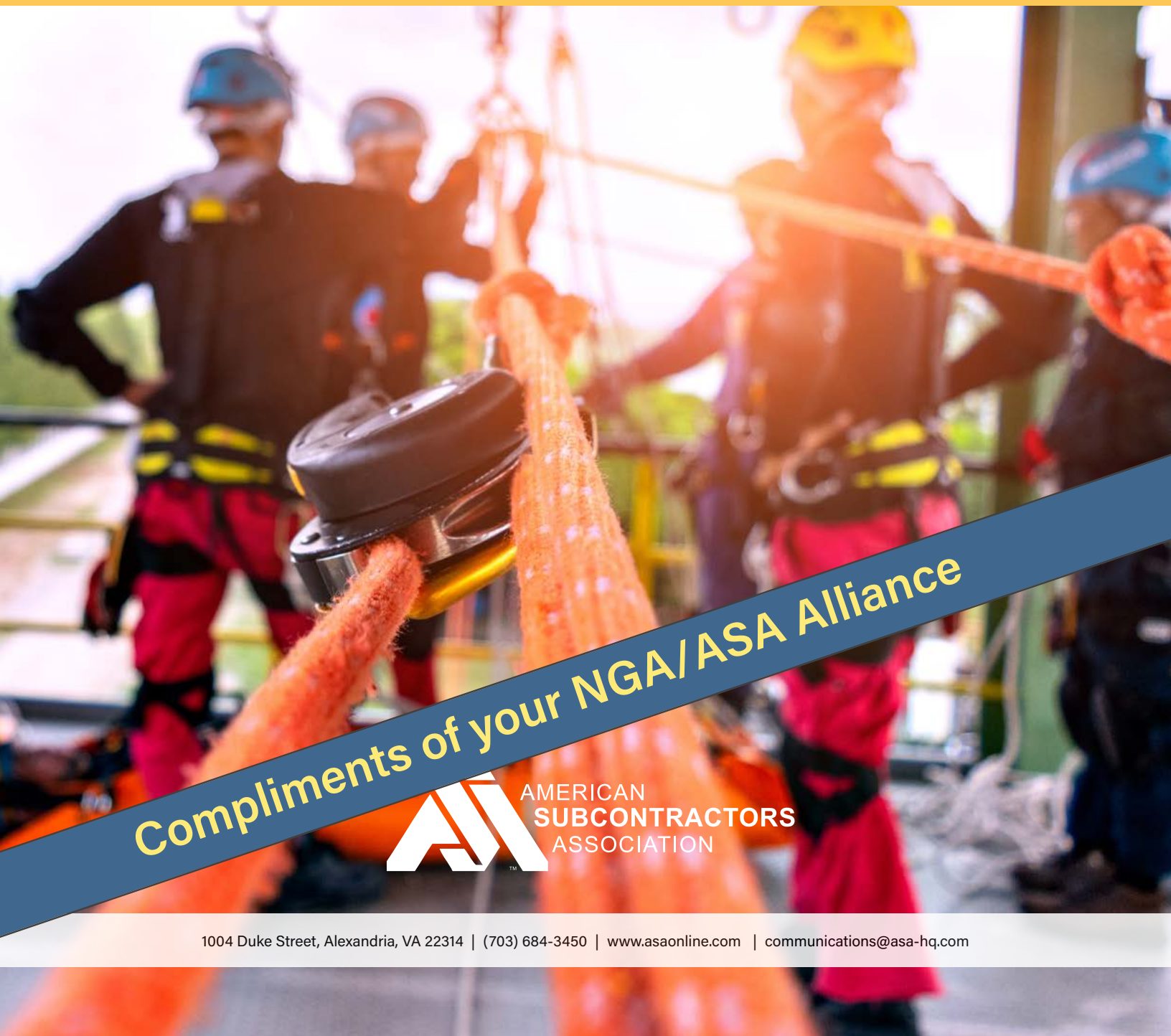


# THE CONTRACTOR'S COMPASS

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– Project Manager **Roche Constructors**

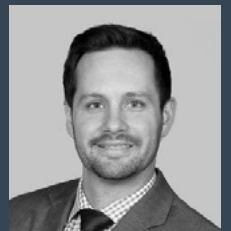
Easy to communicate while in the field with team instead of having to write things down and communicate when back at a computer or text from phone.

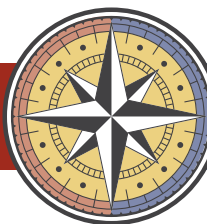
– Office Manager **Todd Bonneau Homes**

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[eric@fonn.com](mailto:eric@fonn.com), M: (970) 980-5734





## EDITORIAL PURPOSE

*The Contractor's Compass* is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network.

FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

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

## MISSION

To educate and equip subcontractors and suppliers with the education and resources they need to thrive in the construction industry. Additionally, FASA raises awareness about issues critical to and about construction in the United States.

## SUBSCRIPTIONS

*The Contractor's Compass* is a free monthly publication for ASA members and nonmembers. For questions about subscribing, please contact [communications@asa-hq.com](mailto:communications@asa-hq.com).

## ADVERTISING

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## EDITORIAL SUBMISSIONS

Contributing authors are encouraged to submit a brief abstract of their article idea before providing a full-length feature article. Feature articles should be no longer than 1,500 words and comply with The Associated Press style guidelines. Article submissions become the property of ASA and FASA. The editor reserves the right to edit all accepted editorial submissions for length, style, clarity, spelling and punctuation. Send abstracts and submissions for *The Contractor's Compass* to [communications@asa-hq.com](mailto:communications@asa-hq.com).

## ABOUT ASA

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

## LAYOUT

Angela M Roe  
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wants to help you with **Risk Transfer**.



The following are important coverage considerations before executing a sub-contract agreement with an upper tier.

## INDEMNIFICATION REVIEW

Are you indemnifying Owner/Developers, GC's and Prime Contractors for contract provisions that are not covered by your Liability Insurance?

## ADDITIONAL INSURED REQUIREMENTS

Does your Additional Insured coverage comply with contract language?

## COVERAGE RESTRICTIONS & EXCLUSIONS

Do your insurance policies include coverage exclusions and conditions which may either restrict or not respond at all to certain contractual obligations you entered into, and land you in breach of contract litigation?



# PRESIDENT'S LETTER



Dear ASA Members:

As the summer draws to a close, my oldest son Creighton has been asking lots of wonderful questions as he explores the balance of his K-12. Last week, he informed me that he wanted to study Civil Engineering when he goes to college and we discussed that path. Given that Engineering was the path I followed into the Construction Industry, I couldn't be prouder that my son was laying a foundation that might take him into the industry that I love so dearly.

In each of your companies, I hope you will reflect as we finish out summer on who are the next generation of leaders in your company. Are they your children? Trusted employees that you have trained from ground up? Soldiers, Sailors, Airmen, or Marines who have returned home after the longest war in our nation's history who now chose to build our nation? This is the time, as it should be every single day, to develop and invest in the leaders in your company and the leaders in our industry. These will ultimately be our community, state and national leaders.

ASA is a key cornerstone in building our next great industry leaders. As ASA members, I encourage each of you to take advantage of the endless benefits available to you locally and nationally.

- Attend local/national events (available both in-person and virtually);
- Read local and national ASA news to stay on top of the critical issue that affect our livelihoods; and
- Make sure you access the **[online area of the ASA National website](#)** (known as the Info Hub) to unlock the knowledge base and tools of the vast resource library and special membership benefits

Additionally, ASA members should take pride in the work going on to represent each of you behind the scenes on Capitol Hill. For example, ASA's top priority this legislative cycle was to ensure performance and payment bonds were included in federal Public Private Partnership transportation projects and the Senate voted 97-0 in favor of ASA supported legislation with the Van Hollen (MD) Amendment to protect subcontractors. This legislation already passed the House and will become law upon presidential signature. Candidly, a 97-0 vote in the Senate is HUGE, and this is our second such vote in two years with the first being the ban on reverse auction in federal bidding practices for construction projects. Our voices as ASA members are being heard loudly and clearly in the halls of Congress!

Also, ASA's Subcontractors Legal Defense Fund (SLDF) is active in a lien waiver case in Oklahoma (**[click here to learn more](#)**). So, ASA is full speed ahead representing subcontractors where laws are made and where laws are interpreted, both critical to how your businesses function.

Another part of engagement is communication. Let us know if you aren't receiving our weekly e-newsletter *ASAToday*, or our bi-weekly updates via *Hammer & Nails*. We want to make sure you are getting everything you possibly can from your ASA Membership. Let us know how we are doing. We are here for you. Together, we build America!

Sincerely in your service,  
Brian K. Carroll  
ASA President 2021-2022

# JOINING THE SBA MENTOR-PROTÉGÉ PROGRAM

## IS AS EASY AS **A B C** AND **1 2 3**!

The SBA Mentor-Protégé Program (SBA MPP) is the government's largest business development program aimed at helping small businesses gain capacity in the federal marketplace by teaming with more experienced businesses.

Are you a small business that's ready to enhance your goods and services offerings to the federal government?

### GETTING IN—THE ABC's

**A**

#### ASSEMBLE YOUR TEAM

- ✓ Find a mentor.
- ✓ Ensure you and your mentor are eligible.
- ✓ Register both businesses in SAM.gov.

**B**

#### BE SURE YOU'RE READY

- ✓ Visit the SBA website.
- ✓ Complete the MPP tutorial.
- ✓ Keep the certificate.
- ✓ Decide if MPP is right for you.

**C**

#### CERTIFY AND GROW!

- ✓ Prepare your documents.
- ✓ Apply at [certify.sba.gov](https://certify.sba.gov).
- ✓ Allow 105 days for SBA to process.
- ✓ Remain responsive.
- ✓ Grab your welcome letter and grow.



### STAYING IN— AS EASY AS 1, 2, 3!

**1**

#### MAINTAIN ANNUAL EVALUATIONS

- ✓ Complete your annual evaluation each year within 30 days from your anniversary date (on your welcome letter).

**2**

#### LET US KNOW HOW IT'S GOING.

- ✓ Any changes to the Mentor-Protégé Agreement (MPA)?
- ✓ Any changes to the relationship?
- ✓ Need advice?

**3**

#### FORMING A JOINT VENTURE?

- ✓ Create a SAM profile for your new entity.
- ✓ Provide Joint Venture compliance certificate to the SBA and the contracting officer.
- ✓ Send SBA your annual statements upon contract award.



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# CONTRACTOR COMMUNITY

## Smith Currie Named Construction Law Firm of the Year

We congratulate Smith Currie being named 2021 Construction Law Firm of the Year by Chambers and Partners USA and its deputy editors.

The USA deputy editors at Chambers and Partners USA noted that Smith Currie's expertise in healthcare-related construction positioned the firm well to assist clients providing essential construction services across the U.S. in responding to the COVID-19 pandemic. The firm's ability to help guide clients through the pandemic helped place Smith Currie as the choice for Construction Law Firm of the Year.

"In a challenging year for the sector, clients looked to the construction specialists at Smith Currie for guidance through the unprecedented turbulence of the COVID-19 pandemic," said Maddy Vincent, deputy editor USA, with Chambers and Partners USA. "Smith Currie's COVID-19 task force played a key role advising developers, owners, contractors, and subcontractors on the latest pandemic-related developments, assisting them in remaining operational as lockdowns, delays, furloughs, and materials shortages rocked the sector." The firm's task force was led by Scott Walters. Smith Currie was nominated for this award and chosen as the winner largely based upon client input received through the Chambers and Partners USA thorough ranking methodology.

## Infrastructure Status

On Tuesday, August 10, 2021, the Senate voted 69-30 to pass a \$550 billion bipartisan Infrastructure Investment and Jobs Act (IIJA), which was highlighted in the August 6th *ASAToday*. House Democrats are trying to keep the Senate passed infrastructure package intact and any changes that the House wants to make on infrastructure issues will likely take place on the reconciliation bill. On Wednesday, August 11, 2021, the Senate passed a \$3.5 trillion budget resolution by a party line vote of 50-49 that is expected to have a final vote in September. This resolution,

along with the IIJA, will be debated by the House starting on Monday, August 23, 2021.

## ASA Submits Comments on OSHA's COVID-19 ETS

On Friday, August 19, 2021, ASA, along with the Construction Industry Safety Coalition (CISC), submitted comments to OSHA's Emergency Temporary Standard (ETS). These comments supported the Agency's determination not to include the construction industry within the scope of the rule. The construction industry has been consistently characterized as low risk for exposure to COVID-19 by OSHA and other regulatory agencies. The construction industry has been at the forefront of efforts to implement proactive mitigation measures specific to COVID-19. Per our comments, "any attempts by OSHA to expand the ETS to cover construction is not supported by the evidence and would be impermissible under the Occupational Safety and Health Act of 1970."

Our comments were separated into several parts with Part 1 explaining the proactive measures taken by the CISC and the construction industry to address COVID-19 in construction. Part 2 addresses the process that OSHA has undertaken to develop the ETS and how applying the ETS to the construction industry without engaging the Advisory Committee on Construction Safety and Health ("ACCSH") and specifically raising construction-specific issues in the ETS would be inappropriate and unlawful. Part 3 describes how and why the construction industry is low risk and thus applying the ETS to the construction industry would be impermissible. Part 4 describes how it would be inappropriate to apply the requirements of the ETS, the vast majority of which would be inapplicable to the construction work environment, in the construction industry. Finally, Part 5 discusses how OSHA's anti-retaliation paragraph permitting OSHA to pursue Citations and Notifications of Penalty for alleged retaliation is unlawful and impermissible under the OSH Act and OSHA must delete this provision from any final rule.

## CDC Provides Updated Guidance

*This article is from our friends at SESCO Management Consultant, ASA's Human Resource partner. To learn more about this and all of the incredible benefits that are included in your ASA membership, click [here](#).*

The Centers for Disease Control and Prevention (CDC) has issued updated guidance recommending that even fully-vaccinated individuals should wear masks indoors in geographic areas of "substantial or high transmission." The CDC also recommends even fully-vaccinated individuals get tested and wear a mask in public indoor settings for 14 days if they have a known exposure to someone with suspected or confirmed COVID-19 or until they receive a negative test.

The CDC does not directly regulate employers – it just offers recommendations and guidance. Time will tell how the federal Occupational Safety and Health Administration (OSHA) and state agencies/governors will respond to the updated CDC guidance. Of course, we will provide further updates when new guidance or requirements are released.

SESCO retainer clients and members of select associations can call or email SESCO to discuss specific industry, state and/or company questions and concerns. Those receiving these alerts that are not SESCO clients can contact SESCO by phone, fax or email to explore support options.

## Nonresidential Spending Slumps in June and Year-to-Date; Wages Post Record Jump in Second Quarter

*This article is from the Associated General Contractors of America. You can learn more about the AGC at [www.agc.org](http://www.agc.org).*

Construction spending in June climbed 0.1% from May rate and 8.2% from June 2020 to a seasonally adjusted annual rate of \$1.55 trillion, the Census Bureau **reported**. Because project shutdowns depressed spending in the spring of 2020, it is more useful to compare year-to-date figures for

January-June combined in 2020 and 2021 than June rates alone. Year-to-date, total spending increased 5.4% but there was a huge disparity between strong residential spending growth and diminishing nonresidential activity. **Private residential construction spending** jumped 25% year-to-date: single-family, 36%; multifamily, 19%; and owner-occupied improvements, 12%. **Private nonresidential construction spending** declined 9.4% year-to-date, with decreases in all 11 components. The largest private nonresidential segment (ranked by year-to-date spending)—power—slumped 6.3% (including electric power, -4.0%, and oil and gas field structures and pipelines, -14%), followed by commercial, -4.7% (including warehouse, 7.5%, and retail, -20%); manufacturing, -3.8%; and office, -12%. Lodging had the largest decrease, -29%. **Public construction spending** slumped 71% year-to-date. The largest public segment, highway and street construction, slid 6.0%. Public education construction declined 8.7% (primary/secondary, -4.0%, and higher education, -20%). Public transportation construction fell 6.8%. (Census includes data centers in office construction and does not break them out. Nonresidential combines renovation and new construction.) As usual in August, Census posted annual state totals for private and state/local nonresidential spending, and updated length-of-construction-time studies.

**Wages and salaries in the construction industry** rose 1.4 %, seasonally adjusted, in the second quarter (Q2) of 2021, up from 0.9% in Q1 2021 and 1.1% in Q2 2020, the Bureau of Labor Statistics (BLS) **reported** on July 30. The increase was the largest 3-month gain since the series began in 2000, Total **compensation** (wages, salaries, and benefits, including required employer payments) **in construction** rose 1.2% in Q2 2021, up from 0.9% in both Q1 2021 and Q2 2020. Over 12 months, compensation increased 3.0%, vs. 3.3% in the previous 12 months, while wages and salaries rose 3.2%, down from 3.9% in the previous 12 months. BLS does not break out benefit costs for construction, but the fact that total compensation increased less than wages (3.0% vs. 3.2%) indicates that benefit costs rose less rapidly than wages. For all private industry employees, employer costs over

the past 12 months increased 3.1% for total compensation, 3.5% for wages and salaries, and 2.0% for total benefits (including 0.4% for health insurance, the least since 1997).

**Construction employment**, not seasonally adjusted, decreased from February 2020—the pre-pandemic peak month for seasonally adjusted employment—to June 2021 in 80 (22%) of the 358 **metro areas** (including divisions of larger metros) for which BLS **posts** construction employment data, increased in 257 (68%) and was unchanged in 21, according to an analysis AGC **released** on July 28. The share of metros with employment increases was far below the typical share—on average, 92% of metros added construction jobs between February and June from 1990 through 2019. (BLS reports combined totals for mining, logging, and construction in most metro areas, to avoid disclosing data about industries with few employers; AGC assumes the construction-only changes in these areas match the combined change.) The largest losses over 16 months occurred in Houston-The Woodlands-Sugar Land (-33,400 construction jobs, -14%), followed by New York City (-22,000 combined jobs, -14%); Midland, Texas (-9,300 combined jobs, -25%); and Odessa, Texas (-7,900 combined jobs, -38%). Odessa had the steepest percentage decline, followed by Lake Charles, La. (-34%, -6,700 construction jobs), Laredo, Texas (-25%, -1,000 combined jobs) and Midland. The Chicago-Naperville-Arlington Heights division added the most jobs (14,300 construction jobs, 12%), followed by Minneapolis-St. Paul, Minn.-Wis. (13,800 combined jobs, 18%) and Indianapolis-Carmel-Anderson (10,700 construction jobs, 20%). Fargo, N.D.-Minn. had the highest percentage increase (50%, 3,700 combined jobs), followed by Sierra Vista-Douglas, Ariz. (48%, 1,200 combined jobs) and Bay City, Mich. (500 combined jobs, 45%). Seven areas set new lows for June and 48 set new highs, in series dating in most cases to 1990.

Inflation-adjusted **gross domestic product** (real GDP) rose 6.5% at a seasonally adjusted annual rate in Q2 2021, the Bureau of Economic Analysis (BEA) **reported** on July 29, following a 6.3% gain in Q1. Real **residential investment**

in permanent-site structures rose 4.8% (single-family structures, 2.6%; multifamily, 16%). There was a 7.0% decrease in real gross private domestic **investment in nonresidential structures**, (commercial and health care, -11%; manufacturing, -10%; power and communication, -14%; wells and mining structures, 33%; other non-mining structures, -14%). Real **government gross investment in structures** declined 25%, including federal investment for defense structures, -6.9%; nondefense structures, -36%; and state and local structures investment, -12%. The **GDP price index** increased 6.0%, with price indexes for nonresidential structures investment up 8.8%; residential investment, 14.5%; and government investment in structures, 10%.

**Steel** remains problematic. Steel Market Update **reported** that hot-rolled coil averaged \$1860, more than four times the August 2020 low point of \$440. Contractors report mills are quoting 11-12 month lead times for bar joists. New South Construction Supply reported, “**Rebar** remains in extremely high demand and tight supply. All four major rebar manufacturers in the southeast are reporting large backlogs, little to no sitting inventory, and a continual flow of incoming purchase orders for more material. Lead times are running at a month’s time after purchase order is placed....**Wire rod** availability remains a major issue and production is outpacing the arrival of more raw materials. Lead times are out to almost four months, depending on gauge and size.”

## Construction Industry adds 11,000 Jobs in July

The construction industry added 11,000 jobs between June and July but nonresidential construction employment remains far below pre-pandemic levels, according to an analysis by the Associated General Contractors of America of government data released on August 6. Association officials said nonresidential construction has been affected by declining demand for projects, particularly for public infrastructure work, and urged Congress to quickly pass the new bipartisan infrastructure measure.



# *It's always something* **AWESOME**

## **Martin T. Rucker Development**

*by Mary Klett, ASA Communications Team*

DeLano Sheffield, Executive Director of Kansas City ASA, recommended I chat with Martin T. Rucker II, and find out his Always Something Awesome story. It ends with a doozy.

As with any professional sports player, your life is consumed with getting better and being the best you can be. And Martin did just that, playing professional football for five years, before an ACL tear got him thinking about life after football. He knew he wanted to own his own business, but what would be best suited for him?

So he got to thinking...What do people always need? Healthcare ("Do I really want to go to medical school?"), Funeral homes ("Just can't do it."), BBQ ("But I can't compete with Gates."), and...construction ("It slows down, but still never ends.") His mentor suggested Martin meet with Jim Kissick, who owned one of the larger civil contracting companies in the region. Jim advised Martin to come work for him. "Lose a little of my money before you go out on your own and lose all of yours."

At Kissick Construction Company his first job was installing water lines outdoors in the winter months before the new streetcar lines. After six years, he was a project engineer, in the interim soaking up how to run a business, how the industry works, how projects work. He noticed that there were never enough trucks to haul debris away.

In 2019 he saw his opportunity and bought three trucks. From April





**Felicia, a school bus driver, joined Martin T. Rucker Development when the pandemic hit and schools were closed.**

through December he hauled asphalt and other construction materials. Just as COVID-19 closed down the country in 2020, he bought nine more trucks. Many businesses closed, and he was able to provide jobs for school bus drivers and others that needed critical income. Martin T. Rucker Development LLC went from 3 employees in January 2020 to 23 in August of 2020, with an impressive 33% female and 60% minority makeup. He has less than that now, but is actively hiring and looking for good employees (hint, hint). Contact mrucker at [mruckerdevelopment.com](http://mruckerdevelopment.com) or call 816-237-0015.

Employees typically work solo, so masks and vaccinations are not mandated, although he has stepped up cleaning measures, sanitizing trucks between drivers.

As far as being a member of ASA? "It's a no-brainer! I spoke to a buddy from college who's a member, and also chatted with DeLano. He's got a lot of great ideas, and I look forward to having a positive impact on our chapter."

A bible version from Proverbs directs his life: "In all your ways acknowledge him, and he will make straight your paths." And football taught him another lesson - "Never get too high, or too low. Keeping an even keel alleviates a lot of stress."

He's going to need those thoughts in the near term, as the most amazing Something Awesome happened on August 14, when Martin's family welcomed Martin T. Rucker, III into this world.

Welcome, Martin, to the ASA family, and keep being awesome!



**It's construction month at their school so we brought a piece of the industry to them. They were very excited and loved the loud horn!**

The Contractor's Compass is recognizing excellence in ASA's ranks. Every month we are highlighting the activities, achievements, and actions of ASA members that might inspire others. Do you have something you want to share? Send us an email at [communications@asa-hq.com](mailto:communications@asa-hq.com).





## Reaching Your Best Subcontract Self: Tips for Negotiating Subcontract Terms to Maximize Profit

*by Michael Metz-Topodas, Cohen Seglias Passa Greenhall & Furman PC*

With each new subcontract negotiated, contractors have an opportunity for the “art of the possible”—a chance to negotiate the best possible deal to work on a new project. Doing so depends on considering not only the scope of work and pricing but also other commonly used terms and conditions, as these can affect how scope and pricing operate. To help subcontractors successfully enter agreements that maximize profit, here are considerations for negotiating several common contract provisions.

### Force Majeure

Construction subcontracts often contain provisions that excuse delayed performance, partial performance, or even non-performance resulting from an unpreventable or uncontrollable event, often called force majeure clauses. In the past, such clauses covered wars, floods, or acts of nature. Recently, they have received greater attention and use because the COVID-19 pandemic and related restrictions disrupted construction work nationwide. Generally speaking, courts will enforce such provisions but construe them narrowly and apply them only to events unforeseeable to the parties when they entered the contract. At the pandemic’s onset, when such clauses did not expressly list “pandemic” as a covered event, subcontractors faced challenges in obtaining protection under them. And now, over 18 months into this pandemic, it hardly qualifies as an unforeseen event. So, going forward, subcontractors should consider ensuring that the force majeure clauses in their agreements explicitly include specific unforeseeable instances that could reasonably threaten performance. Unfortunately, no agreement can cover all circumstances, so subcontractors must consider the risks presented for a particular project

when negotiating such clauses and adjusting their pricing.

### Price Escalation

Typically, subcontractors provide bid pricing for a scope of work based on expectations for labor and materials costs. The executed subcontract locks in that pricing, shifting the risk to the subcontractor should any costs change between when the subcontract is signed and the work is performed. In the past, subcontractors often accepted such risk because they could rely on relatively stable materials markets. Recent pandemic aftershocks have resulted in larger price fluctuations for materials, potentially creating a greater risk to subcontractors. To account for such dramatic price changes, subcontractors can negotiate to have general contractors share some of this risk through price escalation provisions. Although such clauses come in almost endless varieties, they typically establish criteria under which the general contractor (GC) agrees to pay an increased contract price due to a rise in materials costs. For example, a clause may require that should average lumber prices rise during the time between execution and performance by more than 10% based on an agreed metric (e.g., a price index), the GC would compensate a portion of the subcontractor’s actual increased lumber costs. As this example reflects, such clauses can contain many details about the conditions and terms for adjusting the subcontract price due to materials escalation costs. Subcontract negotiations should find the best arrangement that fits the project’s circumstances.

### Performance Specifications

Most contracts outline a scope of work with reference to applicable

drawings and specifications. And most contractors know to review those documents carefully and raise questions and issues with the owner, designer, or GC regarding technical details and constructability. Some specifications, however, do not address the technical aspects of construction but merely direct that the final constructed product performs according to certain standards. For example, such performance specifications can require a building envelope to meet certain LEED standards regarding air infiltration.

Performance specifications create risk for subcontractors. To achieve performance specifications’ standards, a subcontractor may need to modify, adjust, or even redesign work performed in the field within what other project specifications permit. Those adjustments, modifications, or redesigns may require additional labor or materials, but receiving additional compensation via a change order for this in-scope work would likely face challenges. So, in negotiating agreements, subcontractors should pay close attention to performance specifications, the discretion afforded to meet them, and pricing and other terms so that they can control this risk as much as possible.

### Pay-if-Paid

Subcontracts frequently include provisions that tie a subcontractor’s payment for work performed to the GC receiving payment for that work. Some clauses, typically called “pay-when-paid,” pertain to a payment’s timing and direct that when the GC receives payment for a subcontractor’s work, the GC must, in turn, pay the subcontractor, often within a specified time. The more stringent “pay-if-paid” clauses make a GC’s obligation to pay its subcontractor conditioned on the



GC actually receiving payment for the subcontractor work performed. That means the GC has no obligation to pay a subcontractor for work performed and accepted unless and until the GC is paid for that work. Unlike a pay-when-paid clause, a pay-if-paid clause removes any independent obligation for the GC to pay its subcontractors and passes the risk of owner non-payment from the GC to the subcontractor. To account for this risk, subcontractors can adjust their pricing or negotiate to modify this language—both challenging propositions. Some jurisdictions, however, enforce a pay-if-paid clause only if it has very explicit and clear language that payment to the subcontractor is conditioned on the GC receiving payment.

Further, under many states' laws, if the GC's actions are causing non-payment for a subcontractor's completed work, then the GC may lose the right to rely on a pay-if-paid clause. Lastly, a smaller number of states have found pay-if-paid clauses unenforceable. So, negotiating such payment clauses needs to account for the risk presented under the applicable law.

## No Damages for Delay

Due to the many "moving parts" and other variables on construction projects, delays frequently happen. Such delays create extra costs for subcontractors—often additional labor and extended general conditions costs, to name a few. Typical subcontracts, however, limit a subcontractor's remedies for delays to time extensions to the contractual deadline for the subcontractor to complete its work. These "no damages for delay" clauses present another area in which subcontractors end up bearing significant risk. Extensions of time relieve a subcontractor of liability for liquidated damages or other consequences from not meeting contractual deadlines but leave subcontractors without remedies for costs incurred from extra time spent on a project. In some jurisdictions, however, where an owner or GC causes a subcontractor's delay by actively interfering with the subcontractor performing its work, the owner or GC

cannot enforce a "no damages for delay" provision. Nor do such clauses apply to delays from events that were unforeseen when the parties entered the contract. Regardless of the defenses to a "no damages for delay" provision, subcontractors should negotiate their agreements to afford as much recovery as possible for delay costs. Otherwise, subcontractors should price their work to account for such potential costs.

## Work Continuation

Most subcontracts have clauses that require a subcontractor to continue working even after submitting a claim for payment or after initiating any other proceeding under the agreement's dispute resolution process. Under this requirement, if a GC withholds payment to a subcontractor because it disputes the quality or extent of the work performed, or for any other reason, a subcontractor faces a no-win dilemma: keep working without getting fully paid or risk breaching the subcontract by stopping work. Fortunately, some states have laws that permit a subcontractor to suspend work for non-payment despite what a subcontract may direct, as long as the subcontractor complies with certain notice and other requirements. Such laws should play a role in gauging whether to negotiate or accept a subcontract's requirement to continue working despite a pending claim or dispute.

## Notice Requirements

Most subcontracts require the subcontractor to notify the GC about certain project developments, especially events that could lead to a claim for additional payment or performance time. Often, such notice requirements direct the form, delivery method, and, most importantly, timing for such notices. For example, AIA A201-2017 Art. 15, Sec. 15.1.3.1 requires notice of a claim within 21 days after the event leading to the request for extra payment or the claimant's awareness of such an event (whichever is later). Negotiating such notice requirements depends

on the requirements' reasonableness relative to the project. Specifically, does the requirement afford sufficient time to prepare the notice? Are timing requirements measured from when the notice is sent or received? Also, applicable law can affect the burden notice requirements impose. Some states' laws bar enforcing notice provisions when the party invoking them, usually the GC, has actual notice or does not suffer any prejudice despite a breach of the contractual notice requirements. In other states, a missed notice deadline almost invariably waives the right to any claim or right connected to that notice. So, for example, failing to provide a required 10 days' notice likely makes a claim lost forever. In negotiating such provisions, subcontractors need to understand how they operate within both the project's context and the applicable underlying law.

## Conclusion

A common theme runs through these subcontract negotiation considerations: they vary with the circumstances of the underlying project and the law of the applicable jurisdiction. For that reason, subcontract negotiations benefit greatly when involving experienced construction counsel. The lawyers at Cohen Seglias have been helping clients analyze, assess, and negotiate subcontracts and their provisions for over thirty years and welcome further opportunities to continue supporting subcontractors in the difficult contract negotiation process.

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### About the Author

*Michael Metz-Topodas is a partner at Cohen Seglias. As a construction litigator, he represents general contractors, subcontractors, owners, designers, and suppliers through all stages of private, public, and federal projects. Michael helps clients navigate construction project disputes, including delay and inefficiency claims, design and construction defects, unforeseen site conditions, project scope disputes, and payment claims. He can be reached at [redacted] and 267.238.4755.*



## The Ties that Don't Necessarily Bind: Force Majeure and Price Escalations

by Jordan R. Pavlus, Esq., Byrne Costello & Pickard, P.C.

When the COVID-19 pandemic hit, we all got a stark refresher in force majeure clauses, which prior thereto were rarely invoked. Force majeure clauses typically excuse contractual performance for some identified reason outside the control of the contracting party, like an act of god, war, labor strikes, etc. When the pandemic shut down construction projects, many subcontractors combed their subcontracts to determine whether they could obtain any relief via a force majeure clause. Inasmuch as many force majeure clauses did not explicitly reference pandemics, it was usually not a perfect fit, and it has been a mixed bag for subcontractors regarding whether they could obtain relief via these clauses. Unfortunately, for many subcontractors, they had to work with what was already in their subcontracts, many of which are for a lump sum price.

### Look Back. Learn. Look Ahead

One of the positives to come out of this situation is that subcontractors can learn from it and recognize the potential project impacts from a global pandemic and its effect on their supply chain. This will allow subcontractors to anticipate potential impacts and negotiate to address them on the front end of a project, rather than relying on a force majeure clause which is not a perfect fit for the situation.

One of those issues which should be addressed by subcontractors on the front end of a project is the potential for construction material price escalations. The construction industry continues to deal with extreme price volatility in the material supply sector. The price of many materials have more than doubled within the last several months, much of which can be attributed to the COVID-19 pandemic. Even if price escalations are more modest, any material price escalation can turn what could have been a profitable project into a money pit. The good news is that a subcontractor can protect itself from being forced to proceed with a project without an equitable mechanism by which it can seek relief from material price escalations.

### Price (De)Escalation Clause?

Ideally, a subcontractor would negotiate language into its subcontract prior to commencing work on the project which allows for an equitable adjustment in the contract price due to material price escalations which meet an agreed upon threshold.

Any such material price escalation clause requires that the subcontractor keep records of material prices used to formulate its contract price so that they can be contrasted with later price escalations.

It is no easy task to negotiate a material price escalation clause into a subcontract because the upstream parties are looking for certainty in cost. The typical construction bid is a gamble based on certain assumptions in material price, schedule, labor costs, sequence of the work, etc. If the subcontractor made the right gamble, it will be a profitable project. If not, the project will be a loss. Most owners and general contractors will take this position.

If a subcontractor is successful in negotiating for a material price increase clause, it should be anticipated that the upstream parties will likewise seek a material price decrease clause. In other words, if the price of materials goes down, they pay less. If it goes up, they pay more.

Subcontractors should also make careful note that they must comply with applicable contractual notice provisions when it comes to material price escalation clauses. If the subcontract requires notice of any changes in price within seven days, the subcontractor must ensure to notify the contractor within seven days of each discovery of material price escalations. This means that every time the subcontractor gets notice from a supplier of a material price increase, the subcontractor must in turn notify the contractor.

### It Pays to be Overly Cautious

Here is a recent cautionary tale which is illustrative: the owner on a government construction project issues a stop work

order at the start of the pandemic. At this point, no one knows when the project will re-commence, if ever. For over one year during the pandemic shut down, the subcontractor receives periodic notices from its material supplier of price increases. The subcontractor does not provide these notices to the contractor or owner because it does not know if/when the project will re-commence. When the project is finally re-commenced, the price of materials has sky-rocketed. The subcontractor submits its request for a material price adjustment when the project is re-commenced. The owner denies the claim because contractual notice was not provided within fifteen days of discovery of the price increases (as required by contract).

Do not be a cautionary tale. Negotiating for a material price escalation clause at the front end of a project is a critical aspect of a successful project and notification requirements must be observed at all times.

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### About the Author

*Jordan Pavlus focuses his practice primarily on all facets of construction law, including contract review, contract and addendum drafting, terms and conditions review and drafting, litigation, arbitration and mediation. He regularly advises clients on the nuances associated with construction law, including bond claims, lien law, prompt payment law, and a broad variety of issues faced in the commercial construction field. Jordan has served as solo trial counsel in numerous matters and has also been lead attorney on multi-week arbitrations with damages in seven figures. He is a frequent lecturer on construction related issues. For more information on Jordan Pavlus and Byrne, Costello, & Pickard, P.C., visit <http://bcplegal.com/>*





## FEATURE

# Health and Safety Best Practices for Subcontractors when Staying Prepared for COVID-19 During the Current Outbreak

by Kevin J. McMahon, MS, CIH, HazTek Inc.



The Delta variant of the coronavirus, which began appearing in the US in March 2021, now accounts for over 90% of new cases. This form of the virus is much more transmissible, likely more severe, and is affecting more younger people than the original virus. Dr. Rochelle P. Wilensky, director of the Centers for Disease Control and Prevention, has said that "It is one of the most infectious respiratory viruses

we know of and that I have seen in my 20-year career." It spreads as similarly easy as chicken pox, and although fully vaccinated individuals have good protection, breakthrough cases are occurring.

This is a rapid turnaround from when President Biden announced on May 13 that we could take our masks off as a result of the distribution of vaccines. "If you are fully vaccinated, you no

longer need to wear a mask," he said, summarizing new CDC guidance and encouraging more Americans to roll up their sleeves. "Get vaccinated – or wear a mask until you do." (AP, May 13, 2021)

As a result, many employers are re-evaluating their approach to preventing further spread. There are updated steps-to-take to ensure the health and safety of subcontractors amid the pandemic.





Among the recent developments, employers are using the following approaches:

- Delaying return to the office/workplace for employees, i.e., continuing to work from home.
- Requiring vaccinations of employees in the workplace or testing employees weekly.
- Asking for proof of vaccination (showing documentation) or attesting to having received the vaccine.
- Requiring the use of face coverings/masks for all individuals, regardless of vaccine status, or requiring those who have not received the vaccine to wear face coverings/masks unless working outside and at least 6 feet (physical distancing) from others.

Additional best practices include:

- daily tool-box talks to update and re-enforce hygiene procedures,
- frequent inspections to confirm compliance with required procedures, and
- limiting the use of pool cars and ride sharing among employees, or use of N-95 respirators when traveling with 2 passengers or more for more than 30-minutes.

Should the number of new cases continue to grow rapidly, or other variants appear, more companies are expected to take new measures to curtail the spread, including possibly more requirements for vaccinations.

Most importantly, employers should continue to follow the CDC guidelines for preventing spread, as they have from before the delta variant appeared. AIHA, the association for scientists and professionals committed to preserving and ensuring occupational and environmental health and safety (OEHS) in the workplace and community, has from the beginning of the pandemic, published guidance documents for workplaces. Recently it published a series of ***Back to Work Safely™ Guidance Documents (2nd ed.)*** for small to mid-size businesses in 27 industry sectors including the ***construction industry***. <https://www.backtoworksafely.org/construction-reopening-guidelines-covid-19>

The free guidance documents, available only in English now (and in Spanish this Fall), provide clear and actionable steps towards the safe operations of a variety of workplaces through prevention, early detection, and control of COVID-19. The 2nd editions offer practical guidance for employers to implement multiple layers of risk mitigation strategies through use of engineering controls (e.g., increased ventilation and air filtration), administrative controls (e.g., staggered shifts), and personal protective equipment (e.g., respirators and gloves).

Since conditions are changing rapidly, and to varying degrees at different locations, it is critical for all companies to continue to monitor the

spread of the virus and to apply the measures that are most effective in preventing the spread at their work sites. It is best to take a multi-layered approach, using a combination of control measures that will assure effective results, including engineering methods (e.g., ventilation and physical barriers), administrative controls (e.g., physical distancing, work from home, staggered shifts, temperature and symptom screening, infection testing, cleaning and disinfecting), as well as face coverings/masks and personal protective equipment (e.g., respirators, gloves). While mandating of vaccines has not become universal, companies should evaluate their specific needs, and encourage their employees to be vaccinated if eligible, and with a healthcare professional's consultation.

An important tool for subcontractors to continuously evaluate their specific needs, and apply critical safety practices, is the use of Job Safety Analyses (aka, Job Hazard Analysis, Task Hazard Analysis) discussed in the AIHA Back to Work Safely™ Guidance Documents. In addition, AIHA members – Industrial Hygienists – can play a vital role in assisting employers to develop plans and evaluate their workplaces to assure that controls are effectively being practiced.

Visit the AIHA's COVID-19 ***Resource Center*** to access updated comprehensive information for responding to the pandemic.

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#### About the Author

*Kevin J. McMahon, MS, CIH, is Director of Technical Services for HazTek, Inc. a safety management consulting firm that specializes in services to the construction industry. He has contributed to the Focus on Health: COVID-19 document published by AIHA and is a current member of the TAG WG5 Committee for the forthcoming ISO 45006 standard for Occupational Health and Safety Management – preventing and managing infectious diseases – General guidelines for organizations.*



# FEATURE

## How to Share Construction Opportunities with Students—and Why You Should

by Rachel Burris, NCCER

*You can help make a difference — not just for the industry, but for the young people who aren't aware of the opportunities that construction offers.*

"I grew up in a small town with little education about career opportunities outside of the typical mold of a four-year degree. Back in 2019, I drove through my hometown and stopped at a fast-food restaurant to find that three of my high school classmates worked there — 14 years post-high school graduation. It made me sad to realize that they probably didn't know there were and are other options for them.

After that experience, I found a job posting for the Build Your Future Manager role and started working at NCCER in September 2019. Part of my focus is on helping the construction industry make connections with education, as well as recruiting and reaching people, with a large focus on students.

However, the part of my job that gets me out of bed in the morning is knowing that what I do impacts lives. It is my mission to empower students through information to find opportunities that can change their

circumstances." — Holly Mathis, Build Your Future Manager

We've all seen the stats about the workforce shortage in the construction industry:

- **53% of the seasoned workforce** is expected to retire by 2036.
- More than **half of construction firms** are having a hard time filling both salaried and hourly craft positions.
- For **more than seven straight years**, construction skilled trades are the hardest roles to fill.





Let's take a second to step back and think less about the effect on construction and more about the impact a job in the industry could have on somebody. For too long, construction careers have not been traditionally seen as a path to success. The university route is portrayed as the best way for students to 'make something of themselves' only for them to fall into massive debt getting a degree that may not be needed in the workforce. In fact, 25% of workers with student loan debt are employed out of their chosen field because of debt obligations.

As Holly's story illustrated, young people can also fall into jobs that don't give them much room to grow because they see that as the only option available.

We know that construction offers more — it teaches skills that are in high demand, it has high salaries and it provides satisfaction from jobs that have meaning. But how do we show students that there are more options available to them?

It's up to you.

We're not asking you to do this on your own. Build Your Future (BYF) is an initiative that aims to be the catalyst for recruiting the next generation of craft professionals. Powered by NCCER, BYF creates pathways that bridge the gap between curiosity and career placement.

As a grassroots effort, we work to equip industry representatives with the resources needed to reach students, families and educators and effectively promote careers in construction. With **Gen Z expected to make up 27% of the global workforce by 2025**, it's important to start making those connections now.

Check out these four ways that you can get involved: Be a spokesperson at your local school. Volunteer on local school advisory councils. Share your

story and what construction has done for you. Be a mentor.

## Be a spokesperson at your local school

BYF works with many companies that connect with their local schools and do presentations, career day visits and provide resources for educators and counselors. We always recommend having a craft professional attend these events — Gen Z, in particular, are looking for authentic experiences and who better to tell what it's like working on the job site than you. Not only are you contributing to building a talent pipeline, but you're inspiring the next generation to consider a career they may not have thought of.

## Volunteer on local school advisory councils

Your local school has an advisory council — or most likely several — and they're looking for volunteers from the community. General councils come up with annual plans to improve education in vital areas of the school, while other councils are more specialized in areas such as career and technical education. Garrett High School's Career Development program credits a good portion of their success to local industry representatives sitting on their advisory board. Contact your local high school to see how you can contribute.

## Share your story and what construction has done for you

Build Your Future is always on the lookout for inspiring stories to tell. Our success stories bridge from apprentice to journeyman to CEOs — students and young people want to hear it directly from the source that construction offers viable, successful career paths. Contact us at [marketing@nccer.org](mailto:marketing@nccer.org)

to share how you got into the industry, what you find most satisfying and what you would recommend to the next generation.

## Be a mentor

While mentorship typically begins when somebody has already chosen their career, having an encouraging mentor can be the key element to the mentee choosing to stay in the industry. In addition, although the benefits to yourself may not be the first thing you think of when becoming a mentor, it's definitely worth consideration. A 2006 study found that mentors were promoted six times more often than standard employees and the retention rate was higher — 72% compared to 49%. Keep that in mind when the next opportunity presents itself to become a mentor. The exchange of knowledge and guidance from those who are more experienced is an important part of craft training, and you'll be furthering the education of those newer to construction.

Working with BYF, you can help make a difference — not just for the industry, but for the students and young people who aren't aware of the world of opportunity that construction offers. Be a voice in your community about the benefits of construction and impact a student's life.

Visit [byf.org](http://byf.org) to see other ways you can get involved.

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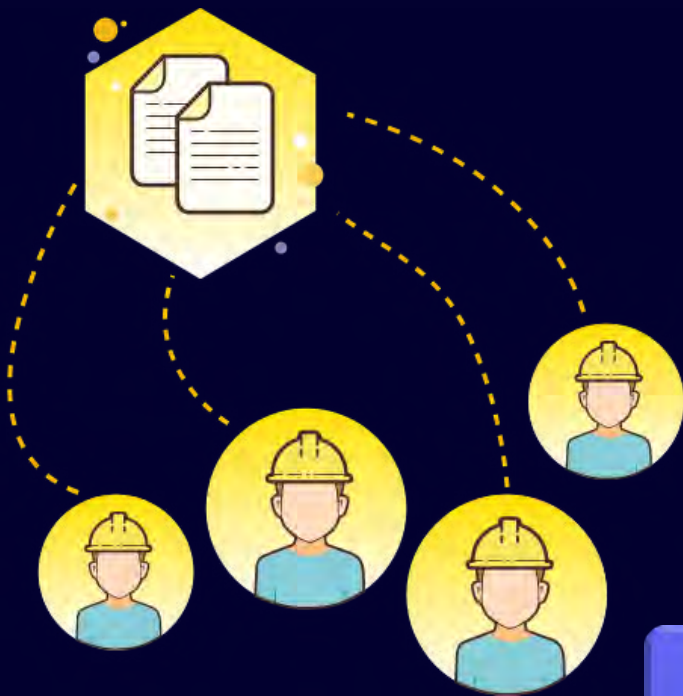
### About the Author

*Rachel Burris is the communications manager at NCCER. She has over seven years' experience in communications and public relations, including writing and editing content for emails, social media, press releases, blogs and articles. She holds a Bachelor of Arts in English from the University of South Florida and a Master of Business Administration degree from Webster University.*



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# FEATURE

## Post-Pandemic Drives Best Practices

by Jack Rubinger, freelance writer

Right now we're coming back to life. Some may even be looking at the pandemic from their rearview mirrors. Many are reviving long dormant projects, programs, practices. The reopening of libraries, for example, means ideas and books are being shared again. People are traveling again.

To survive and thrive in this current climate, networking and sharing ideas is vital — even if the meetings are boring. If you go once in a while, that's better than not going at all — whether they're virtual or in person.

Marketing construction-related products and services is a lot about timing, filling a need and providing above-the-call-of-duty customer service. It's making on the fly adjustments to rapidly changing conditions. Themes can always be changed. How accurately can you project out six months from now? The pandemic changed predictions.

Resiliency is the big theme of best practices. You adjust or you die. It takes creativity. Persistence. Substance. Since the pandemic, companies have changed strategies to survive, grow and compete in this new environment.

**Christine Zielke is the Operational Manager at the BC Municipal Safety Association in British Columbia, Canada.**

"The BCMSA made some large-scale transitions to ensure we could continue to serve our membership throughout the pandemic," said Zielke. "This included transitioning our occupational health and safety training to a virtual platform. Now we reach more remote and small communities."

The association provided a wealth of resources in relation to COVID-19 as well as a venue to connect membership utilizing the collective mind of experts in the construction industry to share knowledge and support safe workplaces across the province. The association also provided a free toolkit for mental health related to COVID-19.

"A silver lining of the pandemic has been how mental health has become a prioritized subject," said Zielke.

**Laura Alexander is a Federal construction project manager.**

Construction continued through COVID even though buildings being constructed were vacant or would be vacant for a while.

"What harmed the industry the most was

the cost of building materials, which was a reason to slow projects down with hopes that the prices would become reasonable again. Lumber costing two to four times what it had cost months prior caused most construction companies to look to other ways to build using concrete beams and columns or lower quality materials like MDF and melamine," said Alexander.

In Alexander's experience, during the pandemic the "low-guy" trumped hiring other contractors. The cost of necessary materials reduced the group of competing contractors considered.

Another best practice?—Keeping construction site documentation visible and free from damage from the elements. Because construction doesn't stop when it rains or snows and workplace documents like permits and procedures should always be visible, TUFFA Products has introduced a weatherproof permit document holder to store and display Permit to Works, Safety Data Sheets, Instruction Manuals, Written Procedures, and Checklists.

**Health and Wellness Changes**—At the time of this article, some states have removed the requirement for masks and a third of the people in the U.S. have accepted vaccines, but two-thirds still threaten the population by not getting vaccines.

In the workplace even a report of the flu or a cold is intimidating for many people.

"I think that employers are more willing to let sick workers recover at home now and employees are more willing to remain at home when they are sick to protect other people," said Alexander.

Maybe the days of being a martyr and showing up for work when ill are becoming a thing of the past.

**Andrea Cansler is with Quality Tank & Construction Co, Inc. in Sandy, Oregon. They're "over-servicing" customers to stay competitive.**

"We fix broken components that are necessary to keep entire facilities running. It is necessary to find what companies need most. We try to help customers find long term solutions to keep running smoothly and more efficiently for the long haul. I don't see our competitors going that extra mile," she said.

"I had a conversation with a purchasing manager. He loved the fact that we never had

change orders. We quote what it will cost and we stick to it. He recommended us just because we weren't a nuisance to deal with. So there are other indirect parts of business people don't think about," said Cansler.

**Mack Turner heads the Institute for Safety in Powerline Construction. Their business took a big hit during the pandemic.**

"When COVID hit we had 80% of our business at customer locations and of course that dried up completely. We started going after more work that we could do in-house once we were able to get back to the office. We also started doing more webinars. Now things have opened back up. We will try to go back to 80% at the customer's workplace but still offer more distance learning opportunities," said Turner.

Finally, there's Rigdon Fair, the founder of The Pothole Man. Fair started five new businesses this year and is doing all he can to keep up. Rigdon found ways to adapt to difficult and challenging times that came along with the pandemic.

Looking ahead, the vibe among most small businesses is cautiously optimistic. While Dodge Data & Analytics forecasts construction starts to rebound in 2021 and 2022, with the prospect of far greater gains if a Federal infrastructure spending plan is passed.

The construction industry will continue to innovate, create and inspire new ideas, new ways of thinking and add new influencers to the mix. It's best to listen to others, weigh the pros and cons and ultimately make your own decision with respect to what's best for you, your company and your customers.

### About the Author



Jack Rubinger is a freelance writer, with more than 10+ years of workplace safety and construction industry research and writing experience. Looking for an article on a specific construction topic?

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## Tips for Today's Harsh Reality of Communication

by Chad Pearson, Plexxis

It's an ugly truth that most businesses, relationships and company initiatives fail. And poor communication is often the root cause of the failures. But is poor communication the problem or a symptom? Before you answer, consider these two facts:

**Fact 1:** Google 'improve communication skills' and you'll find over 1.1 BILLION results that include;

- Endless seminars, books and TED Talks.
- Countless companies, consultants, therapists, psychologists who focus on improving communication.
- Personality assessments like DiSC and Myers-Briggs as well as endless technology and apps, ALL designed to improve communication.

**Fact 2:** You, along with many people and leaders, have most likely invested time and money into one or more resources above in order to improve communication, yet failure rates did not improve.

So then, if that level of effort is being committed to improving communication, and if poor communication is the core problem when things go off the rails, then most businesses, relationships and company initiatives should be making tangible progress...right?

Shouldn't they be as successful as they appear on social media and in their marketing?

Uh...well...they are not!

Communication is not a problem. It is a symptom...it is a giant red flag you cannot ignore. Does this workplace example sound familiar?

1. Something goes wrong at work
2. Poor communication is identified as the problem
3. Company reacts by
  - adding new email templates and/or notifications
  - adding more people to emails and notifications
  - creating bulletins or newsletters

- adding a new standard operating procedure or meetings to the weekly agenda
- hiring management or DiSC/Myers Briggs consultants
- creating team building initiatives to improve connections
- adding more reports and forms to daily task
- people feel bogged down by additional requirements and information

4. Then problems persist and then the cycle repeats itself.

The above cycle doesn't solve the core problems, which continue to fester and harm everything and everyone on the team. Addressing symptoms while ignoring core problems is like taking sleeping pills so you can sleep on the floor instead of sleeping in the comfortable bed right beside you.

Fear not. There "can" be a bright light at the end of this tunnel... and it need not be a train coming at you! At Plexxis Software, an integral building block of our internal training is a high-performance course of 20 classes over 7 weeks and one of the 20 classes addresses this problem. Keep reading to learn more.

*"But first, if you are still reading, CONGRATULATIONS! You have a greater attention span than 38% of the population. The rest of this article will test that attention span even more, on purpose, as paying attention to attention will prove really important in the solutions that follow."*

To understand the problem and solution better, it will help to review one of the most popular communication solutions from the list above, the DiSC assessment. Some companies experience a significant improvement with their team's communication after the DiSC program yet, we're claiming it's a waste of money.

### Why would we say that?

Personally, I have done the DiSC assessment 3 times and observed the same symptoms and core problem each time. At one conference in 2018, an attendee stood

up and said "I did this at our company two years ago and it was the best thing we ever did. We posted our personality types on our doors and wore badges so we all knew how to communicate with each other. It works great!"

This glowing reference is similar to others I heard but remember, communication is not a problem. It's a symptom...A giant red flag you cannot ignore.

If communication is not the REAL problem, then what is the problem?

For this example, Mr. Rogers, AKA Fred Rogers from the television series Mister Rogers' Neighborhood, has the answer. Fred was known as an exceptional communicator. The truth is, he simply gave people his undivided attention and great communication was the result.

Mr. Rogers says it best during an interview with Tom Junod; "Do you know what is most important to me right now? I'm talking to you, so right now you are the most important person to me. Our conversation is the most important thing to me right now."

Mr. Rogers personified 'being present.' He was authentically interested in every person he spoke to which enabled him to communicate as humans were meant to communicate. Most people already have everything they need for elite communication, yet most are thinking about other things while they are speaking with people standing right in front of them.

Also, people tend to listen in order to respond rather than listening to understand which erodes the trust in relationships and prevents people from noticing critical behavioral cues which results in poor communication.

Even though we stated that DiSC is a waste of money for companies with distracted workers and leaders, it's a very good use of time. Those companies who benefit from the DiSC program realize success NOT because DiSC's outdated pseudoscience from the 1920s is magic,

but because the distracted workers start paying attention to each other.

**Poor communication in this case was a symptom. Poor attention was the problem.**

*DiSC is a waste of money because these companies can achieve the exact same result, or even a better result, simply by emulating Mr. Rogers, which is free.*

**How then, do high performers avoid using poor communication as a scapegoat?**

Like Mr. Rogers, high performers 'appear' to be great communicators, but the reality is, they're EXPERTS at paying attention to people they are communicating with. As a result of providing undivided attention, which leads to great communication, they can build the habit of recognizing, diagnosing and voraciously attacking real underlying problems.

This habit helps high performers continuously outpace and outperform competitors.

Two tactics that, when used properly, help people achieve this level of performance and build the habit of recognizing, diagnosing and voraciously attacking real underlying problems are 'back briefs' and 'AARs (After Action Review)'.

**Tactic 1 of 2: Back Briefs and how do you use them properly?** Back Briefs are so simple a caveman can do them (Sorry to any cavemen reading this. We mean no offense).

Each time you brief team members on important information or assign tasks, have team members repeat back what they 'heard'. And of course, when team members provide leaders with important insight or requests, leaders too shall repeat back what they heard.

This validates the speaker's ability to be clear, the listener's ability to listen and it builds trust within the group as people show they care enough to listen while helping the team communicate with military precision. When things go wrong, they can eliminate communication concerns from investigations, bypassing symptoms, and focus entirely on identifying core problem(s).

*"Want to improve your communication odds? Say the following phrase in EVERY key discussion until it becomes a habit: "I*

*don't know what I said until you tell me what you heard".*

**Extra tip: Face to face wins the race!**

When possible, communicate face to face as humans are hardwired to recognize countless non-verbal behavioral cues that improve communication. (Tactics to overcome challenges of communication over media are covered in other classes.)

**Tactic 2 of 2: AARs (after action reviews) and how do you use them properly?** An example of effective AAR is a 3-10 min meeting after every major event (ie: projects, missions, presentations, training exercises etc.) that answers 3 questions;

1. What was the goal?
2. We're we perfect and what did we learn?
3. Who else needs to know?

Proper use of AARs ensure real problems are identified and preventative measures are distributed across the entire team to prevent recurrence.

AARs seem simple enough for cavemen to do (again, sorry cavemen) but few succeed because of 2 fatal flaws.

**Fatal flaw #1: Inconsistency:** AARs must be done after EVERY major event. A mistake companies make is that they only do them when things go wrong. This is catastrophic because people start to associate AARs with negative events, which damages the psychological safety team members need in order to be open and candid in AARs.

When team members censor themselves out of fear, AARs fail to be effective.

**Fatal flaw #2: Inaction:** AARs require immediate distribution and execution of solutions across teams to be effective. To avoid information overload, AARs are limited to major events and resolutions for problems that harm the mission and the team. Problems that impact individuals or one-off events do not apply here.

A mistake companies make is they treat AARs like reports to feed analytics for future decisions. Again, this is the catastrophic equivalent of continuously collaborating with coworkers and agreeing on positive changes, only to have co-workers come to work the next day and do the things you just agreed not to do.

Employees routinely leave companies

because of harmful behaviors that persist despite knowledge of the harmful behaviors being known by leaders. There are many reasons for this type of inaction but almost all of the reasons can be traced back to a weakness in leadership.

An example of effective AARs are officer safety notifications in police work. These notifications describe incidents where police officers were injured or killed in action by a means that could be occurring in other locations. They inform officers across the service, and sometimes across North America and Globally, so they can prevent injury or death to themselves and others on their platoon.

An example of effective AARs in business is sales demonstration AARs. These help identify new objections or competitive intelligence that injure sales so sales teams across an entire company can implement corrective measures immediately to protect sales pipelines.

As most businesses, relationships and company initiatives fail, most people, teams and leaders commit inspirational levels of effort and grit to pursue success. Their effort, however, is focused on symptoms, not the problem.

When done properly, back briefs and AARs help shine a big giant beautiful bright light on the real problems, enabling leaders and team members to refocus their impassioned energy and turn every step backwards into 3 steps forward.

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## About the Author

*Chad Pearson brings a unique perspective to AEC mixing 13 years in ConTech with careers in law enforcement and over 30 years competing in combat arts and coaching top professional fighters.*

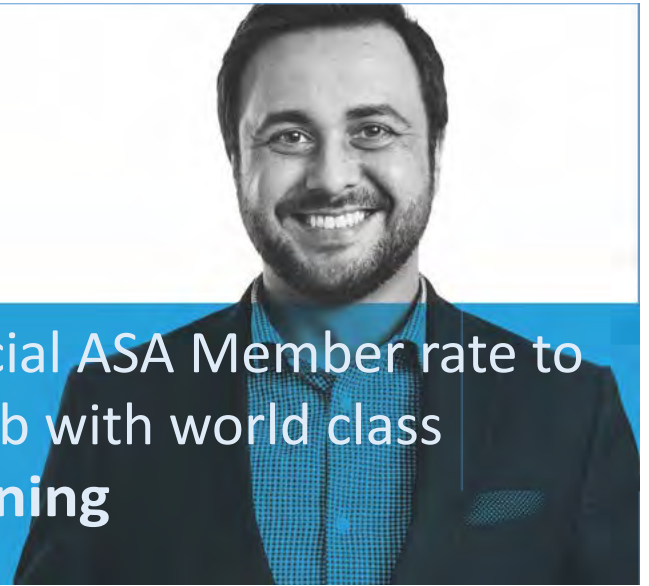
*At Plexxis software, Chad is the Dir. Biz Dev and Dealer of Truth & Happiness and help subcontractors unite their teams with technology. Chad also coaches Plexxis teammates on high performance during chaos and critical stress.*

*Chad's formal training includes a Bachelor of Arts, Crisis Resolution, Police Defensive Tactics, Use of Force, CBRN Response (Chemical, Biological, Radiological & Nuclear), emergency response, criminal investigation and outlaw motorcycle gang liaison work.*



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## FEATURE

# Five Ways to Ensure the Safety of Your Workers Without Breaking the Bank

by Michael Zalle, YellowBird



Safety is a critical challenge for employers across the country and construction remains heavily regulated. According to the Occupational Safety and Health Administration (OSHA), in 2020 alone, the three main general safety and health inspections totaled more than 1,300 recorded violations<sup>1</sup>. Each of these violations can cost between \$14k and \$135k, a hefty expense for subcontractors. The citations, along with potential injuries and fatalities, can be avoided by following safety programs, implementing training sessions, and seeking out environmental, health and safety (EHS) expertise. As the

construction industry intensifies recruiting efforts, you should consider safety a valuable recruiting factor, implementing simple steps, and leveraging new tech solutions. Here are five ways you can ensure your subcontracting company is compliant, keeps workers safe, and saves thousands of dollars.

### 1. Make Safety One of Your Company's Top Values

Due to the amount of physical labor required in construction jobs, it's imperative that the workforce be properly trained. To avoid incidents, fatalities, and fines from various

government agencies, compliance should be a top priority. This should be a sincere effort and a constant reminder for workers of all ages, sexual orientations, and genders.

### 2. Host Safety Sessions Mandatory to All Workers

Your employees will do what they see management do. Training sessions are no exception. Your company management team can set an example and show that safety is for everyone, not just for frontline workers. Demonstrate that the entire company is invested in the safety and health of all employees.

<sup>1</sup> [https://www.osha.gov/sites/default/files/MFC\\_Construction\\_FY20.pdf](https://www.osha.gov/sites/default/files/MFC_Construction_FY20.pdf)



### 3. Ensure Access to PPE

The construction workforce is more open to injuries when access to the right PPE and safety protocols are lacking. This happens because new (and veteran) employees underestimate the risks involved in apparently simple tasks. But access to PPE is not enough. Make sure the protective equipment is well fitted for all workers, and that it is adequate for women, for example.

### 4. Site Safety Management

Not all construction contractors can afford a full-time EHS professional to enforce regulations and policies. Your company can still stay compliant and have safety oversight by leveraging emerging technologies. If your company is too small to have a full-time EHS professional on staff you can hire on-demand expertise for fall protection training, first aid programs, confined space training, and more.

Hiring EHS expertise on-demand allows you to use data points to quickly search candidates for a specific location, which greatly impacts the project timeline. In addition to saving time, you also reduce costs, since you can get the safety protocols assessed quickly and pay by gig. Compared to hiring through staffing and temp agencies, using on-demand service reduces costs by as much as 25%. But perhaps the most important benefit for construction contractors is that the on-demand marketplace allows them to accurately find candidates with the credentials they need.

### 5. Mock Safety Audits and OSHA Inspections

A mock OSHA inspection helps you identify workplace safety and health hazards that need remedying to make sure your company follows OSHA's rules and regulations.

A safety audit, on the other hand, is an objective analysis of the programs and strategies a business has in place to help keep workers safe. A safety audit provides documented findings that the company's management team can implement to improve safety. Audits are typically conducted from an external point-of-view, which is why many audits are conducted by EHS professionals. During an audit, an EHS professional will help you answer key questions such as:

- How effective is my company's EHS recordkeeping?
- Are our safety programs and strategies compliant with current safety regulations?
- Is our hazard communication effective?
- What weaknesses are evident in our safety programs and strategies, including training documentation, incident and accident documentation, and policy/procedure reviews?

Even organizations that are compliant may still have weaknesses. A safety audit can help you learn how to improve safety programs and strategies and provide the most protection possible to your employees, worksite visitors, and overall operations. Employers in the construction industry should consider having weekly or daily safety audits and reviews of the company's safety plan.

The audit can cover a wide range of safety needs within your company. Some subcontracting companies need an OSHA safety audit, or a general site safety audit, or perhaps a third-party safety inspection for their insurance provider. Whatever the needs are, an EHS professional can help assess and identify areas of concern. The audit can be completed within a day or be scheduled weekly, which will ensure your workplace is safe and compliant while making your management team aware

of potential OSHA citations. Employers can also opt to have an EHS professional on site daily to perform inspections while the project is ongoing.

The EHS professional will focus on all aspects of safety compliance, including recordkeeping reviews, training documentation, OSHA log review, incident and accident documentation, as well as policy/procedure reviews. Finally, it is important to perform a thorough facility walk through to identify safety gaps that a regulatory compliance agent may notice. The professional will observe safety details such as egress, safety signage, evacuation routes, chemical storage, and employee safety behaviors. The consultant will then document observations and compliance gaps, then provide you with a comprehensive compliance report detailing all aspects of the visit. This report can be used as a roadmap to better compliance.

In essence, your workers' safety is too much of a risk for small businesses to be overlooked. If your organization is too small to have a dedicated professional, consider engaging a qualified EHS professional to address your safety and compliance needs while keeping your business financially healthy.

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#### About the Author

*Michael Zalle is the founder and CEO of YellowBird, a gig-economy marketplace that quickly and easily connects Risk and Safety professionals with businesses on-demand. By providing a fast and efficient method for insurance companies, business leaders and skilled professionals to consult, YellowBird matches the right people, in the right location, with the right experience for the job. A career tech entrepreneur, Michael has accumulated successful exits throughout his 25-year career. He attended San Francisco State University and Pepperdine University with a focus on Business Management. He is a husband of 20 years and father of two great kids, Nicholas (16) and Josephine (12).*



# FEATURE

## Best Practices 101: Ask the Right Questions

by Duane Craig, Freelance writer

Do you ever feel like you're on a treadmill, running after every new thing that comes along in your search for business and project answers? To break free, you need a strategy based on asking the right questions. And, for construction businesses that require seeing your company for what it really is.

As a general contractor, you create one-off projects with help from a group of partners. A set of

project best practices might work on one project, but not necessarily on the next. If your business best practices aren't tailored to your unique business, they aren't likely to serve in the long run either. Instead of chasing and adopting generic best practices, consider what practices would work best for your business.

A set of project best practices might work on one project, but not necessarily on the next.

### From Questions to Innovation

When seeking out the practices that align with your business, you tap into solutions that fit your business culture and project types. Answering the right questions also inspires innovation. Nowadays, innovation is a competitive necessity.

For centuries, ***innovation was considered*** an affront to the status quo and heresy in religious circles.





It posed a threat to the entrenched power structure. Today, innovation is often necessary as it helps businesses keep their competitive edge. For general contractors, innovation comes in at least three types. The first type includes features for which the client is willing to pay. Energy-saving items are one example.

The second types of innovations are those that reduce your costs, like adopting a construction project management solution or improving your estimates. Improving your reputation or boosting your credibility places third. For example, you might decide to set up public relations events to showcase new methods used on a project or increase your social media engagement to attract new recruits.

## From Right Questions to Better Questions

However, those aren't the only places where asking the right questions can lead to innovative strategies. In every phase of the project, you have opportunities to innovate. In the planning stage, you might use new processes to identify alternative materials or methods. During construction, you might set up performance models to see whether you can speed time to completion on critical activities.

The best solutions for your business are less likely to arise from asking questions like:

"What are the best practices for recommending materials and methods?"

"What are the best practices when designing performance models?"

But, you can discover better solutions by **asking better questions** like:

"How can I change materials or methods used in this project to better balance client needs and cost?"

"What kind of performance model fits with my company culture and the unique aspects of the projects I build?"

To come up with better questions, try looking at issues from different angles.

To come up with better questions, try looking at issues from different angles. Then, you will naturally start asking different questions. The answers often lead to insights and innovation.

Suppose you spent 10 hours preparing a bid only to lose out to a new competitor in your area. If you assume that losing the bid was a bad thing, you might go seeking answers to a question like, "Why did we lose out on this bid?" However, then you'll be focusing only on the negatives, with your efforts focused on preventing the event from happening again.

But, what if losing the bid was a good thing? A good thing because you weren't really ready for that type of project. Your estimate might have been too low, or the client saw what you didn't. By asking, "How did losing this bid affect the company?" you leave the door open to see the event from all sides, the good and the bad.

## The Better Questions Advantages

Asking the right question means getting specific to the need, and specific to your business. As you start answering these more relevant questions, you'll find answers that fit your business. You'll get deeper insights into how your business functions, and that often leads to innovative ideas for improvement.

Asking the right questions will have several **positive outcomes**.

It causes you to focus on what you can control, so you can see how you might change the outcomes next time around.

It also helps you see situations where you didn't have the control you needed to get the outcome you wanted.

When you are open to a range of perspectives as you consider issues you get insights into any skills or experience shortages behind the problem.

When you decide to really see something with an open mind, you will see the situation in its true light, balanced for both the good and the bad.

When asking the right questions, you set yourself up to uncover solutions that fit your business.

Best practices make a good framework from which to explore improvements. It's also time to start asking better questions.

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### About the Author



*Following roles as photojournalist, education director, landscaper and residential project manager/superintendent,*

*Duane Craig moved to writing for a less stressful life. For the past 14 years Duane has covered the construction, food, finance and tech industries. This article originally appeared in October 2019 in Procore's blog and we are republishing with their permission.*



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# FEATURE

## Three Ways to Step Up Your Construction Photo Documentation

by Jessica Meno, Raken



In construction, keeping a project on track (and your customers happy) is easier said than done. However, increasing your project visibility can help you make more informed decisions along the way. One of the best ways to do so? Photo documentation.

Photos let you see how teams are following safety protocols and maintaining high-quality work. They can also help you identify any potential safety hazards or risks. By learning how your crews are working, you can offer better support by giving them the resources they need.

Here are some best practices to improve your photo documentation—and your projects.

### 1. Use cloud storage to keep all your photos in one place

Photos help capture your project's progress when you can't be on the site yourself. Instead of sifting through messy project notes, you can quickly review

any images uploaded by your field team. This saves your field crews time, too—all they have to do is snap a few shots with their phones.

With cloud storage, you can easily save, store, and share jobsite photos online—no matter where you are. Automating the process for photo management also makes remote collaboration easier than ever. Since all your photos are a few clicks or taps away, you'll never have to search long for

important documentation. This makes keeping clients in the know easier, too.

### 2. Highlight the most critical project info with photo markup

Sometimes, your crews take photos to highlight something specific about a project. Photo markup lets you do just that.

With photo markup, workers can draw directly on photos of the site. For extra clarity, they can also add photo descriptions and captions. This helps your team have a clear idea of project progress—and helps them adjust accordingly to keep things on track.

### 3. Protect against litigation with date and timestamps

Time-stamped photos clearly document who's doing what, when, and where on a project. More specifically, a

timestamp captures the date and time an image was taken. (Construction software, like Raken, also shows you who uploaded the photo and the site location.)

Timestamps can be powerful evidence in the case of a dispute or litigation. Combining them with other digital documentation (like productivity data or safety checklists)? Even better. Historical data will give your company more legal protection in court, since you can prove your case with a clear record of events.

Just look at companies like Sellen Production. Since they use construction software, they can clearly document their progress—and improve compliance as a result.

"[We can] easily access data, keeping our field workers on site instead of in the legal office," said Tyler Stewart, Technology Solutions and Training Manager at Sellen Production.

### Improve your photo documentation with Raken

With Raken, your field crews can download the mobile app and start taking project photos right away. Every photo is automatically attached to their daily reports—then, everything is stored on the cloud for easy access. Hello, real-time insights and better project management.

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#### About the Author

*Jessica Meno is a writer for Raken, the cloud-based software that was built to connect the field to the office. Raken helps boost productivity and safety by streamlining workflow processes such as daily reporting, time cards, production tracking, and safety management. **Schedule a demo today** to see how Raken can work for your business.*

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## FEATURE

# Everything I Learned About Business from Michael Scott and Dunder Mifflin—An introspective on the best-in-class business from a not-so-best-of-class manager

by Gregg Schoppman, FMI

Several years ago, *The Office* dominated the national comedy television spotlight with its unique “mockumentary” style filming of a small paper company in Scranton, PA. The team was led by a naïve, not-so politically correct but often kind-hearted manager by the name of Michael Scott portrayed by Steve Carrell (or Ricky Gervais if you prefer the British original). Many of the stories focused on the escapades of the office’s staff. One of the main observations that any watcher would glean from these episodes was Michael’s inability to lead/manage but achieve success considering his

vast ineptitude. In fact, choosing to write a piece on Michael’s “business savviness” is a lot like writing a piece on Bob Uecker’s vast baseball acumen or Bonnano Pisano’s deep knowledge of foundations (i.e. the architect who designed that famous Tower in Pisa). However, as an avid fan of *The Office*, there are several business lessons any construction organization can easily apply to its strategy and approach to how it operates.

### Passion for Paper

Dunder Mifflin, the fictitious company in *The Office* sold paper. Garden variety, white copy/printer

paper. Sometimes the recycled stuff but more or less, paper, and hardly a sexy premise for a television show. However, if there was one thing that Michael Scott had was passion for paper. Michael and his trusty assistant manager (or assistant TO the regional manager) Dwight K. Shrute knew about paper and all of its many nuances. Yes, paper. Nothing could be more vanilla (no pun intended) Now, ask yourself this question – How passionate are you about the construction industry? How passionate is your team? Channeling Simon Sinek, the great and very real business guru, why do you do what



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you do? Does that passion resonate throughout your organization or do you simply go through the motions? Michael Scott could make the most boring product come alive for their customers and keep his branch office alive. Does your team do the same thing for its clientele?

## Customer Service

One of the main premises for the show was the firm's ongoing competitive battle with the "big box store" and how the competitive landscape caused Dunder Mifflin to pivot repeatedly. Michael Scott was often the top salesperson for Scranton and his firm. He could sell paper in spite of having the intellect of a ream of paper. What made him a success – customer service! He knew his clients and in countless episodes he and Dwight could be seen in interacting with clients and showcasing Dunder Mifflin's superior customer service. While I may be guilty of reading "between the lines," the Dunder Mifflin did this in the face of enormous customer price pressures in a hard-bid commodity industry. Sound familiar? Never confuse marketing for old-fashioned superior customer service. Listen to the customer!

## Positions and Promotions

An entire piece could be dedicated to Dwight K. Shrute as the Assistant Regional Manager (Assistant TO the Regional Manager) but one of the key takeaways was about Michael Scott. Michael was a superior salesperson at Dunder Mifflin even winning an award for Top Salesperson. However, Michael was hardly a great manager. How often do firms take a great foreman or great project manager and promote them to a position that is not commensurate with their skill sets? Being a great builder does not always translate to being a great builder of people or even of business. Many firms make the mistake of promoting for one set of skills and hope they enable that person to be successful in

that new environment. Often, this is done with little guidance, little training and little development. Michael Scott had no mentorship, short of his time with Jan Levinson Gould, his district manager.

## Recognition

On an annual basis, Michael Scott would engage in an unsanctioned, yet well-intentioned event known as the Dundies. Receiving a Dundie was meant to be the equivalent of an Oscar or Emmy but had the same impact as being given a number at the DMV. Nonetheless, Michael's passion was once again on display. Winning a Dundie for "Whitest Sneakers" might not get anyone's attention in the construction industry but at a strategic level, when was the last time ANYONE in your firm "caught someone doing something right?" In a world where we ripe with cynicism and where we seem to thrive on watching someone stumble, why not showcase the amazing things your organization does. Just try not to do it in a Chili's.

## Innovation Adoption

During one episode, the new regional manager launches Dunder Mifflin Infinity which is the organization's strategy to combat the increased traffic to the box store's and online retailers. Much to his chagrin, Michael bucks the trend and fights to keep the business status quo and also kidnaps a hapless pizza delivery person in the process. His belief is customer service alone will separate Dunder Mifflin from the online community. While applauding his zeal for face to face interactions with his customers, halting the innovation is a futile as using a paper towel to thwart a tsunami. However, there are no shortage of industry laggards that serve as hold-outs amidst the strong tailwind of innovations surging in the industry. Autonomous vehicles, augmented reality, real-time data collection/dissemination, prefabrication/modularization, tablet

utilization, robotics, 3D printing and blockchain are not only buzzwords representing the future of the construction industry but also the world of tomorrow.

This is a tongue and cheek examination of a WORST-case business management philosophy. One of the enduring elements of *The Office's* sticking power is the audience's ability to relate to the awkwardness and cringe worthy performances of Michael Scott. Everyone has had a manager or leader that seems to be "successful" in spite of themselves. However, *The Office* also provides a moment for leaders to ask themselves rhetorical questions about their style, approach and strategy. The construction industry is hardly showcased on *The Office* (short of Vance Refrigeration) but the lessons are pertinent and germane. And couldn't we all use an event like "Pretzel Day" to get us motivated?

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## About the Author



*As a principal with FMI, Gregg specializes in the areas of productivity and project management. He also leads FMI's project*

*management consulting practice. He has completed complex and sophisticated construction projects in several different niches and geographic markets. He has also worked as a construction manager and managed direct labor. FMI is a unique and fast-growing firm of professionals passionate about creating a better future for engineering and construction, infrastructure and the built environment throughout North America and around the world. For more information on FMI, please visit [www.fminet.com](http://www.fminet.com) or contact v by email at [gschoppman@fminet.com](mailto:gschoppman@fminet.com).*





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# Did You Know?

## Insurance Captives Grow in Popularity Among Contractors

by Greg Hess, AssuredPartners

Many unique risks exist in the construction industry. There are the obvious risks such as operating large equipment, moving heavy loads, transporting shifting materials, performing work at various heights, working with hand tools, etc. Add in the exposures that exist when working with owners, GC's, suppliers, municipalities and other subcontractors and you begin to see the complexities of managing risk in the construction industry. Contractors turn to the insurance market to alleviate much of this risk and transfer these potentially costly exposures to the insurance market. Each year, most mid-sized construction companies purchase traditional insurance policies with guaranteed costs and low deductibles. These well-known insurance policies provide the desired transfer of risk. However, they have recently become more costly and the commercial insurers get to keep all the underwriting profits. Some savvy owners and risk managers of construction firms have turned to group captives as a better risk transfer solution.

Group captives have been around for decades and were initially utilized by large multinational corporations. However, through the years, the captive market has become accessible to much smaller companies. In recent years, interest in captives has exploded and the construction industry, in particular, has seen a growing number of firms move into this space. Much of this growth is due to the hardening insurance market and wild premium fluctuations. By year-end, the average commercial insurance premium is expected to rise by 13.6% , according to a survey of top insurers in a recent report by the Alera Group. This follows double digit average rate increases in 2020. Many companies are turning to captives as an alternative to the uncertainty playing out in the traditional insurance market. The construction industry has taken notice and many firms are evaluating the benefits of a captive to solve their insurance needs.

What is a group captive? A group captive is simply an insurance company formed to insure only the risks of its member companies. Members wholly own and control the insurance company and share all underwriting profits. These captives often are usually homogeneous in nature

consisting of similar companies in the same industry. For example, there are captives formed for only roofers or excavators, while other captives may consist of various trades such as carpenters, plumbers, electricians or painters.

The reasons contractors are turning to captives are many. Here are a few of the key benefits of joining a captive and some issues to consider:

### Benefits

- **Lower Insurance Costs:** After fixed costs, all insurance dollars not paid out for claims are returned directly back to the member, not the insurance company. For safety conscience firms with a favorable claims history, this is a very significant savings.
- **Lower Fixed Costs:** Captives operate at lower costs by spending less on marketing, acquisition and administration costs. This lower cost creates a bigger profit potential for the members.
- **Control:** Members can have as much control over claim handling decisions as they wish. Members can consult with claims administrators and direct whether to "settle or fight" a particular claim. Additionally, critical decisions about the captive itself are made by its members by forming a board of directors and holding annual meetings.
- **Improved Loss Control and Claims Services:** These services are specifically geared toward the construction industry and its unique risks and characteristics. Off-site safety seminars, webinars, accountability, and free consultant hours are often part of any established captive.
- **Underwriting Stability:** Premiums are based on a member's individual loss experience making it much less vulnerable to the cyclical nature of hard and soft markets. Contractors can stabilize budgets by having more consistent expenses around insurance.
- **Enhanced Profit Potential:** In addition to retaining underwriting profits, investment income is earned on premiums and retained earnings within a favorable tax structure.

### Considerations

- **Risk Retention:** Members need to be prepared to retain some level of risk as the premiums are not guaranteed. A bad loss year with a high frequency of claims could result in paying additional premium.
- **Financial Stability:** A strong balance sheet is required to meet capital and collateral levels.
- **Risk Management:** A solid safety program should be in place with commitment from upper management for continued improvement.
- **Claims Experience:** Captives are picky and look only to add members who they hope to positively impact the bottom-line. To get accepted into a captive, a firm needs above average claims experience. A five-year average of loss ratios under 40% is a good benchmark.

Despite the multiple advantages of using a captive, construction firms need to carefully evaluate their specific risk transferring needs along with their appetite to take on risk. A cost analysis needs to be done to determine how a potential captive membership compares to what is available in today's traditional insurance market. For the contractor who prioritizes safety, is financially stable and is entrepreneurial and forward thinking, a group captive is often the best long-term insurance decision.

### About the Author

*Greg Hess, Vice President and Regional Captive Practice leader with AssuredPartners. Greg has over 25 years of insurance brokerage experience. He enjoys working with companies to develop and evaluate alternate risk solutions. AssuredPartners is the 10th largest Insurance Broker and Consultant in the country providing Commercial Insurance, Risk Management, Employee Benefits through consulting and services. For more information on AssuredPartners, please contact Greg by email at [Greg.Hess@assuredpartners.com](mailto:Greg.Hess@assuredpartners.com) or [asa@assuredpartners.com](mailto:asa@assuredpartners.com)*





## How to Handle Late Payments in Construction

by Patrick Hogan, *Handle.com*

Getting paid on time is one of the biggest struggles among contractors, subcontractors, and material suppliers in construction. With construction's complex payment structures and ambiguous contract provisions, the problem with late payments continues to persist and trouble in the industry.

Late payment issues are even worse during major economic downturns. When nearly every company is going through tough financial roadblocks, payments are even more likely to get delayed.

But no matter the state of the economy, knowing how to deal with late payments should become a matter of policy for every contractor and subcontractor. Here are some notes to consider when putting up your standard practices for dealing with late payments:

### 1. Send payment deadline reminders

In an ideal scenario, your clients already know their payment deadlines. They should also know how often you issue your invoices and on which date you send them out. However, it would not hurt to still give them regular reminders.

You can send your clients automated emails or text messages to remind them of upcoming payment deadlines. If you do not have the mechanisms for sending auto-reminders, you can set internal reminders for yourself to reach out to your clients manually.

Prevention will always be better than cure, and so it is imperative that you do everything you can to keep late payments from happening. Even though late payments may be unavoidable in the construction industry, doing simple steps like sending payment reminders can make a big difference.

### 2. Send late payment notices

Once the infraction has been committed and payment has not arrived on time, you should send the erring clients a late payment notice.

When sending **late payment notices**, make sure that the details included in the

notice are correct and accurate. Specify the amount due, the date the payment was originally due, and even the date when the invoice was served. Also specify the payment methods available so the clients know how they can submit their payments.

By specifying these important pieces of information, you are also able to ensure that you have your details organized. For instance, you should not send a late payment notice if the related invoices have not been served yet.

### 3. Charge late payment penalties

Charging late payment fines is another effective way to prevent late payments from occurring. A client is more likely to exert effort in avoiding payment delays if they know that they might get charged extra.

The key to imposing late payment penalties is transparency. Late payment fines should not be hidden from your clients, and your clients must be made aware of the consequences for late payment right when they sign the contracts.

Note that late payment charges should not be an additional source of revenue for your company. Charging late payment fines is a preventative measure to discourage your clients from paying late, and to penalize them accordingly if they fail to honor their payment obligations on time.

### 4. Send a Notice of Intent to Lien

Sending a Notice of Intent to Lien is like sending an ultimatum to your clients. When you send a Notice of Intent to Lien, you are essentially telling your clients that they need to pay or else you will file a mechanics lien.

Filing a mechanics lien is one of the most effective weapons against non-payment in the construction sector. When you file a mechanics lien, you put a public record against the property in question, which can greatly reduce the property's market value.

Clients are therefore more cautious about mechanics liens. If the payment

reminders and late payment notices did not get your clients' attention, serving a Notice of Intent to Lien could.

Note that some states require serving a Notice of Intent to Lien prior to filing a mechanics lien. In states like Illinois, Pennsylvania, and Wisconsin, for example, serving a Notice of Intent to Lien is not just an option – failing to serve a Notice of Intent to Lien could dissolve your lien rights.

### 5. File a mechanics lien

If a client does not respond to your notices and if negotiations fall through, your next best recourse is to file a mechanics lien. As mentioned, filing a mechanics lien could reduce a property's market value, which could then alert property owners and prompt them to pay up.

Even when owners fail to settle the outstanding payments, you can still recover your payment if the property gets foreclosed after you enforce your mechanics lien.

However, keep in mind that filing a mechanics lien is not necessarily a simple process. There are lien-related deadlines and requirements that are strictly implemented in each state. To file a mechanics lien successfully, make sure that you understand the rules and regulations applicable to your situation.

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### About the Author



*Patrick Hogan is the CEO of **Handle.com**, where they build software that helps contractors, subcontractors, and material suppliers with late payments. Handle.com also provides funding for construction businesses in the form of invoice factoring, material supply trade credit, and mechanics lien purchasing.*

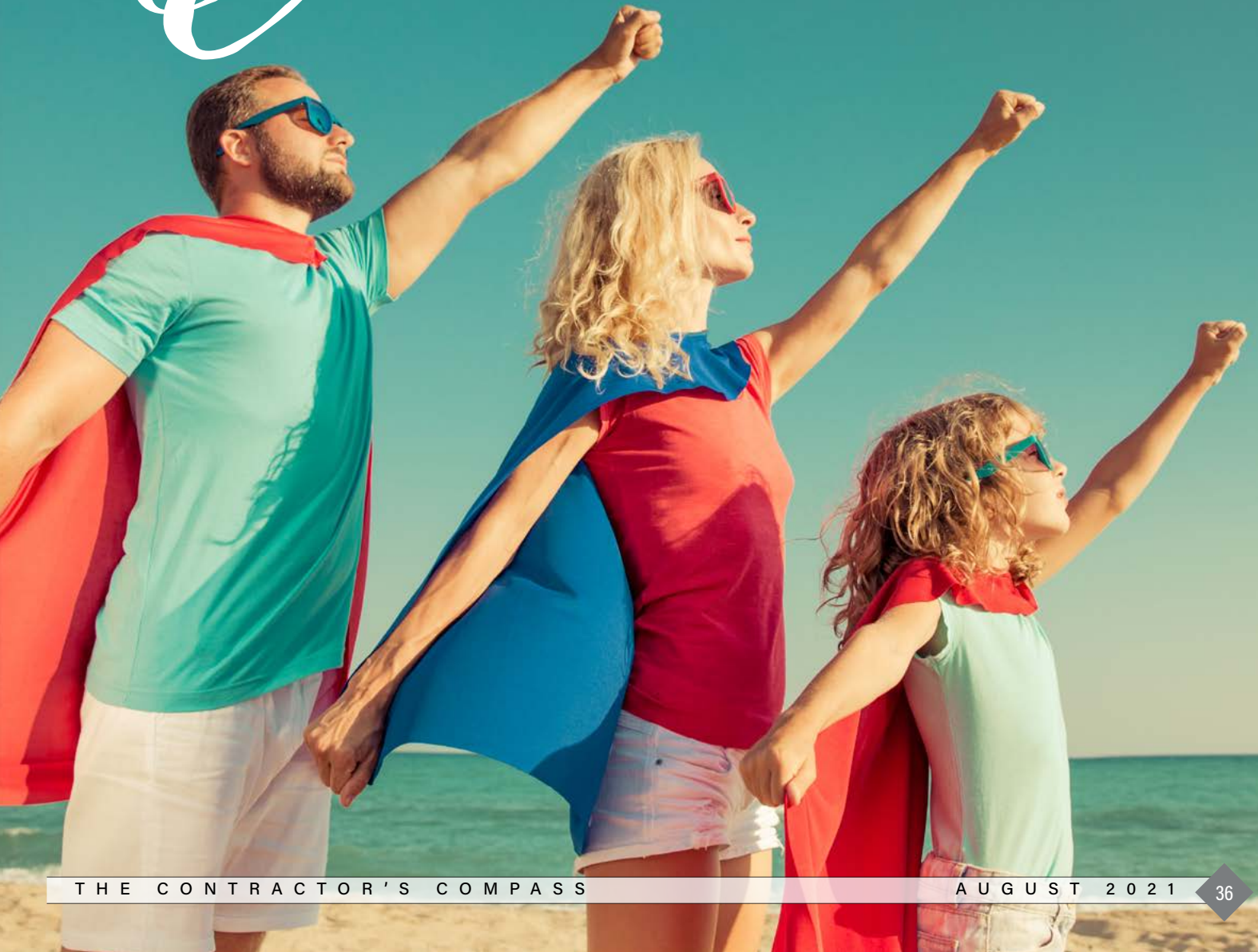
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## Event Sponsorship Opportunities

### **The Beach Bash Event Sponsor - \$30,000**

You will be listed as the sole sponsor for The Beach Bash. Your logo will be placed on all event signage as well as the SUBExcel website. Your company name and logo will be attached to all messaging regarding this event. You will also be recognized at the event and offered two minutes of microphone time.

- **The Beach Bash Food Sponsor - \$13,000**

You will be the food sponsor for The Beach Bash event. In addition to your logo being placed on all event signage and SUBExcel website, your logo will also appear on signage representing you as the food sponsor for the event.

- **The Beach Bash Bar Sponsor - \$7,000**

You will be the bar sponsor for The Beach Bash event. In addition to your logo being placed on all event signage and SUBExcel website, your logo will also appear on signage at the beach bar.

- **The Beach Bash Activity Sponsor - \$2,000**

You will be the sponsor of one of the activities during The Beach Bash event. In addition to your logo being placed on all event signage and SUBExcel website, your logo will also appear on signage at The Beach Bash.

### **Reception and Banquet Sponsor - Sponsor \$30,000/ Co-Sponsor \$15,000**

The reception and banquet are open to all registrants. Your sponsorship will be listed in the credits of the awards program video, on the SUBExcel website, and in all conference literature. Sponsors of this event will also be recognized verbally from the podium. Your company name and logo will be attached to all messaging regarding this event.

- **Cocktail Hour at Reception and Banquet Sponsor - Sponsor \$5,000/ Co-Sponsor \$2,500**

Your logo and signage will appear at the reception area. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

- **Wine Sponsor at Reception and Banquet - \$2,500**

Your logo and signage will appear in the banquet area. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

### **ASA President's Welcome Reception Event Sponsor- \$20,000**

Multiple Sponsorships are welcome! All Sponsors will appear on signage displayed in the room and will be listed in conference literature and on the SUBExcel website. Your company name and logo will be attached to all messaging regarding this event. All sponsors will be recognized verbally during the event.

- **ASA President's Welcome Reception Food Sponsor - \$17,000**

- **ASA President's Welcome Reception Bar Sponsor - \$3,000**

- **ASA President's Welcome Reception Friend of ASA - \$1,000**

### **Keynote Speaker Sponsors**

This is an opportunity to introduce one of the keynote speakers, the first speaker of the day, on either Thursday or Friday! You will have two minutes of microphone time to introduce the speaker. Appropriate signage will be displayed in the room. Your company name and logo will be attached to all messaging regarding this event. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

- **Thursday Keynote Speaker - \$20,000**

- **Friday Keynote Speaker - \$8,000**

### **Registration Area Sponsor - Sponsor \$10,000/ Co-Sponsor \$5,000**

This is an excellent opportunity to sponsor the registration area. You will be permitted to provide promotional literature to all attendees as they arrive. Appropriate signage will be displayed in the area. This is the most visible area to all attendees to view your support of SUBExcel. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

### **SLDF Fundraiser Sponsor - \$10,000 or \$1,000 sponsorships available**

You will be listed as the headlining sponsor of this event. In addition to your logo being placed on SUBExcel's event signage and website as a sponsor, your logo will appear on all promotional materials circulated for the event. Your company name and logo will be attached to all messaging regarding this event.

**Luncheon Sponsor (Thursday and Friday) - Sponsor \$10,000/ Co-Sponsor \$5,000**

The luncheons are open to all registrants. Appropriate signage will be displayed in the room. Your sponsorship will be listed on the SUBExcel website and in all conference literature. Sponsors will be recognized verbally from the podium.

**Breakfast Sponsor (Thursday and Friday) - \$8,000 / Two available**

Sponsor the morning's first activities during each of the breakfast sessions. Appropriate signage will be displayed in the room. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

**Audio/Visual Sponsor - Sponsor \$8,000/ Co-Sponsor \$4,000**

Sponsor the A/V equipment being used throughout the convention, from the Opening Session to the Final Awards Banquet. Your logo and signage will appear throughout the convention. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

**Logo Key Card Sponsor - \$5,000 - Three Spots Available**

This sponsorship offers visibility to all conference attendees as your logo will be placed on every attendee's room key card. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

**Event App Sponsor - \$5,000**

Your sponsorship will be listed on the SUBExcel website and in all conference literature as well as all sponsorship signage. Your logo will also be prominent on the event app software that all conference attendees use.

**Hospitality Suite Sponsor - Sponsor \$5,000/ Co-Sponsor \$2,500**

Your sponsorship will be listed on the SUBExcel website and in all conference literature. Your logo will also appear on signage in the heavily attended hospitality suite.

**Refreshment Breaks Sponsor (Thursday and Friday) - \$2,500**

Your logo and signage will appear at the refreshment break area. You are invited to provide cups, napkins, and other utensils with your logo on each. Your sponsorship will be listed on the SUBExcel website and in all conference literature.

**Annual Conference Tote Bags - \$2,000**

A wonderful giveaway, your logo will appear on all bags. Attendees carry tote bags throughout the conference and in many instances back home and beyond. Your logo will appear on the SUBExcel website and in all conference literature.

**Email Blast Sponsor - \$2,000**

Be a featured sponsor on one of the ASA promotional emails that will go out to everyone in the ASA database. Your logo will be placed at the top of each email blast that is sponsored. This sponsorship will get your company noticed by all of ASA, not just conference attendees. Your logo will appear on the SUBExcel website and in all conference literature.

**Video Recording Sponsor - \$1,500**

This year's convention will include a video during our awards program. Your sponsorship and logo will be listed in the credits of the video, on the SUBExcel website, and in all conference literature.

**Hotel Room Drop Sponsor - \$1,000**

This is an opportunity to send collateral or gifts to all attendees in the conference hotel directly to their hotel rooms. ASA coordinates all activities with the hotel and ensures delivery of a gift which you will provide. Your sponsorship will be listed on the SUBExcel website and in all conference literature. No room drops will be permitted without coordinating with ASA.



# Upcoming Webinar

WEDNESDAY, SEP 8, 2021 | 12:00 - 1:00 PM (EDT)

## OSHA in the First Year of the Biden Administration: What We Know and What to Expect



We are now several months into the administration of President Biden and the "new" OSHA. OSHA has already been incredibly active in terms of new guidance initiatives. This informative session will discuss what OSHA has accomplished over its first several months and what to expect in the months ahead, including

new regulatory and enforcement initiatives.

**Presented by: Bradford T. Hammock**

Bradford T. Hammock's national practice focuses on all aspects of occupational safety and health law. Brad works closely with employers to help them understand and implement safety and health management systems. In addition, he represents employers throughout OSHA rulemaking proceedings, including OSHA's informal public hearings on proposed rules. Brad also defends employers against OSHA enforcement actions.

[Register here.](#)

WEDNESDAY, OCT 13, 2021 | 12:00 - 1:00 PM (EDT)

## Power in a PDF? Using Existing Documentation to Create Beneficial Data



What if adopting technology on your job site could be as simple as using your existing company documentation to create beneficial data? What if the PDFs your field managers fill out on a regular basis, could be filled out in the same comfortable format, by simply uploading a PDF? What if your team could eliminate

using multiple systems for custom forms, and take your job site from a single-copy stack of messy paperwork to a single, digitized solution? This technology is available, easy to use, creates beneficial data based on your inputs, and is viewable from anywhere. Join Fonn to see how using software for custom forms and fillable PDFs can:

- Seamlessly integrate with your company's existing forms
- Automate "contactless" submission of forms
- Reduce paper
- Save time
- Create efficiency
- Improve access to critical data

**Presented By: Eric Crawford**

Eric Crawford is the Director of Sales for North America at FONN, a construction management application provider. FONN specializes in construction technology and provides a simple, yet robust platform for construction contractors to get the job done right. Eric is a national member of ASA, AGC and NAHB as well as his local chapters in Northern Colorado.

[Register here.](#)

# Coming Up

in the September 2021  
Issue of FASA's



Theme:

## Human Resources in the Spotlight

- Leading a Multi-generational Workforce
- The Farm System and Free Agency
- and more...

Look for your  
issue in September.

To access past issues  
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