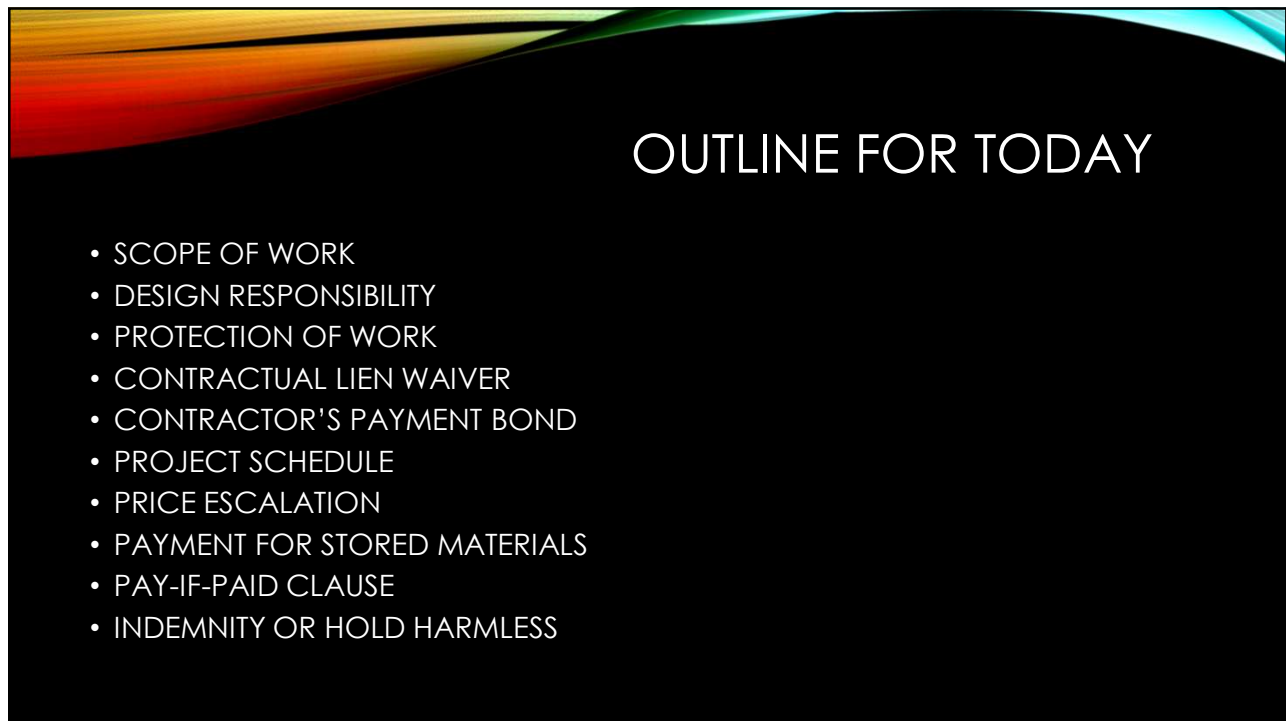


1



2

BASIS OF INFORMATION

- These slides are excerpts taken from a compilation of subcontracting tips produced by the American Subcontractors Association, Inc. I have chosen only a few topics that are important to subcontractors and recommend you consider further investigation.
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3

SCOPE OF WORK

- What you may see:
 - "The Subcontractor shall furnish all material, labor and equipment, necessary or incidental, to satisfy the Contractor's obligations to the Owner with respect to the [specific trade] portion of the project. Such work shall be in compliance with any and all general and subcontract requirements, including any work reasonably inferable from any Contract Documents."

4

SCOPE OF WORK

- Suggested language
 - Subcontractor's scope of work include only the following: [Insert your scope.]" Note: The subcontractor's description of the work should contain three elements:
 - The general denomination of the type of work that the subcontractor is going to perform.
 - A designation of the relevant portion of the project (by sheet numbers, date and date of last revision).
 - A statement that the work is to be in accordance with certain designated sections of the project specifications.

5

SCOPE OF WORK

- Impact on the subcontractor
 - A subcontractor could find that it disagrees with its customer about the scope of its work.
 - A subcontractor could find its scope of work, and thus its cost, has expanded dramatically.

6

SCOPE OF WORK

- Negotiating tips:
 - When a Contractor Says: "This owner is very demanding and doesn't always know what it wants. I need you to stay flexible."
 - A Sub Can Say: "Like you, I'm committed to giving the owner the best job possible. But the documents currently contain many added cost items that we didn't know about when we bid to you. We can either work out our pricing with you on those items or go back to the earlier requirements."

7

SCOPE OF WORK

- Negotiating tips:
 - When a Contractor Says: "We both know what your trade involves. I don't think we need to define every dot and tittle now."
 - A Sub Can Say: "You'll see that our bid submission was very specific about what it covered. We either need to incorporate into the subcontract the description of work in my submission and incorporated in my price, or we need to delete from the subcontract those items that were added."

8

SCOPE OF WORK

- Negotiating tips:
 - When a Contractor Says: "We can address these concerns later as the job progresses."
 - A Sub Can Say: "I know we're both committed to making this project go as smoothly as possible. It's best for both of us to address these potential problems now, instead of waiting for actual problems to arise."

9

DESIGN DESIGNATION

- What you may see:
 - "The Customer has requested that the Architect prepare documents for the Project, which are to be complete and accurate. The Subcontractor acknowledges and represents that it has not and will not rely upon any representations by the Customer or the Customer's agents concerning such documents."

10

DESIGN DESIGNATION

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

11

DESIGN DESIGNATION

- Impact on the subcontractor
 - A subcontractor may find itself with design responsibility for which it must hire a professional at a cost it did not include in its bid.
 - A subcontractor may find that it is not licensed and/or insured for design responsibility for which it has contracted.
 - A subcontractor is likely to find that a disclaimer of owner-furnished plans and specifications is a red flag for a problem on the project.

12

DESIGN DELEGATION

- Negotiating tips:
 - When a Contractor Says: "My customer insisted on this design disclaimer in my contract, so this is just a pass through."
 - A Sub Can Say: "I am willing to accept responsibility for designing portions of the work that were clearly identified and included in the bid documents. But it's not fair to ask me to make representations about the design without letting me know up front that I needed to include a line-item in my bid to include fees for an architect or engineer."

13

DESIGN DELEGATION

- Negotiating tips:
 - When a Contractor Says: "The subcontract makes clear that the Architect's documents are to be complete. You shouldn't have a problem."
 - A Sub Can Say: "I can't be locked into a design that you or someone else has prepared, without being allowed to rely on the documents prepared by that someone. I have to be able to rely on the architect's plans, or I have to be reimbursed for retaining my own design professional."

14

DESIGN DELEGATION

- Negotiating tips:
 - When a Contractor Says: "This is standard industry practice."
 - A Sub Can Say: "AGC and ASA agree that '[r]eview of design drawings and documents by the contractor should be for the purpose of facilitating construction and not impose on the contractor a duty to discover errors, omissions or inconsistencies.' Even the AIA 201 includes an affirmative representation by the owner that the prime contractor is 'entitled to rely on the accuracy of the information furnished by the owner.'"

15

PROTECTION OF THE WORK

- What you may see:
 - "The Subcontractor shall protect its work hereunder and shall be liable for any loss or damage to any work in place and to any of the Subcontractor's material and equipment on the jobsite."

16

PROTECTION OF THE WORK

- Suggested language
 - "Subcontractor is not responsible for damage to its work by other parties, and any repair work necessitated by such damage is extra work."
- Alternate
 - "The Subcontractor shall provide reasonable protection for its jobsite material and work, but shall be liable for losses only to the extent caused by the Subcontractor's negligence. It is understood and agreed to that the Owner's or Contractor's builders risk insurance includes coverage for the full value of loss or damage to the Subcontractor's work in place, for its stored materials and for its materials in transit."

17

PROTECTION OF THE WORK

- Impact on the subcontractor
 - A subcontractor may be forced to be responsible for the activities of others over whom it has no control.
 - Unexpected expenses associated with correcting damage caused by others can rapidly erode a subcontractor's profit margin.

18

PROTECTION OF THE WORK

- Negotiating tips:
 - When a Contractor Says: "I need you to be responsible for your work from the beginning of the project to the end."
 - A Sub Can Say: "Your company, not mine, is responsible for overall jobsite security. I can't be on the project 24/7 and thus I can't protect my work 24/7."

19

PROTECTION OF THE WORK

- Negotiating tips:
 - When a Contractor Says: "There are a lot of other subs coming and going on the jobsite. I need your work to be protected from their doing accidental damage."
 - A Sub Can Say: "I can't manage the comings and goings, and other activities of other subs on the project. Project sequencing, subcontractor management, and jobsite security all are your bailiwick."

20

PROTECTION OF THE WORK

- Negotiating tips:
 - When a Contractor Says: "You're one of those subcontractors who is coming and going. Certainly, you understand that you have to take precautions."
 - A Sub Can Say: "I train my employees to take precautions against damaging the work of others, and I'm willing to be responsible if they do. However, your language makes me responsible for damage done by others who I don't manage and can't control."

21

PROTECTION OF THE WORK

- Negotiating tips:
 - When a Contractor Says: "But your insurance covers this kind of damage."
 - A Sub Can Say: "The universal custom is that the owner or contractor provides builders risk insurance."

22

CONTRACTUAL LIEN WAIVER

- What you may see:
 - "To the fullest extent permitted by applicable law, the Subcontractor hereby waives and releases any and all lien rights for labor, material, equipment and services furnished by Subcontractor to improve or modify the Owner's premises or related property."

23

CONTRACTUAL LIEN WAIVER

- Suggested language
 - "Subcontractor will only issue waivers of lien or bond rights that exclude any waiver of lien or bond rights securing payment of retainage, unbilled changes, and claims which have been asserted in writing or which have not yet become known to Subcontractor, and any such waivers shall either apply only through the date of work covered by Subcontractor's last payment application that has been paid in full, or shall be conditional upon receipt of funds to Subcontractor's account."

24

CONTRACTUAL LIEN WAIVER

- Impact on the subcontractor
 - A subcontractor may find that it has no rights in the event of nonpayment by its prime contractor or the owner.
 - A subcontractor may give up rights and interests that have been provided by the legislature or the courts.
 - Note: Subcontractor lien rights are established as a matter of law. Many state lien laws invalidate any contractual lien waivers as being against public policy. In other states, an agreement to waive a subcontractor's lien rights is binding only if it is unambiguous and if the subcontractor was aware or should have been aware of the waiver when it entered into the subcontract. A subcontractor should be familiar with the intricacies of the lien laws in the states in which it operates.

25

CONTRACTUAL LIEN WAIVER

- Negotiating tips:
 - When a Contractor Says: "We include this lien waiver language as part of our standard subcontract. Other subcontractors don't disagree with it."
 - A Sub Can Say: "I can't speak to what other subcontractors will agree to. I do know that my company can't agree to waiving lien rights in advance of payments."

26

CONTRACTUAL LIEN WAIVER

- Negotiating tips:
 - When a Contractor Says: "You know that my company is a good payer."
 - A Sub Can Say: "We can agree to provide lien waivers with respect to material or work for which we've been paid in full but not for any unpaid work or material."

27

CONTRACTUAL LIEN WAIVER

- Negotiating tips:
 - When a Contractor Says: "My customer, the owner, insists on lien waivers in advance of payment."
 - A Sub Can Say: "I understand that the owner has concerns about its own interests. But if it needs advance lien waivers, then I'll need a direct payment system, so that I can get my money straight from the owner."

28

CONTRACTUAL LIEN WAIVER

- Negotiating tips:
 - When a Contractor Says: "This is just standard industry practice."
 - A Sub Can Say: "Waiving lien rights before one is paid is against public policy in many states. And, certainly, neither ConsensusDocs nor AIA include the practice in their standard industry documents."

29

COPY OF CONTRACTOR'S PAYMENT BOND

- What you may see:
 - Note: Many contractor proprietary subcontracts are silent on whether the contractor is obligated to provide the subcontractor with information it needs to exercise its payment bond and mechanics lien rights.

30

COPY OF CONTRACTOR'S PAYMENT BOND

- Suggested language
 - "The subcontract is subject to credit approval by Subcontractor, and Subcontractor shall be provided with the legal description of the property, the name, address and representative of the project owner, evidence of adequate owner project financing, and a copy of Customer's payment bond for the project, if any."

31

COPY OF CONTRACTOR'S PAYMENT BOND

- Impact on the subcontractor
 - Some sureties, particularly individual sureties, may not have sufficient or sufficiently liquid assets to pay claims. Confirm that the surety that issued the bond is financially secure.
 - Some surety bonds may not be for the full amount of the contract. Confirm that the dollar amount of the bond is sufficient to cover possible claims.

32

COPY OF CONTRACTOR'S PAYMENT BOND

- Impact on the subcontractor
 - A subcontractor may not be able to comply with some notice and claims procedures. Review the notice and other claims procedures to determine that they are attainable.
 - Some onerous bond terms can change the entire contract relationship. Review the bond for terms such as allowing the prime contractor to "declare" that the subcontractor is in default, limiting the payment bond to the amount payable by the owner to the contractor or to the contractor's net worth, including an expiration date that is prior to the likely completion of the project, and other onerous terms.

33

COPY OF CONTRACTOR'S PAYMENT BOND

- Impact on the subcontractor
 - In today's political environment, even public construction may not be fully funded.
 - Note: The subcontractor needs to consider what kind of owner financial information it will accept as "adequate" (i.e., audited financial statement, loan agreement, letter of credit).

34

COPY OF CONTRACTOR'S PAYMENT BOND

- Negotiating tips:
 - When a Contractor Says: "My customer required a bond. I shouldn't have to provide a copy to you as well."
 - A Sub Can Say: "The bond is part of the contract documents. Before I sign the subcontract, I'll want to review the language in the bond to make sure that it doesn't contain any provisions with which I can't agree."

35

COPY OF CONTRACTOR'S PAYMENT BOND

- Negotiating tips:
 - When a Contractor Says: "I don't understand why you need a copy of the bond at all."
 - A Sub Can Say: "The bond itself will contain all the information I need concerning notice and procedures that I'll need to follow in the unlikely event that I need to file a claim."

36

COPY OF CONTRACTOR'S PAYMENT BOND

- Negotiating tips:
 - When a Contractor Says: "I'll provide you with a copy of the bond at that time if you need it."
 - A Sub Can Say: "Since we both agree that we don't expect claims, I think it would be better to get this out of the way, instead of possibly interrupting our work down the road."

37

COPY OF CONTRACTOR'S PAYMENT BOND

- Negotiating tips:
 - When a Contractor Says: "My practice of only providing a copy of the bond at the time of a claim is standard industry practice."
 - A Sub Can Say: "In fact, both ConsensusDocs and the AIA make clear that a subcontractor like me can get a copy of the bond before the start of the project. The federal government requires a prime contractor to provide a copy of its payment bond to its prospective subcontractors and suppliers."

38

PROJECT SCHEDULE

- What you may see:
 - "The Subcontractor shall commence its work when directed by the Contract, and the Subcontractor shall achieve final completion not later than <date certain>, it being agreed that time is of the essence in this subcontract. The Subcontractor recognizes the Contractor's exclusive right to modify the schedule or sequence of work from time to time without extension of time or additional compensation."

39

PROJECT SCHEDULE

- Suggested language
 - "Subcontractor shall be entitled to equitable adjustment of the contract price, including but not limited to any increased costs of labor, supervision, equipment or materials, and reasonable overhead and profit, for any modification of the project schedule differing from the bid schedule, and for any other delays, acceleration, out-of-sequence work and schedule changes beyond the Subcontractor's reasonable control, including but not limited to those caused by labor unrest, fires, floods, acts of nature or government, wars, embargos, vendor priorities and allocations, transportation delays, suspension of work for non- payment or as ordered by Customer, or other delays caused by Customer or others."

40

PROJECT SCHEDULE

- Impact on the subcontractor
 - Earlier-than-planned subcontractor start, and completion dates can result in an unrealistically short installation period if sufficient labor and material cannot be made available that soon.
 - Later start and completion dates than expected can result in higher wage and material costs.
 - A delayed starting date with no change in the completion date compresses the work into a shorter time span. When subcontract work is accelerated to meet the unchanged completion date, extra costs usually occur due to overtime, out-of-sequence work, and other inefficiencies.

41

PROJECT SCHEDULE

- Impact on the subcontractor
 - The timing for the performance of most subcontract work is dependent on overall job progress and timely accomplishment of preceding work on a coordinated basis.
 - Subcontract work may be weather sensitive and therefore must be, or preferably should be performed within certain time periods.

42

PROJECT SCHEDULE

- Negotiating tips:
 - When a Contractor Says: "You're going to have to be flexible and adjust your schedule as necessary."
 - A Sub Can Say: "I understand that you may have to make subcontract schedule changes, but I can't agree in advance to adapt and adjust my work to suit your needs without the right to more money and an extension of time for me to finish my work."

43

PROJECT SCHEDULE

- Negotiating tips:
 - When a Contractor Says: "Don't worry. We're going to have everything ready for you."
 - A Sub Can Say: "I can't make the schedule unless your jobsite utilities are ready on time, and my submittals are approved and returned promptly."

44

PROJECT SCHEDULE

- Negotiating tips:
 - When a Contractor Says: "We don't pay for acceleration. You just have to be flexible."
 - A Sub Can Say: "If my work doesn't start on time because of project delays, I'll need to be paid for my acceleration costs or be allowed more time to finish."

45

PROJECT SCHEDULE

- Negotiating tips:
 - When a Contractor Says: "Time is of the essence on this project. There's never an excuse for not getting the job done on time. You'll be held fully responsible."
 - A Sub Can Say: "We agree to make a good-faith effort to help you meet your completion date, but we can't give up any delay claim rights if we incur more cost for reasons outside of our control."

46

PAYMENT FOR STORE

- Negotiating tips:
 - When a Contractor Says: "Time is of the essence on this project. There's never an excuse for not getting the job done on time. You'll be held fully responsible."
 - A Sub Can Say: "We agree to make a good-faith effort to help you meet your completion date, but we can't give up any delay claim rights if we incur more cost for reasons outside of our control."

47

PRICE ESCALATION

- What you may see:
 - "The Contractor agrees to pay the Subcontractor for the performance of its work hereunder the following sum or sums, which shall unless otherwise specified, include all taxes, insurance premiums, charges for permits and all other fees and charges, and shall be firm and binding on the Subcontractor for the work and not conditioned upon a firm completion date or on any labor increases or material escalation costs which might occur during the course of construction."

48

PRICE ESCALATION

- Suggested language
 - “A change in the price of an item of material of more than 5 percent between the date of the subcontractor’s bid proposal and the date of installation shall warrant an equitable adjustment in the subcontract price.”

49

PRICE ESCALATION

- Impact on the subcontractor
 - A subcontractor may build contingencies into its bids, thus threatening its ability to win contracts.
 - A subcontractor may have to absorb all the costs of inflation of labor and materials, even when the owner and/or contractor cause extended delays in the project.
 - Failure to address price escalation during the subcontract negotiation process may lead to unnecessary disputes during the project.

50

PRICE ESCALATION

- Negotiating tips:
 - When a Contractor Says: "I need the subcontract price to be firm. Neither I nor the owner wants to worry about price increases that are out of our control."
 - A Sub Can Say: "My bid proposal included a price escalation clause. One of the reasons I could give you such a low bid is because I didn't have to build contingencies into my price."

51

PRICE ESCALATION

- Negotiating tips:
 - When a Contractor Says: "We're going to get this project done quickly. I don't expect any delays."
 - A Sub Can Say: "Then the escalation clause really shouldn't be a factor. We'll be in and out before we get any surprise price increases."

52

PRICE ESCALATION

- Negotiating tips:
 - When a Contractor Says: “We can address unexpected price increases later if they arise.”
 - A Sub Can Say: “You and I both know that leaving issues like this unresolved can lead to disputes later. Let’s address this now so we can focus all of our energies on building the best project possible.”

53

PAYMENT FOR STORED MATERIALS

- What you may see:
 - “The Subcontractor’s payment shall only include the value of labor and material or equipment installed in the work.”

54

PAYMENT FOR STORED MATERIALS

- Suggested language
 - “Monthly progress payments to the Subcontractor shall include the value of material delivered and suitably stored at the jobsite or an approved offsite location prior to incorporation into the Subcontractor’s work.”

55

PAYMENT FOR STORED MATERIALS

- Impact on the subcontractor
 - A subcontractor is deterred from purchasing material and equipment ahead of time leading to possible delays.
 - A subcontractor risks escalating prices.
 - A subcontractor’s cash flow is eroded.
 - A subcontractor may suffer the consequences of slow project progress or other impediments that cause a lag between the delivery of materials and the time of installation.

56

PAYMENT FOR STORED MATERIALS

- Negotiating tips:
 - When a Contractor Says: "It's important that you're ready to start work when we notify you. That means you need to have all equipment and material ready to go."
 - A Sub Can Say: "Before I'm willing to order materials or tie up my shop fabricating special products, I need to be sure that I'll get paid without delay upon delivery."

57

PAYMENT FOR STORED MATERIALS

- Negotiating tips:
 - When a Contractor Says: "We expect you to start work immediately upon notice."
 - A Sub Can Say: "I can't afford to front the cost of materials while waiting for a building to reach the point that I can install the materials."
 - When a Contractor Says: "I can't pay for materials over which I don't have control."
 - A Sub Can Say: "We're willing to arrange for title to be shifted to you and store the materials anywhere you want."

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PAYMENT FOR STORED MATERIALS

- Negotiating tips:
 - When a Contractor Says: "Other subcontractors don't ask for this. It isn't standard practice in our industry."
 - A Sub Can Say: "Payment for properly-stored materials is standard practice in the construction industry. Both the ConsensusDocs and AIA standard subcontracts include payment for stored materials."

59

PAY-IF-PAID CLAUSE

- What you may see:
 - Example #1: "Payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Prime Contractor of its payment from the Owner."
 - Example #2: "The Contractor will pay the Subcontractor only if the Prime contractor has been paid by the Owner."
 - Example #3: "Receipt of payment from the Owner by the Contractor for the Subcontractor's work is an absolute condition precedent to the Subcontractor's right to payment."

60

PAY-IF-PAID CLAUSE

- Suggested language
 - "Subcontractor does not accept the risk of Customer's receipt of payments from any source, and in no event will payments to Subcontractor be based upon or subject to, Customer's receipt of payment for Subcontractor's work."

61

PAY-IF-PAID CLAUSE

- Impact on the subcontractor
 - A subcontractor bears the credit risk for the owner.
 - A subcontractor may not be able to take legal steps against the owner, because it has no contractual relationship with the owner.
 - A subcontractor has no control over or responsibility for owner payment delays.

62

PAY-IF-PAID CLAUSE

- Impact on the subcontractor
 - A subcontractor's right to sue for payment, assert a claim against a prime contractor's bond or file a lien are jeopardized, because payment theoretically is not due to the subcontractor until the owner pays the contractor.
 - There is not a specific time limit on how long a subcontractor can be denied its money, even assuming the owner is solvent.

63

PAY-IF-PAID CLAUSE

- Negotiating tips:
 - When a Contractor Says: "The subcontractor should share in the risk of owner insolvency."
 - A Sub Can Say: "My credit risk is with you. There's no justification for me to also extend credit to the owner. I don't have a contractual relationship with the owner. You did the credit check on the owner and your decision to go forward is strictly your responsibility."
 - When a Contractor Says: "A subcontractor's lien rights and the job's payment bond will offer payment protection."
 - A Sub Can Say: "Bonding companies routinely deny claims on pay-if-paid terms, reasoning that no money is owed when an owner fails to pay. Liens also are often challenged using the same logic."

64

PAY-IF-PAID CLAUSE

- Negotiating tips:
 - When a Contractor Says: "You should always be willing to wait for your money until I'm paid."
 - A Sub Can Say: "I can't wait until you pay me to issue checks to my jobsite workers, office staff, utility companies and suppliers. If I'm supposed to finance you, I've become a banker, not a builder."
 - When a Contractor Says: "Pay-if-paid is a valid concept."
 - A Sub Can Say: "Contingent payment terms are void in some states as being against the public interest and fair contracting practice. Even widely- endorsed model documents, such as ConsensusDocs and AIA, do not include a pay-if-paid clause. I would have to be a pretty lousy business person to agree to such a questionable concept as pay-if-paid."

65

INDEMNITY/HOLD HARMLESS

- What you may see:
 - "The Subcontractor shall defend, indemnify and hold harmless the Contractor, the Contractor's other subcontractors, the Architect/Engineer, the Owner and their agents, consultants and employees (the indemnitees) from all claims for bodily injury and property damage arising out of the performance of the Subcontractor's Work."

66

INDEMNITY/HOLD HARMLESS

- Suggested language
 - “Any indemnification or hold harmless obligation of Subcontractor extends only to claims relating to bodily injury and property damage (other than to the subcontractor’s work), and then only to that part or proportion of any claim caused by the negligence or intentional act of Subcontractor, its sub- subcontractors, their employees, or others for whose acts they may be liable.”

67

INDEMNITY/HOLD HARMLESS

- Impact on the subcontractor
 - A subcontractor could pay claims for its customer’s negligence.
 - A subcontractor could pay claims for the negligence of a host of others involved with the project, such as the owner, design professional, consultants and other subcontractors.
 - If a subcontractor’s employee is hurt on the job, that incident “arises out of” the sub’s work, whether it’s actually the sub’s fault or not, because the sub’s employee would not have been hurt if the sub were not working on the project.
 - If a subcontractor’s work is damaged because of someone else’s negligence, that damage “arises out of” the sub’s work and the sub is responsible for all of the cost of corrections.

68

INDEMNITY/HOLD HARMLESS

- Negotiating tips:
 - When a Contractor Says: “Our subcontract includes indemnity language to the extent it’s allowed in this state.”
 - A Sub Can Say: “Our bid specifically excluded anyone’s negligence but our own.”
 - When a Contractor Says: “We need you to be responsible for problems arising out of your work on the project.”
 - A Sub Can Say: “We strongly believe that each party should be responsible for its own negligence. We simply can’t be responsible for damage to our work or injury to our or another’s employees merely because of our presence on the project.”

69

INDEMNITY/HOLD HARMLESS

- Negotiating tips:
 - When a Contractor Says: “We’re concerned about third-party over claims.”
 - A Sub Can Say: “We can’t be responsible for third- party overs. We are offering an OCP, which will serve as your insurance for third-party overs.”
 - When a Contractor Says: “This kind of indemnity language is standard industry practice.”
 - A Sub Can Say: “Nearly all states outlaw broad form indemnity and many outlaw intermediate indemnity as well. And the standard industry documents, like ConsensusDocs and AIA, also limit liability to one’s own negligence.”

70