

GET THE MOST FROM ASA'S CONTRACT RESOURCES

By Scott Holbrook, Esq

The American Subcontractors Association (ASA) has a number of contract-related resources available to members, including the *ASA Subcontractor Bid Proposal*, the *ASA Addendum to Subcontract*, and the *ASA Short-Form Subcontract Addendum*, as well as supporting reference materials such as the "ASA Model Subcontracts Best Practices" document. [Access them in the members-only section of the ASA Web site (www.asaonline.com) on the ASA Member Resources page.] Learning about how and when to use these valuable resources and references, which is the objective of this overview, will pay off.

Uncontrolled Costs: Head 'Em Off at the Pass

In today's complicated world of subcontracts, it is increasingly important to include terms and conditions in bids and proposals along with a scope letter when bidding projects as a subcontractor. Increasingly, subcontractors that bid simply "per plans and specs" receive contracts that add costs in insurance requirements, warranties, retention (or "retainage"), or other cost areas. The *ASA Subcontractor Bid Proposal* addresses a number of items of concern to subcontractors, including progress payments, interest on late payments, warranties, insurance requirements and other cost areas that subcontractors often fail to seek to control in their bid prices. ASA's bid proposal form gives subcontractors the opportunity to recognize these often-overlooked areas of expense when bidding and attempts to control and limit these often-hidden costs.

Specifically, if a general contractor (GC) or at-risk construction manager (CM) accepts a subcontractor's proposal made with the ASA bid proposal form and attempts to modify the items in the subcontract it offers in response, the subcontractor can attempt to incorporate the bid by reference into the proposed contract and provide that the bid proposal form shall override any inconsistent terms in the form subcontract. In the event that the GC/at-risk CM is not amenable to incorporating the bid in the ultimate subcontract, the use of the *ASA Subcontractor Bid Proposal* gives a subcontractor leverage to negotiate the more onerous terms out of its proprietary subcontract. The first condition of the bid proposal states:

Allowing the Subcontractor to commence work or preparation for work will constitute acceptance by Customer of this bid proposal. Subcontractor and Customer will execute an American Institute of Architects A401-1997 subcontract form to memorialize their agreement, supplemented and modified as provided by this bid proposal which shall be incorporated by reference into the final subcontract. In the event of any conflict between the terms of this bid proposal and any other documents stating terms of the final subcontract, this bid proposal shall govern.

Thus, the use of the bid proposal form may give the subcontractor the right to opt out of doing the work if the

GC/at-risk CM demands that its subcontract be signed without the terms called for in the bid proposal. If the subcontractor has been instructed to commence work, the GC/at-risk CM has accepted the bid proposal by conduct, and is obligated to sign an A401-1997 incorporating the bid proposal by reference.

ASA Resources/References and the New CICC and AIA Contract Documents

The *ASA Subcontractor Bid Proposal*, the *ASA Addendum to Subcontract*, and the *ASA Short-Form Subcontract Addendum* were developed in the context of pre-2007 industry model contract documents. With new model contract documents being published by the Construction Industry Contracts Council (CICC) and with the American Institute of Architects (AIA) revising its A201 and A401 forms in the fall of 2007, watch for updates from ASA in the language of its bid proposal form and in other ASA contract-related resources and references. Be aware of contractual references — they affect your rights, remedies and responsibilities! [Editor's note: The amount of time that contractors have to legally use former editions of documents such as the AIA A401-1997 once a new document such as the A401-2007 is published may be limited. Limits would be governed by intellectual property licenses granted by the document's copyright holder(s) and applicable intellectual property law.]

Negotiation: A Matter of Position

If a subcontractor does end up in the position of negotiating specific subcontract terms and conditions, one of the many valuable references that it will want to use is the "ASA Model Subcontracts Best Practices," developed and published by ASA. It provides an outline explaining the best practices for avoiding onerous contract terms in a concise manner, organized by commonly used contract terms such as "dispute resolution" and "scheduling." An example is the explanation of the best practice for hold-harmless provisions:

Hold harmless terms must be limited to bodily injury and property damage (other than the Work itself). Such terms must also be limited to provide indemnity only to the extent of the subcontractor's negligence, and must provide for payment of attorney's fees rather than including a duty to "defend." Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other party to the subcontract against the consequences of the indemnitor's own negligence.

When negotiating all or many of the terms and conditions of a subcontract agreement, the never-ending question for every subcontractor is: "Have I caught everything that is of utmost concern to me in reviewing my subcontract before signing it?" Most subcontracts are many pages of minuscule type

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ASA's CONTRACT RESOURCES, CONTINUED

containing proprietary clauses that the GC/at-risk CM has spent years or decades perfecting in an attempt to shift risk to subcontractors — often risks over which the subcontractors exercise no control.

Many subcontractors are reluctant to modify subcontracts, and take to heart customers' admonitions not to modify proposed subcontracts, but the *ASA Addendum to Subcontract* may present a friendlier approach than scratching out the words of an original contract. An addendum is a straightforward way of addressing the most worrisome terms of a proposed contract. Sometimes, the addendum format is a more acceptable alternative simply because it is easier to identify the changes it proposes than it is to understand handwritten changes subject to further interpretation.

In some, but not all, circumstances, the *ASA Addendum to Subcontract* is a valuable tool that can save time and appropriately limit risk. Against the backdrop of the many demands on subcontractors' time and the widespread use of proprietary subcontracts, the *ASA Addendum to Subcontract* is an efficient tool that can be attached to a subcontract and deal with the most important issues concerning them. The concerns ASA's addendum addresses may not be all-inclusive, depending on the trade or project, but it does address more than two dozen areas of common concern in construction subcontracts.

A subcontractor's strategy for using the addendum should depend on its negotiating position. The subcontractor could respond by attaching the *ASA Addendum to Subcontract* to a proposed contract for a number of reasons, including onerous proposed contracts terms or a change in scope since bid day. (Note that the addendum requires the subcontractor to fill in the scope — it doesn't incorporate the bid scope.)

Where a subcontractor sees less need for changes, less room for negotiation, or needs a fallback position, it may use the *ASA Short-Form Subcontract Addendum*. Subcontractors may find this document — which is limited to payments, back charges, right to attorney fees,

scheduling, responsibility for materials, indemnity, and insurance — especially useful to negotiate small jobs. These changes, while fewer in number than the long-form proposes, are critical and would improve the rights of a subcontractor compared to most proprietary subcontract forms.

As with any contract negotiation, the inclusion or exclusion of any terms within a contract is ultimately a business decision. ASA's goal in making contract-related resources and references available is not to tell subcontractors what language to include within contracts, but rather to educate subcontractors about the risks they are taking. Each of these tools will assist subcontractors in negotiating a fair subcontract. Using these tools will make it simpler for subcontractors to recognize and deal with important issues so that they do not unwittingly stake huge company assets on risks they neither recognize nor control.

Pictured here with ASAC Legislative Advocate Skip Daum and newly elected President Brian Swisher, Scott Holbrook is a partner with the law firm of Crawford & Bangs in Covina, Calif., and 2007-08 chair of the ASA Attorneys' Council. He can be reached at sholbrook@builderslaw.com.



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