payment for such labor and material so invoiced has been received . . . the subcontractor will be paid . . . ."	Pay-when-paid clause in contract was superseded by unambiguous language of final payment clause in same contract. The court concluded that the second clause overruled the pay-when-paid clause.  "We do not believe that the record supports [the subcontractor's] claim that its right to payment . . . was absolute and not in any way contingent upon [the general contractor] receiving payment from the owners under the general contract. Our analysis of [the subcontract provisions] convinces us that the language is clear and unambiguous and, thus, there is no need to resort to rules of construction nor extrinsic evidence . . . plain, unambiguous language contained in the contract binds the parties to a condition precedent."	"Any provision in a contract, agreement or understanding, when payment from contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party including private or public owner, shall not be a defense by the party responsible for the payment to a claim brought under Section 21, 22, 23 or 28 of the Act against the party." 770 I LCS 60/21.
nois (Cont.)	surety case - void under statute	<u>Brown &amp; Kerr Inc. v. St. Paul Fire &amp; Marine Ins. Co.</u> , 940 F. Supp. 1245 (N.D. Ill., 1996).	"Final Payment . . . [shall be made] when . . . the Contractor has received final payment from the Customer under the Prime Contract."	By statute, the clause cannot create a condition precedent to payment. The clause merely establishes a reasonable time for payment. A surety cannot defeat a subcontractor's claim on a payment bond by asserting the contractor's pay-when-paid clause defense.	
hiana	Majority	<u>Midland Eng. Co. v. John A. Hall Constr. Co.</u> , 398 F. Supp. 981 (N.D. Ind. 1975).	". . . the last payment, which the said contractor shall pay to said subcontractor immediately after . . . final payment received by the contractor."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
va	Majority	<u>Grady v. S.E. Gustafson Constr. Co.</u> , 251 Iowa 1242, 103 N.W.2d 737 (1960).	"Contractor shall pay [] Sub-contractor in full within three (3) days after final acceptance of the project and payment of the final estimate by the Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

ansas	Majority	<u>Shelley Elec., Inc. v. United States Fidelity &amp; Guaranty Co.</u> , 1992 W.L. 319654 (D.Kansas 1992).	"Payment shall be made to Subcontractor within ten days after payment has been received by Contractor respecting such work or material, less any applicable percentage thereof retained in accordance with the aforesaid General Contract."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed. (It noted that there was no express condition precedent language or use of terms like "if" or "unless.")	
Kentucky	Majority	<u>A.L. Pickens Co. v. Youngstown Sheet &amp; Tube Co.</u> , 650 F.2d 118 (6th Cir. 1981).	"We will pay you a sales commission of 5% on our F.O.B. net realized mill value of our products covered by this agreement. This commission will be paid once each month on sales of our products on the invoices which have been fully paid."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Louisiana	Majority	<u>Southern States Masonry, Inc. v. J.A. Jones Constr. Co.</u> , 507 So.2d 198 (La. 1987).	". . . Contractor shall pay to Subcontractor, upon receipt of payment from the Owner, an amount equal to the value of Subcontractor's complete work, to the extent allowed and paid by Owner on account of Subcontractor's Work. . . . final payment. . . shall be made within forty-five (45) days after the last of the following to occur. . . (c) final payment by Owner to Contractor. . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.  (Note: LA courts appear willing to consider extrinsic evidence.)	
Louisiana (Cont.)		<u>C.Bel for Awnings, Inc. v. Blaine-Hays Constr. Co.</u> , 532 So.2d 830 (La. Ct. App. 4th Cir. 1988).	"The contractor agrees to pay the subcontractor . . . as the work progresses on estimates made and approved by the Contractor and/or Architect and payment received from the owner." Additionally, by subsequent agreement: [the] "parties acknowledge that . . . Subcontractor is not entitled to receive payment from [the general contractor] until [the general contractor] receives payment from [the owner]."	The subsequent agreements remove this case from the factual context of <u>Southern States</u> . The provision creates a condition precedent.	
Maryland	Majority	<u>Gilbane Bldg. Co. v. Brisk Waterproofing Co.</u> , 86 Md. App. 21, 585 A.2d 248 (1991).	"Monthly and final payments will be made to the trade contractor within five (5) days after receipt of payment by the construction manager from the owner. . . . It is specifically understood and agreed that the payment to the trade contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments, including retainer from the owner."	Clause was enforced as creating a condition to payment because the parties utilized express condition precedent language to shift the risk of owner non-payment or owner insolvency. (Case preceded statute).	"(b) A provision in an executory contract between a contractor and a subcontractor that is related to construction, alteration or repair of a building, structure, or improvement and that conditions payment to the subcontractor on receipt by the contractor of payment from the owner or any other third party may not abrogate or waive the right of the subcontractor to: (1) Claim a mechanic lien; or (2) Sue on a contractor's bond . . .  (c) Any provision of a contract made in violation of this section is void as against the public policy of this State. Maryland Real Property Code, § 9-113. (Applies only to contracts executed after 10/1/94)

Massachusetts	Majority	<u>A.J. Wolfe Co. v. Baltimore Contractors, Inc.</u> , 355 Mass. 361, 244 N.E.2d 717 (1969).	"Payments were to be made, ". . . within 10 days after . . . [the owner's] payment of such monthly progress payments . . . [has] been received by . . . [general contractor]. The balance of the contract price shall be paid . . . within thirty . . . days after full and final payment for the work by . . . [the owners]. . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	Pending: 1997 MA H.B. 1813 (introduced Jan. 1, 1997; now in Joint Comm. on State Admin.): "Performance by a subcontractor in accordance with provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is not a condition precedent to payment to a subcontractor and payment by a
Massachusetts (Cont.)					contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and as [sic] agreement to the contrary is unenforceable."
Michigan	Minority	<u>Berkel &amp; Co. Contractors v. Christman Co.</u> , 210 Mich. App. 416, 533 N.W.2d 838 (1995), <u>appeal denied sub. nom.</u> , 450 Mich. 1019, 549 N.W.2d 562 (1996).	"All payments received by Christman for the work done, 'the receipt of such payments received by the Christman Company being a condition precedent to payments of the subcontractor.'"	Clause enforced as creating a valid condition precedent to payment. Therefore, the contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Court held that, because the pay-when-paid clause did not contain any language limiting the condition precedent and requiring payment in a reasonable amount of time, the court refused to read the limitation into the clause.	
Minnesota	Majority	<u>Mrozik Constr., Inc. v. Lovering Assoc., Inc.</u> , 461 N.W.2d 49 (Minn. Ct. App. 1990).	"At all times the Subcontractor shall be paid to the extent that the Contractor has been paid on the Subcontractor's account."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	Pending: 1997 MN H.B. 335 (introduced Jan. 30, 1997; House Comm. on Commerce, Tourism and Consumer Affairs recommended passage) (same 1997 MN S.B. 256): "A provision contained in, or executed in connection with, a building and construction contract whereby payment from a contractor to subcontractor or supplier is conditioned upon receipt of payment from any other party, including the state, a political subdivision of the state, or a private owner, is void and unenforceable."
Mississippi	No cases				
Missouri	Majority	<u>Havens Steel Co. v. Randolph Eng. Co.</u> , 613 F. Supp. 514 (W.D. Mo. 1985), <u>aff'd</u> , 813 F.2d 186, (8th Cir. 1987).	Payment due ". . . after Supplier/ Subcontractor has satisfied Havens . . . and Owner of its compliance with all the terms and conditions hereof and, if also satisfied, twenty (20) days after Havens has received final payment from the . . . Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed.	Mo. Rev. State § 431.183 (1996): "Any provision in a contract, agreement or understanding that provides that a payment from a contractor to a subcontractor, trade contractor, special contractor or

Missouri (Cont.)		<u>American Drilling Service Co. v. Springfield</u> , 614 S.W.2d 266 (Mo. Ct. App. 1981).	"Upon complete performance of this subcontract by [the subcontractor] . . . [the general contractor] will make final payment to [the subcontractor] of the balance due to [the subcontractor] under this Subcontract within 30 days after full payment for such work and materials has been received by [the general contractor] from [the owner]."	"A clause which provides that the contractor shall pay a subcontractor within a stated number of days after the contractor has received payment from the owner merely fixes the time when payment is due and does not establish a condition precedent to payment."	supplier is contingent or conditioned upon receipt of a payment from any other private party, including a private owner no defense to a claim to enforce a mechanic's lien pursuant to the provisions of Chapter 429, RS Mo."
Montana	No cases				
Nebraska	Majority	<u>D.K. Meyer Corp. v. Bevco, Inc.</u> , 206 Neb. 318, 292 N.W.2d 773 (1980).	"[T]he Contractor shall not be liable for, nor bound in any respect to the Sub-contractor for the payment to him of his monthly or final estimates of any monies in excess of the amount which the Contractor receives from the Owner for the Subcontractor's work."	Clause not enforced as creating a condition precedent to payment, the clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Nevada	No cases				
New Hampshire	No cases				
New Jersey	Majority	<u>Seal Tite Corp. v. Ehret, Inc.</u> , 589 F. Supp. 701 (D. N.J. 1984).	"The contract price [ ] shall be payable in the following manner: Ninety (90) percent monthly of work completed, within seven (7) days of receipt of payment by the Owner, or his Agent . . . [t]he balance to be paid within thirty (30) days after acceptance and receipt of final payment by the owner. . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
New Mexico	No cases				

ew York	Quasi-Majority  Void as against public policy	<u>West-Fair Elec. Contractors v. Aetna Cas. &amp; Sur. Co.</u> , 87 N.Y.2d 148, 638 N.Y.S.2d 394, 661 N.E.2d 967 (1995).  <u>Com-Tec, Inc. v. Bilt-Rite Steel Buck Corp.</u> , 1996 U.S. Dist. LEXIS 8310, (S.D.N.Y. 1996) <u>supp. op.</u> , 1996 U.S. Dist. LEXIS 11996 (S.D.N.Y. 1996).	"It is specifically understood and agreed that the payment to the Trade Contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments including retainer from the owner. . ."  "Contractor agrees to pay Subcontractor the amount stated in this subcontract expressly conditioned upon and subject to Contractor's prior receipt of funds from Owner for the work properly applied for, invoiced and performed by Subcontractor . . . The retained percentage and final payment shall not be paid to Subcontractor unless: . . . (3) Contractor has been fully and finally paid by Owner for the work . . . ."	Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law. The clause merely established a reasonable time for payment by the contractor to the subcontractor.  Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law.	
orth Carolina	Clauses void by Statute (Previous to Statute, Courts followed Majority Rule)				"Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable." N.C. Gen. Stat. § 22C-2 (1995).
orth Dakota	No cases				
io	Majority	<u>Thos. J. Dyer Co. v. Bishop Int'l Eng. Co.</u> , 303 F.2d 655 (6th Cir. 1962).	"The total price to be paid to Subcontractor shall be . . . (\$115,000.00) . . . no part of which shall be due until five (5) days after Owner shall have paid Contractor therefor, provided however, that not more than . . . (90%) thereof shall be due until thirty-five (35) days after the	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

io (Cont.)	Majority	<p><u>Power &amp; Pollution Services, Inc. v. Suburban Power Piping Corp.</u>, 74 Ohio App.3d 89, 598 N.E.2d 69 (1991), <u>not overruled</u>, 62 Ohio St. 3d 1441, 579 N.E.2d 214 (1991).</p>	<p>entire work to be performed and completed under said contract shall have been completed to the satisfaction of Owners, and provided further that Contractor may retain sufficient money to fully pay and discharge any and all liens, stop-notices, attachments, garnishments and executions . . . . “</p> <p>“[General contractor] shall not be required to pay any such monthly billing of the subcontractor prior to the date [the general contractor] receives payment of its corresponding monthly billing from the Owner . . . . Within ten (10) days after said final payment by the Owner, [the general contractor] shall pay the subcontractor the balance of the subcontract sum.”</p>	<p>“[Although] a promise to pay ‘if and when funds are available’ was conditional and did not impose any obligation to pay until funds were available . . . the provision in dispute here does not set a condition precedent to the general contractor’s duty to pay the subcontractor, but rather constitutes an absolute promise to pay, fixing payment by the owner as a reasonable time for when payment to the subcontractor is to be made. If the parties intended to shift the risk of solvency of the owner to the subcontractor, such intention should have been unambiguously expressed.”</p>	
Oklahoma	Majority	<p><u>Byler v. Great American Ins. Co.</u>, 395 F.2d 273 (10th Cir. 1968).</p>	<p>“Contractor . . . will pay to the said Subcontractor, in monthly payments . . . as follows: . . . (100%) of all labor and material which has been placed in position and for which payment has been made by said ‘Owner’ to said Contractor, . . . except the last payment, which the said Contractor shall pay to said Subcontractor immediately after said materials and labor installed by said Subcontractor have been completed, approved by the said Architect, and final payment received by the Contractor . . . .”</p>	<p>Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment, by the contractor to the subcontractor. (<u>See also, Moore v. Continental Cas. Co.</u>, 366 F. Supp. 954 (W.D.Okla. 1973) (following <u>Byler</u>)).</p>	
Oregon	Majority	<p><u>Mignot v. Park Hill</u>, 237 Ore. 450, 391 P.2d 755 (1964).</p>	<p>“It is fully understood by and between the parties hereto that Contractor shall not be obligated to pay Subcontractor for any of the work until such time as Contractor has himself received the money from Bate Lumber Co. . . . In consideration of the prompt and faithful performance by Subcontractor . . . Contractor agrees to pay without interest thereon the . . . total value and price of the road construction work. . . .”</p>	<p>The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed. Where, as here, the contract contains a definite and unambiguous promise to pay for labor and materials performed and furnished, or for other services, the pay-when-paid clause will not be enforced.</p>	

Pennsylvania	Majority	<u>United Plate Glass Co. Div. of Chromalloy American Corp. v. Metal Trims Indust., Inc.</u> , 106 Pa. Commw. 22, 525 A.2d 468 (1987).	"Subject to the terms and conditions of this contract, final payment will be made to the subcontractor upon final acceptance of the work by the owner . . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	8 P.S. § 194 (1996) 73 P.S. §§ 501-516 (1996) 73 P.S. § 507 (1996).  "A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of payments from the owner. Notwithstanding any other provision of this act, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established [elsewhere in the act] were met by the owner."
Rhode Island	No cases				
South Carolina	Majority	<u>Elk &amp; Jacobs Drywall v. Town Contractors, Inc.</u> , 267 S.C. 412, 229 S.E.2d 260 (1976).	"Subject to the receipt of corresponding payments by the Contractor covering the work requisitioned by the Subcontractor, and subject to the approval of quantities in place by the Contractor, ninety (90%) percent of the value of the work actually completed by the Subcontractor during said period shall be paid to the Subcontractor . . . The retainage will be paid sixty (60) days after the later of the following events. . . iv) Full and final payment to the Contractor of all the funds due him for this project; and. . . Subcontractors have been paid in full."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
South Dakota	No cases				
Tennessee	Majority	<u>Koch v. Constr. Technology, Inc.</u> , 924 S.W.2d 68 (Tenn. 1996).	"Partial payments subject to all applicable provisions of the Contract shall be made when and as payments are received by the Contractor. The Subcontractor may be required as a condition precedent to any payment to furnish evidence satisfactory to the Contractor that all payrolls, material bills, and other indebtedness applicable to the work have been paid."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed.	

exas	Majority	<u>Wisznia v. Wilcox</u> , 438 S.W.2d 874 (Tex. 1969), (superseded by statute in part on other grounds).  <u>Gulf Constr. Co. v. Self</u> , 676 S.W.2d 624 (Tex. App., 1984).	"The engineer shall be paid in the same proportionate manner as the architect is being paid by the Overlook Development Corporation."  "Under no circumstances shall the general contractor be obligated or required to advance or make payments to the sub-contractor until the funds have been advanced or paid by the owner or his representative to the general contractor."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment.  The clause was simply a modification of the time for payment provision preceding it and did not create a condition precedent to payment.	
ah	Majority	<u>Zions First Nat'l Bank v. Christiansen Bros., Inc.</u> , 66 F.3d 1560 (10th Cir. 1995).	[Statutory language:] a contractor must pay his suppliers "within 30 consecutive days after receiving construction funds from . . . another contractor . . . or after the last day payment is due under the terms of the billing, whichever is later . . . ."	"[T]he general rule is that such pay-when-paid provisions do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party. To the contrary, these provisions are viewed only as postponing payment for a reasonable time and merely establishing a convenient time for payment."	
rmont	No cases				
gin Islands	Void as against public policy	<u>Shearman &amp; Assocs., Inc. v. Continental Cas. Co.</u> , 33 V.I. 192, 901 F. Supp. 199, (D.V.I. 1995).	"Subcontractor agrees that as a CONDITION PRECEDENT to the contractor's obligation to make any payment to subcontractor under the subcontract agreement, including final payment, the contractor must receive payment therefor from the owner. In the event the contractor does not receive all or any part of the payment from the owner with respect to the subcontractor's work, whether because of a claimed defect or deficiency in the subcontractor's work, or for any other reason, the contractor shall not be liable to the subcontractor with respect to any sums thereto."	A surety cannot defeat a subcontractor's claim on a payment bond, which replaces the mechanic's lien remedy, by asserting the contractor's pay-when-paid clause defense. It is against public policy in light of the Construction Lien Law as a whole.	



sconsin	Void by statute.				<p>"The following provisions in contracts for the improvement of land in this state are void: . . . (3) Provisions making a payment to a general contractor from a person who does not have a contractual agreement with the subcontractor or supplier a condition precedent to a general contractor's payment to a subcontractor or a supplier. This subsection does not prohibit contract provisions that may delay a payment to subcontractor until the contractor receives payment from any person who does not have a contractual agreement with the subcontractor or supplier." Wis. Stat. §779.135 (1994).</p>
yoming	No cases				