

KILLER CONTRACT CLAUSES

Donald W. Gregory, Esq.
KEGLER, BROWN, HILL & RITTER
Attorneys & Counselors at Law
65 E. State Street, Suite 1800
Columbus, OH 43215
(614) 462-5400



Trade Association Form Subcontracts:

**“The Good,
The Not So Bad,
And the Ugly”**



HISTORICAL DEVELOPMENTS

- ∞ **1994** **“HELL FREEZES OVER!” - AGC & ASA Agree on Compromise Subcontract: AGC 640/ASA**
- ∞ **1997** **AIA A401 Subcontract Endorsed by ASA & ASC, but not AGC**
- ∞ **1998** **AGC withdraws endorsement of AGC 640
Publishes AGC 650 and 655
AGC 650 endorsed by ASC, AGC 655 endorsed by neither ASA or ASC**
- ∞ **1999** **AGC publishes AGC 450 and 455, 460 and 465
“Design/Build” Subcontracts**
- ∞ **2007** **ASA does not endorse AIA A401, but endorses ConsensusDOCS 750 with AGC**

AIA SUBCONTRACT

- ∞ **AIA A401 (1997 edition).**
- ∞ **Traditionally endorsed by ASA and ASC, but never by AGC.**
- ∞ **Most favorable to Subs.**
- ∞ **A401 (2007) less favorable to Subs.**



AGC SUBCONTRACTS

In The Past:

- ∩ **AGC 650** **“Pay when Paid”**
 - **Endorsed by ASC, not ASA**
- ∩ **AGC 655** **“Pay if Paid”**
 - **Not endorsed by ASC or ASA**

Now:

- ∩ **ConsensusDOCS 750** **“Pay when Paid”**
 - **Endorsed by AGC, ASA and others**

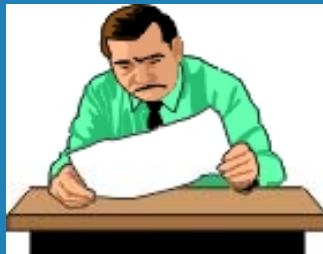
THE KILLER CONTRACT CLAUSES



#1 Contingent Payment

THE NOT SO BAD

- Ω **“Pay When Paid” =**
- Ω **Payment In A Reasonable Time.**
- Ω **Deals With Timing, Not Entitlement.**



THE UGLY

- Ω **“Pay If Paid” =**
- Ω **If Owner Never Pays, Subcontractor Never Gets Paid**
- Ω **Deals With Timing And Entitlement**
- Ω **Shifts Entire Credit Risk of Owner Insolvency To Subcontractor**

CONTINGENT PAYMENT

Ω THE GOOD:

- No Contingent Payment

AIA A401

Ω THE NOT SO BAD:

- “Pay When Paid”

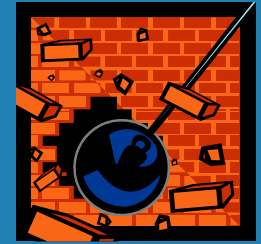
AGC 640, AGC 650
ConsensusDOCS 750

Ω THE UGLY:

- “Pay If Paid”

AGC 655

#2 NO DAMAGE FOR DELAY



∞ THE GOOD

- AIA A401-2007 Subcontract
- ConsensusDOCS 750

Claims Permitted
Prompt Notice

Claims Permitted
Prompt Notice

∞ THE UGLY

- AGC 650 AND 655 Subcontracts

Claims Permitted
for Contractor Delay, but
perhaps not Owner Delay

* Cannot be enforced in Ohio under the Fairness in Construction Contracting Act.

“No Damage for Delay”

“No damage for delay” – sole remedy is a time extension.

Generally unenforceable if –

- 1. Statute/Case considers it against public policy.**
- 2. Extent or nature of delay was not foreseeable.**

TIME IS MONEY!





#3 WAIVER OF LIEN AND BOND RIGHTS

- **Contrary to popular belief, in many states an “upfront” lien waiver (without independent consideration like payment) is ENFORCEABLE.**

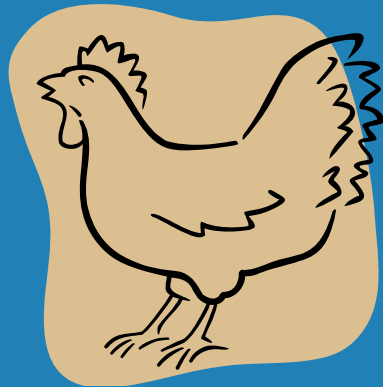
#4 UNCONDITIONAL LIEN WAIVERS BEFORE PAYMENT

Ω The Good

- Unconditional lien waivers before payment are prohibited.

ConsensusDOCS 750

Which comes first – the chicken or the egg?



One solution:

Condition your lien waiver ... followed by a trailing unconditional lien waiver.

#5 ADDITIONAL INSURED

Additional Insured = “Broad Form Indemnity”

Ω **THE GOOD:**

- **ConsensusDOCS 750**
 - Options other than Additional Insured

Ω **THE UGLY:**

- **AIA A401 (2007)**
 - Mandates Additional Insured



#6 CHANGE ORDERS IN WRITING

NOTICE, NOTICE, NOTICE

Avoid provisions that (1) allow one to direct additional work without agreement on price; (2) make payment for the additional work contingent upon approval/payment by the owner; and (3) allow “backcharges” without notice.

#7 DISPUTE RESOLUTION

Ω THE GOOD

- ConsensusDOCS 750

Ω THE NOT SO BAD

- AIA A401-2007

Ω THE UGLY

- AGC 650 and 655

Ω AAA Mandatory Mediation

Ω AAA Arbitration or Litigation

Ω AAA Mandatory Mediation

Ω AAA Arbitration or Litigation

Ω Risk of Final IDM decision

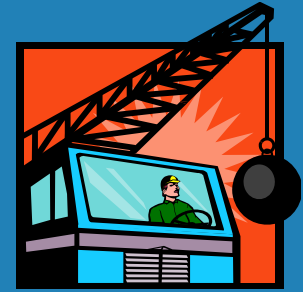
Ω AAA Mandatory Mediation

Ω No Arbitration

Ω May stay Sub's claims indefinitely awaiting

Owner/Contractor Resolution

#8 INDEMNITY



(I.E. JOB ACCIDENTS)

Ω **THE GOOD:**

- **No indemnity for another's negligence (only your own).**

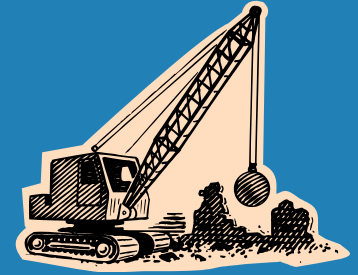
Ω **THE NOT SO BAD:**

- **Indemnity only for personal injury and property damage (insurable risks).**

Ω **THE UGLY:**

- **Broad form indemnity for another's negligence or any losses or expenses associated with your performance or scope of work (non-insurable risks).**

SAFETY INDEMNITY



(I.E. OSHA FINES)

Ω THE GOOD:

- No safety indemnity referenced.

Ω THE NOT SO BAD:

- Sub must indemnify the Contractor for any fines, but no portion caused by Contractor's prior history.

Ω THE UGLY:

- Sub must indemnify the Contractor for any fines, including enhanced penalties.

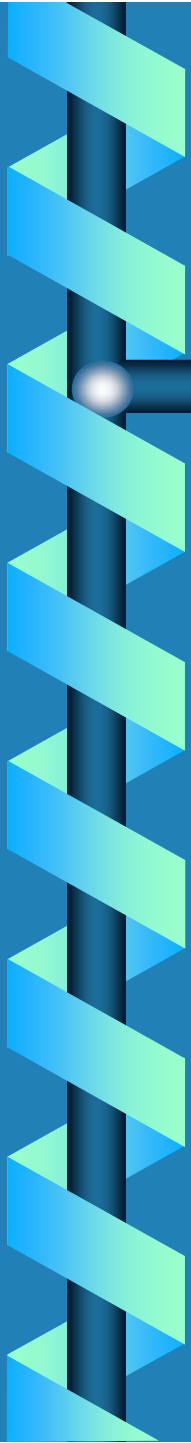


#9 INTEGRATION

Prior negotiations, bid exclusions, etc. are superseded by the CONTRACT.

**Be sure the scope is right in the CONTRACT;
or**

Attach your bid proposal as an exhibit to the CONTRACT.



#10 ACCEPTANCE OF FINAL PAYMENT AS WAIVER

May inadvertently waive claims when final payment for contract sum received.

AVOID or do not request last of final payment until all disputes are resolved.

COMPROMISE: CLAIMS IN WRITING PRIOR TO PAYMENT ARE NOT WAIVED.

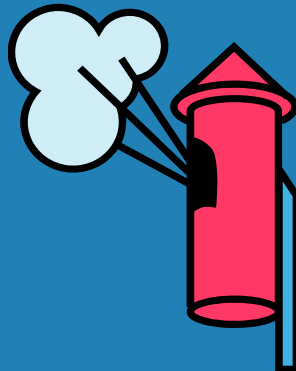
FORM SUBCONTRACT COMPARISON

Most Favorable to Subs

AIA A401
Consensus-
DOCS 750

AGC 640/
ASA 4100

AGC 600



Most Favorable to GC's

AGC 650
AGC 450
AGC 460

AGC 655
AGC 455
AGC 465

PRACTICAL TIPS

∞ Qualify Your Bid:

- **“This bid is conditioned upon use of an AIA 401 (1997) or ConsensusDOCS 7501 Subcontract Form or other contract form acceptable to Subcontractor.”**



∞ Educate Your Customer:

- **Let them know upfront what subcontract forms are acceptable to your company and be prepared to explain why certain language is one-sided and unfair.**



More Practical Tips:

Ω Negotiate a Fair Agreement:

- **ASA provides commentary on the AIA and AGC Subcontract forms, as well as an Addendum to neutralize the AGC 650 and 655 forms. asaonline.com**
- **ConsensusDOCS available at www.consensusdocs.org**



Ω Refuse One-Sided Forms (“Principal Costs”)

- **Nobody needs to work for free or take on a problem project. You must be prepared to “walk away” absent an equitable agreement.**





DONALD W. GREGORY, ESQ.

Kegler, Brown, Hill & Ritter
65 E. State Street, Suite 1800
Columbus, OH 43215
Telephone: (614) 462-5400

- Ω **Chairs the Construction Law and Litigation areas of the law firm of Kegler, Brown, Hill & Ritter in Columbus, Ohio.**
- Ω **General counsel to the American Subcontractors Association and ASA of Ohio.**
- Ω **Former Chairman of the Attorney's Council of ASA.**
- Ω **Former Chairman of ASA's Task Force on the new AGC Subcontracts and ASA's Contract Documents Committee.**
- Ω **Received ASA's National President's Award in 1999.**
- Ω **Project Counsel on some of Ohio's largest construction projects, including the Butler Regional Highway (\$160 Million), Schottenstein Center Arena (\$110 Million), and the Ohio Stadium Renovation (\$200 Million).**
- Ω **Initiated Ohio's New Mechanic's Lien law, Ohio's first Prompt Payment Act, and Ohio's new *Fairness in Construction Contracting Act*.**