



The Subcontractor Advocate

American Subcontractors Association of Ohio

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Project Failures Increase Pay-if-Paid Risk

In today's tough construction economy, pay-if-paid clauses seem like they're everywhere. Clients worried about project financing often see pay-if-paid as a financial backstop in case of project failure, and thus see more value in pay-if-paid when failures are increasing. The problem with this strategy is, of course, that it shifts the increased risk of project failure to you, the subcontractor. Just when pay-if-paid looks more attractive to your client, it looks less attractive to you.

There's no doubt that, in *any* economy, pay-if-paid clauses imperil subcontracting businesses that provide labor, materials and equipment to projects on promises of future payment. In a bad economy with more project failures, pay-if-paid makes a subcontractor's decision to extend credit exponentially riskier. That's why you need to be prepared to present alternatives to pay-if-paid.

One alternative that may help alleviate a client's concerns, and get the client to abandon pay-if-paid, is to strengthen the contractual right to obtain project financing information.

The ConsensusDOCS

www.consensusdocs.org 200 (prime contract) and 750 (subcontract) model documents, endorsed by ASA, the Associated General Contractors of America, and 21 other leading industry associations, contain provisions giving contractors and subcontractors the right to project financing information before and

during a project. (Order ConsensusDOCS using partner code ASA and promo code 200 to get your ASA member discount.) If your client can monitor project financing in real time, it may not feel that a pay-if-paid clause is necessary.

You also need to be prepared to explain exactly what harm a pay-if-paid clause can cause. Tell your client that a pay-if-paid clause could force your company not just to forfeit a payment from the client, but also to forfeit lien or bond protections. A client who is professional and understands the credit risk that your company is taking should not expect you to perform work under a contract that could void these critical protections, especially in a risky economy.

Surviving the current construction economy and creating an industry with higher professional standards go together. If your client values your work, it will respect your right to be paid as companies in other industries respect their service providers' right to be paid. You have your own subcontractors and suppliers to be pay. Your client's acceptance of your desire not to work under pay-if-paid conditions is a sign of trust and a minimum standard for doing business, especially with the risk of project failure as high as it is today.

Learn more about risks and negotiating strategies of pay-if-paid in the Foundation of ASA's CD-ROM, "The Big IF in Pay-if-Paid Clauses" (Item #8055), a two hour audio-visual presentation by Michael Davis, Esq., of the Chamberlain Hrdlicka law firm in Atlanta, GA. (\$65 for members/\$95 for non-members)

Maryland's Highest Court Rules That Termination for Convenience Clauses Must be Exercised in Good Faith and Fair Dealing

“a party with discretion is limited to exercising that discretion in good faith and in accordance with fair dealing”

This ruling ... Is welcome news to construction contractors and firms, particularly lower tiers.

In a victory for subcontractors, suppliers, and construction firms that rely on their executed contracts as reliable indicators of future work, Maryland's highest court unanimously ruled on August 25, 2009, that private parties must act with good faith and in fair dealing when using a termination for convenience clause to end a contract. *Questar Builders, Inc. v. CB Flooring, LLC* Case No. 03-003688. Because the decision interprets a common contract “termination” clause, it should have persuasive impact far beyond Maryland state lines.

In the case, *Questar Builders* (“General Contractor”) was hired to build a luxury midrise apartment building and townhome complex. The General Contractor and *CB Flooring* (“Subcontractor”) executed a contract to install carpeting based on the Subcontractor's bid price of \$1.12 Million. One year into the Project, but before the carpeting work had started, the General Contractor terminated the Subcontractor after it had negotiated a better price with the second low bidder.

The General Contractor claimed that the Subcontractor termination for convenience clause gave it an “absolute” right to terminate at any time for any or no reason. In response, Subcontractor and the American Subcontractors Association – ASA filed an amicus (friend of the court) brief in this case – argued that the implied duty of good faith and fair dealing applies to all contract clauses, including private contract termination for convenience clauses, and that to hold otherwise would render such contracts illusory and have a host of negative public policy ramifications.

In a 7-0 decision, the Maryland Court of Appeals (Maryland's highest court) unanimously agreed with ASA and Subcontractor. The Court stated that termination for convenience clauses must be interpreted and applied “according to the common law of contract as interpreted by this Court, which does not require [the federal contracting standard urged by the General Contractor of] `well-nigh irrefragable proof` of wrongdoing to establish bad faith.”

The High Court found that the General Contractor went “too far” when it argued that it could terminate “for any or no reason” because such interpretation would render the Subcontractor illusory. The High Court then held that “***a party with discretion is limited to exercising that discretion in good faith and in accordance with fair dealing.***” The High Court added that contracting parties “**give up their opportunity to shop around for a better price**” once they execute a binding contract for a specified duration.

This ruling by Maryland's Highest Court is welcome news to construction contractors and firms, particularly lower tiers. Indeed, if the Court had endorsed the General Contractor's arguments, the resulting decision would have encouraged a host of anti-competitive practices such as “bid shopping” after the signing of a contract and the subsequent pressuring of contractors and suppliers into either lowering their bids or agreeing to perform extra work without compensation at the risk of being terminated. In the current environment of declining prices – and increased competition for the work that is available – the Court's unanimous and well-reasoned decision should give private contractors and owners a powerful disincentive to terminate for reasons of price alone.

Thanks to Eric Travers of *Kegler, Brown, Hill & Ritter*. *Kegler, Brown, Hill & Ritter's Construction Law Alert* is prepared by the

September 15th ASA/FASA Webinar Helps You Get Your Share of Federal Stimulus Work

...get tips on how your company can get its share of this work....

Spending of stimulus funds is accelerating....

As more American Recovery and Reinvestment Act (federal stimulus) projects break ground, construction subcontractors have a unique, once-in-a-generation opportunity to bid and win federally funded projects. On September 15, 2009, get tips on how your company can get its share of this work in the 90-minute ASA/FASA webinar, "Where the Projects Are: Finding and Getting Federal Projects," presented by David Hendrick and Bart Reed of Hendrick, Phillips, Salzman and Flatt in Atlanta, Georgia.

Spending of stimulus funds is accelerating, including billions of dollars not just for transportation but also billions for federal, state and local agency non-transportation construction projects. During this live, audio-visual program, learn how to find stimulus projects, and how the ASA-endorsed *ConsensusDOCS 752 Subcontract for Use on Federal Construction Projects* can help you and your prime contractor clients quickly reach agreement on contract terms for federal

projects. Understand the key provisions that your contract must incorporate to conform to federal requirements, including the Federal Acquisition Regulation, the federal Prompt Pay Act, FAR flow-down provisions, ethics compliance programs and E-Verify.

The registration fee is \$199 for ASA members and \$279 for non-members, and allows access to the live event with one Internet connection and one telephone line. The webinar is scheduled for 12:00 – 1:30 p.m. EDT. ASA encourages group learning! Project the webinar on a screen or wall and listen to it on a speakerphone. After the program, registrants will receive a multimedia CD-ROM with an audio-visual recording of the presentation, and a link to a printable, customized ASA Certificate of Completion.

View the webinar schedule, and purchase, at www.asaonline.com, or contact ASA at meetings@asa-hq.com.

Get Introduced to the ConsensusDOCS Sub-Subcontract and Federal Subcontract Through Two New Podcasts

ASA is a founding member of ConsensusDOCS, which offers more than 90 model contracts and forms drafted by designers, owners, contractors, subcontractors and surety professionals (DOCS).

Two new, four minute podcasts on the *ConsensusDOCS 752 Standard Subcontract Agreement for Use on Federal Government Construction Projects* and the *ConsensusDOCS 725 Standard Agreement Between Subcontractor and Sub-subcontractor* can help you understand the value of these tools for your business.

In the podcast "ConsensusDOCS 752 Federal Subcontractor Agreement," listeners hear attorney Thomas J. Kelleher Jr. of Smith Currie & Hancock LLP, Atlanta, GA, describe how the *ConsensusDOCS 752* addresses the coordination of flow-down clauses and complies with federal regulations,

including prompt payment requirements and E-Verify.

In the podcast "ConsensusDOCS 725 Sub-subcontract Agreement," ASA General Counsel Donald Gregory of Kegler, Brown, Hill & Ritter, Columbus, OH, discusses the new *ConsensusDOCS 725* and introduces the document as a straight-forward six-page agreement that fairly allocates risk and address safety, change orders, payment, indemnity and other key topics.

Each podcast is available for download on the ASA home page at www.asaonline.com.

For more information, contact ASA at (703) 684-3450 Ext. 1335.

2009 - 2010

At the time of publication, **83 members** have either renewed their membership or have verbally committed to renewing their membership. **Thank you** to the members who have sent in their dues for 2009 – 2010. If you have not done so yet, **it is not too late**. Please remit your 2009 – 2010 dues immediately. You don't want to miss any of the benefits an ASA membership provides.

Executive Director Rob Vajda has a new e-mail address:
robert@asaofohio.com
The address and phone number have not changed.

The **website** is undergoing some major changes. We are attempting to create a brighter website with a change of color and new photos. Please review your directory data and contact **Rob Vajda** if there are additions, corrections or deletions. You can list more than one contact for your company.

Autodesk Subcontractor Offers ASA Members the Key to Project Documentation

Stuck looking for a solution to your project documentation needs? Look no further. Autodesk Subcontractor, an ASAdvantage Participating Provider, can provide ASA members with an automated process to create and track project documentation so that subcontractors can manage projects – not paperwork. Autodesk Subcontractor offers ASA members software and services to collaborate, standardize and automate their business processes to convey a professional image and help improve their document management processes. Autodesk Subcontractor

helps subcontractors electronically create, track, manage and share RFIs, transmittals, change orders, pay applications, correspondence/e-mails and contact information from a single centralized corporate database. Through the ASAdvantage program, members can receive discounts on Autodesk Subcontractor Licensed User purchases.

To learn more about the newest release of the Autodesk Subcontractor solution, call (813) 903-9446 or visit www.projectdoccontrol.com.

Upcoming Member Meetings and Events in Your City

***** NOTE *** All programs in all cities are subject to change and are dependent on the availability of the speakers!**

Cincinnati

September 17th – Lunch meeting at the Montgomery Inn at the Boathouse. The program will be “Ohio Mechanics’ Lien and Bond Claim Laws”

October 15th – Lunch meeting at the Montgomery Inn at the Boathouse. The program will be presented by Construction Process Solutions, Ltd.

Columbus

October 13th – Lunch meeting at The River Club at Confluence Park. A representative from The Frank Gates Service Company will present a program on changes in the BWC discount program and how it can affect your business.

Cleveland

Nothing scheduled at the time of publication.