

## Why Should I Carefully Review and Negotiate My Subcontract? I Can Think of Hundreds of Thousands, if not Millions of Reasons.

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The most common excuses that are typically made by subcontractors who fail to properly negotiate their subcontracts include a lack of time and a perceived inability to successfully request that changes can be made to the subcontract. This type of attitude often leads to hundreds of thousands, and perhaps millions, of dollars of losses.

A decision issued by the Appellate Court of Connecticut in the case of *Suntech of Conn., Inc. v. Lawrence Brunoli, Inc.*, 173 Conn. App. 321 (2017) in late May is very much worthy of your consideration if you ever feel predisposed to making excuses instead of properly negotiating a subcontract. In this case, the subcontractor sued the general contractor and sought an equitable adjustment in excess of \$555,502.31 for increased costs of labor, materials, overhead and direct job costs caused by various disruptions, delays, suspensions, scope changes, and changed conditions as a result of numerous project change orders, proposal requests, design changes, and construction change directives. However, the Subcontract contained the following no damages for delay clause, "subcontractor agrees not to assess any delay damages or claims." The Court found that this language was not ambiguous and that the no damages for delay clause prohibited the recovery of the damages sought by the subcontractor. In order to evade the clear meaning of the no damages for delay clause, the subcontractor somewhat imaginatively claimed that its damages stemmed from interference and hindrances and not from delays. The Court was not persuaded by this artificial distinction between a hindrance or interference and a delay and denied the subcontractor's claim. Therefore, a subcontractor's acceptance of the no damages for delay clause resulted in the subcontractor performing over \$500,000.00 of work for free.

A clause that should grab your attention as much as, if not more than, a no damages for delay clause, is a pay if paid clause. A pay if paid



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clause makes a payment by the owner to the contractor for the subcontractor's work a required precursor to the contractor's obligation to pay the subcontractor. The Maryland Court of Special Appeals decided the impact of such a pay if paid clause in *Young Elec. Contrs., Inc. v. Dustin Constr., Inc.*, 151 A. 2d. 32 (Md. Ct. Spec. App. 2016) a case decided in late December. Young Electrical Contractors brought a claim for \$533,847.32 for extended and additional labor and supervision, additional tools and equipment costs, acceleration costs, extended overhead costs, owner initiated design costs, design errors, and unforeseen conditions. However, Young Electrical Contractors agreed to a subcontract that included the following provision, "It is specifically understood and agreed that the Contractor's obligations to pay all or any portion of the subcontract sum to subcontractor, whether as a progress payment, retainage, or as a final payment, is contingent, as a condition precedent, upon the contractor's receipt of payment from the owner of all amounts due contractor on account of the portion of the work for which the subcontractor is seeking payment." The Court held that this clause was an enforceable pay if paid clause that prevented the subcontractor from pursuing a claim against the contractor for a payment that the contractor had not received from the owner. The subcontractor's ability to recover for \$533,847.32 of work that it had been performed had thus been forfeited prior to work even beginning.

In order to avoid subjecting your company to the possibility of suffering \$500,000.00 losses like the two subcontractors who unsuccessfully litigated the two previously discussed claims in Connecticut and Maryland, I urge you to carefully review and negotiate each subcontract that you enter. A good start to any contract review initially includes a careful focus on the following four items:

**1. Payment:** There is never a reason to work for free. Every ADSC subcontractor needs to be able to readily identify pay if paid clauses (look for the words "express condition precedent") and pay when paid clauses and understand the impact of both of these clauses on

their ability to be paid.

**2. Indemnification:** Many ADSC subcontractors review the indemnification clause prior to reviewing any other contract provision. This concern stems from the fact that many indemnification clauses require that a subcontractor protect the contractor, the owner, and the project's design professionals from their own negligence resulting in insured personal injury or property damage claims or their own breaches of contract.

**3. Notice:** Many subcontracts now require that a subcontractor provide notice of a claim for extra compensation for differing subsurface site conditions in a very short time period ranging from one day to three days after the subcontractor encounters such a condition. Can your company really communicate a claim from the field to the office to your client in twenty-four hours or over a weekend? If not, you better insist upon a notice provision that allows you to have at least three business days and preferably five business days to make a claim for additional compensation after discovering a differing site condition.

**4. No damages for delay clause:** As discussed above in detail, the *Young Elec. Contrs., Inc.* case, a no damages for delay clause may result in a subcontractor performing many months of work for free. Can your company afford to work for free for an extended period of time?

John Roe of Malcolm Drilling prepared an excellent subcontract review checklist that has been distributed at many ADSC educational presentations. I have made some revisions to this checklist and would be pleased to provide it to any ADSC members who contact me to request a copy of it.

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