



CONSTRUCTION LAW E-UPDATE

BEFORE COMMENCING WORK ON A PROJECT GET THE ESSENTIALS AND TAKE ADVANTAGE OF YOUR “HONEYMOON PERIOD”

By Henry L. Goldberg, STA Legal Counsel

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The “honeymoon period”, the period right after your subcontract has been awarded and approved, is the optimal time for the subcontractor to “line up its ducks” and obtain the essential items needed to protect its rights against unforeseen claims down the road. Typically, during this time, the parties are generally working harmoniously to move the project forward.

Even with the best intentions, conflicts arise due to unexpected delays or owner demands. The subcontractor should take advantage of this typically short period of harmony to obtain the following items and take the necessary steps to preserve its rights rather than trying to address them with the owner or the general contractor after the disputes arise and battle lines are drawn. In fact, we suggest you make this your standard operating procedure.

First, make sure you obtain and review the prime contract between the owner and the general contractor. All subcontracts contain some form of flow-down clause (some more effective than others) that requires the subcontractor to comply with certain (or all) provisions of the prime contract, most notably, the alternate dispute resolution clause, and the notice and recordkeeping provisions. It seems so obvious that the subcontractor should review and clearly know the obligations it is being asked to follow from the general contractor’s prime contract. Yet, more often than not, subcontractors do not request a copy of the prime contract until after a

dispute has occurred. And many times, although the prime contract is received as part of the contract documents, no one on behalf of the subcontractor has reviewed it. Just as you would never accept a contract without carefully reviewing all the technical specifications to clearly understand what work you are agreeing to perform, you should, similarly, not accept a contract without understanding all of the rules and requirements you are agreeing to follow for how you will be required to conduct your activities on the project.

Second, you should also take this time to thoroughly and carefully review all the provisions of your subcontract, not just the technical specifications. Although you may think you are quite familiar with a particular agency’s or particular general contractor’s standard contract, different versions may exist. Also, amendments or supplementary general terms and conditions may have been added that materially change the standard provisions. Once again, you should not proceed with accepting obligations to perform your work if you do not fully and completely understand what specific work you are agreeing to perform and what rules you are being required to follow to perform that work. It is imperative that you have the proposed subcontract and related prime contract reviewed either by in-house or by outside counsel before the subcontract is signed. While a subcontractor may feel as though the general terms of the subcontract are not realistically subject to negotiations, you, at least, should be making educated decisions, which cannot be made without



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thoroughly understanding your contract obligations.

Third, an item of major importance is the need for the subcontractor to obtain a copy of the general contractor's (and/or higher tier subcontractor's) payment and performance bonds. It is imperative to get a copy of the bond(s) while everything is on “good terms” prior to commencing work because, if you wait until after a dispute arises, the general contractor's level of cooperation will almost always drop significantly. This may result in the subcontractor facing time constraints for its possible bond claims that they are unable to analyze and address because they do not have a copy of the relevant bond.

Lastly, it may seem obvious to say it, but make sure you sign the subcontract and that you also promptly and timely complete and provide all related insurance and other required documentation before work starts. We have reported previously how a major contractor was denied coverage under a project's OCIP because the contractor began work before the signed contract and all required OCIP enrollment forms had been provided to and processed by the owner's OCIP administrator. We understand that beginning the project work before all the paperwork is completed is an all-too-common occurrence. Our point is to not let it be so. Taking the time during the “honeymoon” to coordinate the paperwork will save you a lot of costs and headaches later when the work is in full gear and all the associated pressures have kicked in, and,

more problematically, when you may have already lost rights and claims.

G&C Commentary:

These are just a few examples of what a subcontractor should do during the “honeymoon” stage, when the owner and general contractor are still in the cooperative, mobilizing stage. Quite simply, it is the right standard operating procedure to follow. Having all the required contracts and other documentation in hand prior to signing your contract and beginning your work, having your in-house staff or trusted legal counsel review and advise you on your rights and obligations, and having the knowledge ahead of time needed to eliminate disputes or pursue them (if necessary) more successfully, is a much more effective and efficient plan of attack than scrambling to do the same (if possible anymore) after the disputes begin to arise and the cooperation between the parties begins to wear down.

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