

How To Incorporate a Subcontract Addendum in Your Bid

by Scott Holbrook, Esq.

A question every construction subcontractor repeatedly faces is, "Have I caught everything that is of utmost concern to me in reviewing the subcontract before I sign it?" The task of answering is not made easy by the number of subcontracts published by industry organizations, including the American Institute of Architects (AIA), the Associated General Contractors of America (AGC), and the Design-Build Institute of America (DBIA), as well as many others.

Knowing the major provisions of these documents might even be manageable for subcontractors, but this would not solve the problem since subcontractors are rarely offered these form subcontracts. Instead, most subcontracts are many pages of minuscule type containing proprietary clauses that the general contractor or construction manager has spent years or decades perfecting to shift risk to subcontractors, even where subcontractors have no control over those risks. This complexity means that it is impossible, in practice, to identify each and every issue that is contained within a subcontract. So, how can a subcontractor manage?

One tool is an addendum, which is attached to a subcontract to deal with the most important issues in the subcontract. The purpose of such an addendum is to identify and modify items of utmost importance to the subcontractor — "bet the company" type items that put substantial company assets at risk if something goes wrong on the project. Typical language used on such addenda is:

Subcontractor hereby accepts the terms of the attached subcontract subject to Contractor's agreement with the terms set forth in this Addendum, which shall supersede any conflicting terms in any other contract document. Any of the Contractor's terms or conditions in addition to or different from this standard addendum are objected to and shall have no effect. Contractor's agreement herewith shall be evidenced by Contractor's signature hereon or by permitting Subcontractor to commence work for the project.

Using an addendum can be a straightforward solution, except when a request for bid requires the subcontractor to sign a proprietary contract. In this circumstance, subcontractors and their attorneys must take into account applicable state law and how it deals with formation of the contract in question.

Many subcontractors are reluctant to modify a subcontract and take to heart a general contractor's or construction manager's admonition not to modify a proposed subcontract. However, using an addendum can be a more friendly approach to addressing the most worrisome terms than scratching out the terms of an original contract. General contractors and construction managers sometimes, but not always, are more accepting of changes made by an addendum than of having their original contracts marked up. One reason is that it is easier to identify the changes in an

addendum than to find hand-written changes, which in addition are subject to further interpretation.

When a subcontractor decides to use an addendum, it can clarify in its scope letter that the bid is conditioned on these areas of utmost concern addressed in the addendum. This approach helps ensure that a "meeting of the minds" takes place so an enforceable contract is created upon acceptance of the bid. To further ensure a "meeting of the minds," the subcontractor should add the phrase, "subject to a mutually agreeable contract, and if no mutually agreed contract, the parties agree to use the Standard Form AIA A401-1997 Subcontract Agreement."

ASA has published a generic "Addendum to Subcontract," which addresses 28 different areas of common concern in construction subcontracts. While not an all-inclusive list, at a minimum the ASA addendum is a very broad outline to help subcontractors obtain the terms and conditions they want. Some subcontractors are reluctant to use this large addendum as they fear it will scare off customers with a long list of items to be revised. One response to this concern is: "Wait a second, you just gave me a multiple-page contract obligating me to thousands [or millions] of dollars' worth of work and you are objecting to my simple addendum attempting to make the contract fair." The desire not to use a large addendum is especially acute on smaller jobs, where it may seem inappropriate to use the whole addendum. An alternative is to select the clauses most pertinent to

the job in question, as well as to your trade in particular, and include only those items in a shorter-form addendum.

As in any contract negotiation, the inclusion or exclusion of any terms within the contract is ultimately a business decision. The goal of ASA's generic "Addendum to Subcontract," as well as the user's guide for the addendum and other ASA contract resources, is to educate subcontractors about clauses and understand the risks involved when entering into subcontract agreements. Since you cannot always address concerns individually in each subcontract, using an addendum is a simple way to deal with the most important issues for your particular trade or for a particular project, so that you avoid risking huge company assets on risks you cannot control. ■

This article is intended to provide the reader with general information regarding current legal issues. It is not intended to be construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific legal matters.

Scott Holbrook is with the law firm of Crawford & Bangs in Covina, Calif. He can be reached at sholbrook@builderslaw.com.