Top Ten Things You Can Do To Minimize Your Risk

By Donald W. Gregory, Esq.
Kegler, Brown, Hill & Ritter
Columbus, Ohio

There are a number of practical tools that contractors and subcontractors can utilize to minimize their risk. Here is a list of my "top ten."

1. Condition your bid.

The best way for subcontractors to minimize risk is to condition their bid price upon acceptable subcontract language. In this way, they can maintain leverage in subsequent contract negotiations and secure equitable subcontract language rather than simply being forced to sign whatever subcontract comes their way.

2. Review and revise your contract.

Not surprisingly, it is very important that whatever contract is agreed upon is actually reviewed and understood. If it is a contract form you have not dealt with previously, it is probably worth getting a legal review of it that can be used as a template for subsequent contract negotiations. It is always risky to perform work without securing signatures on a contract, particularly if you

have not objected to the contract that has been forwarded to you, or conditioned your bid (*see* no. 1 above).

3. Forward your contract to your insurance consultant.

It is crucial that you provide the exact insurance specified under your contract so that you can avoid breaching the contract or suffering a loss that's uninsured. The best way to deal with this is to forward the proposed contract to your insurance consultant and ask them to "insure this."

4. Give notice in writing; early and often.

Virtually every contract has strict notice provisions where prompt written notice must be given of change orders, claims, or differing site conditions, yet these provisions are frequently ignored in practice. The purpose of these provisions is to avoid surprises and if you give prompt notice you will be eliminating an excuse later for the denial of your request for additional compensation. The time and expense associated with giving timely notice are far outweighed by the benefits.

5. Confirm "the deal" on change orders — before doing the work.

Normally you have an understanding as to when work is "extra work" appropriate for a change order and the basis that you intend to price that work, even if the precise nature of the extra work is not yet defined. You should make sure that you always let the party who is going to be required to pay for the extra work know that you expect to be paid additionally for this work and the basis for pricing the work before the work is performed. Once again, this can eliminate misunderstandings and satisfy the inevitable contractual requirements of giving notice of a change order in writing before the work is performed.

6. Take meeting minutes, or correct them.

Frequently others will be preparing and distributing the meeting minutes and they will be distributed to you with a note that says that any errors or discrepancies in the minutes should be corrected no later than the following meeting. If you take no action to correct misleading or erroneous references in minutes, that evidence may come back to haunt you later. Simply stated, if there is something that is taken out of context or distorted in the meeting minutes it ought to be immediately corrected with some clarifying minutes or letter from your end.

7. Ask for a time extension if work is delayed.

Virtually every contract these days contains a provision that says that you have to ask for a time extension if you are delayed or otherwise impacted in your progress of the work. If you timely request an extension (even if you know it will not be granted) you will retain the right to request additional compensation in the event the project is accelerated or delayed. If you fail to do so, your entitlement to additional compensation may be waived.

8. Accurately track job costs by cost code.

Contractors often are impacted by a particular unanticipated condition but will do nothing to track their costs associated with that event. This leaves the party ultimately responsible for paying for the additional costs the avenue to criticize how damages are computed and to suggest there are other causes for the increased labor costs and other charges. Therefore, whenever practical it makes sense to track job costs due to a discreet impact by separate cost code number, so that the impact can be proven with certainty later.

9. Protect and exercise lien rights.

Subcontractors performing work in a "preliminary notice state" like Ohio are wise to provide a "notice of furnishing" before work begins so that they can maintain lien rights throughout the entire project and also increase the chance that they will be paid voluntarily without the necessity of filing a mechanic's lien. Contractors and subcontractors also should be careful to calendar their last date of work and to make sure that they exercise their lien rights before the time for filing expires at the end of the project. Lien rights are a special right afforded contractors, subcontractors and suppliers and should not be given up through inaction.

10. Follow the dispute resolution procedure.

Many contracts these days have dispute resolution processes that require timely notice to initiate a claim or to appeal an adverse decision. Many require mediation as a "condition precedent" to arbitration and litigation. Others contain provisions that say that the decision of the architect or others is binding upon the contractor (or subcontractor) if mediation is not demanded within a certain period of time. There are many pitfalls for the unwary if you do not read and follow the particular dispute resolution procedure in your contract.

By implementing these ten (10) tips, contractors and subcontractors can, at very little cost, minimize their legal risk and increase the chances they will end up with a profitable and successful job.