



UNDERSTANDING YOUR CONSTRUCTION SUBCONTRACT

IUPAT DC7 LABOR MANAGEMENT CONFERENCE

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Disclaimer: The information provided is for general information purposes only and is not a substitute for legal advice from your attorney.

ACEA
Allied Construction
Employers Association

MEET THE PRESENTER



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- ❖ Air Force Veteran, Graduate of Chicago-Kent College of Law, & Member of the WI Bar Assn. since 2020
- ❖ Former in-house counsel for a structural steel and glazing subcontractor with \$80+ mil in annual sales



What is your contract, really?



It is EVIDENCE of your Agreement with the GC

It is NOT your Agreement

You could legally agree to repaint AmFam Field on a handshake* (don't do this)

So, by definition, your contract only matters when there's a dispute or a problem

*Statute of Frauds, Wis. Stat. § 402.201





- ❖ FLOW DOWN PROVISIONS

- ❖ Often labeled “Mutual Rights and Responsibilities”
- ❖ You’re agreeing to every contractual obligation that the GC has to the Owner and Architect
 - ❖ Excluding Scope of Work, obviously
 - ❖ E.g. Notice requirements, remedies for delay
- ❖ A Subcontractor has every right to review the Prime Contract if they are bound to it
 - ❖ If there are confidentiality concerns, request a redacted copy
 - ❖ If a GC shows hesitancy in providing a copy? – should be *pro forma*
- ❖ Know the obligations you’re taking on!

- ❖ INTEGRATED AGREEMENT CLAUSE

- ❖ The Agreement you’re signing IS the Agreement
- ❖ Any prior written or verbal Agreements/understandings are no longer legally valid
- ❖ Will list documents incorporated into the Agreement
 - ❖ e.g. Prime Contract, Appendices, etc.
 - ❖ Will often list a hierarchy of controlling documents for when there is a discrepancy
- ❖ However, the Agreement can still be modified after signing, even verbally or by conduct*

* *Bacardi U.S.A., Inc. v. Gallo Wine Distributors, L.L.C.*, 829 So. 2d 963, 964 (Fla. Dist. Ct. App. 2002)

❖ COMPLIANCE WITH ALL LAWS

- ❖ Usually written as, “Subcontractor shall comply with all applicable laws, statutes, ordinances, codes, rules, and regulations.”
- ❖ Problem: the clause is VERY broad
 - ❖ Every municipality/county/state/federal has its own building codes & rules, some contradictory
 - ❖ If you unknowingly follow a spec that violates a code, YOU could be expected to cure
- ❖ In general, the Architect is responsible for code compliance
- ❖ Suggested replacement language: “Subcontractor will reasonably rely on the provided specifications re: local ordinances, code compliance . . .”

❖ INDEMNIFICATION CLAUSE

- ❖ Indemnification: compensation for harm or economic loss
 - ❖ Usually used in conjunction with a duty to “hold/save harmless”
- ❖ GCs often structure the clause so that a subcontractor is liable for the GC’s own negligence
 - ❖ GC may legally require a subcontractor to indemnify for GC negligence
 - ❖ Must be explicitly and conspicuously stated*

**Sutton v. A.O. Smith Co.* 165 F.3d 561 (7th Cir. 1999)

❖ PAY WHEN PAID & PAY IF PAID

- ❖ Pay when paid provisions are valid and enforceable in Wisconsin
 - ❖ upstream contractor's obligation to pay the subcontractor is delayed until the upstream contractor is paid
 - ❖ Example language: "Subcontractor shall be paid within (X) days after receipt of payment . . ."
 - ❖ Most WI jurisdictions hold that GCs must pay within a "reasonable period of time"
- ❖ Pay if paid provisions are unenforceable in Wisconsin*
 - ❖ Example language: "payment to the contractor for the subcontractor's work are conditions precedent to the subcontractor's right to payments by the contractor.">

❖ LIEN RIGHTS PROVISIONS

- ❖ Any waiver of lien rights prior to payment, is void and unenforceable in Wisconsin^
 - ❖ i.e. a GC cannot request a subcontractor waive any lien rights in the Agreement
 - ❖ GC can legally request lien waivers after a subcontractor is paid in full
- ❖ Subcontractors must take care to preserve lien rights^o
 - ❖ Must file a claim for lien with the county clerk where work was performed within 6 months
 - ❖ 30 days prior to filing, must serve written notice of intent to lien on the Owner

* Wis. Stat. § 779.135

> *BMD Contractors, Inc. v. Fid. & Deposit Co. of Maryland*, 679 F.3d 643 (7th Cir. 2012), as amended (July 13, 2012)

^ Wis. Stat. § 779.135

o Wis. Stat. § 779.02

❖ WAIVER OF SUBROGATION CLAUSES

- ❖ Subrogation: allows an insurance company which has paid for a loss, to “step into the shoes” of its insured and sue a party that may have been responsible for the loss
- ❖ Waivers prevent an insurance company, that has paid for a loss, from suing another party involved with the project
- ❖ Are enforceable under WI law*

❖ NOTICE

- ❖ Some of the most important provisions in a contract – violating a deadline when things don’t go to plan, puts the upstream party in the driver’s seat
- ❖ Especially important to strictly follow notice requirements to upstream parties when there is a delay
- ❖ If another subcontractor causes your delay, your contract contains your only remedy, you cannot sue the other subcontractor and expect the courts to recompense your loss^

* *Rural Mut. Ins. Co. v. Lester Bldgs. LLC*, 2019 WI 70 (June 18, 2019) & Wis. Stat. § 895.447

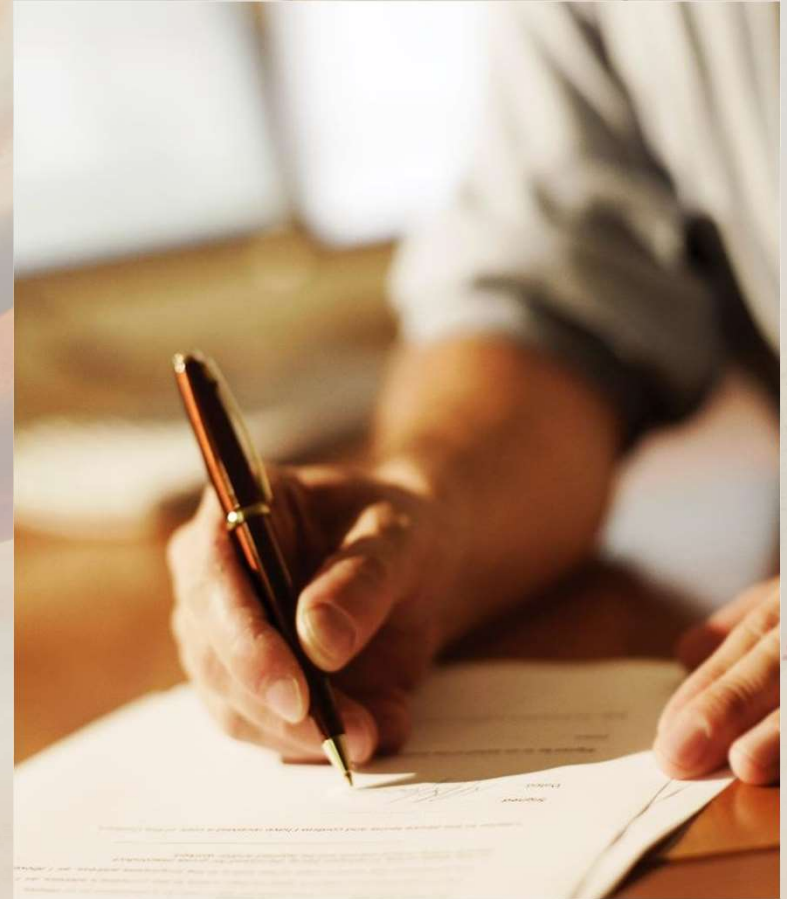
^ *Mechanical Inc. v. Venture Electrical Contractors, Inc.*, 392 Wis. 2d 319, 944 N.W.2d 1, 2020 WI App. 23 (Wis. Ct. App. 2020)

CONCLUSION



Know the risks you're taking on!

- ❖ GCs, especially large GCs, will be very hesitant, or even completely unwilling, to change their standard subcontract
- ❖ Battling over every piece of unfavorable contract language risks business relationships and future projects
- ❖ At a minimum, know when you're agreeing to something especially one-sided so you can account for the risk
- ❖ Questions?



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