

# Killer Contracts

## **Killer Contracts**

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## Model Contracts:

- AIA (American Institute of Architects)
- AGC (Associated General Contractors)
- ASA (American Institute of Architects - Consensus Docs)

## Flow-Down

1. Common Subcontract
  - a. The general, special and supplemental conditions, drawings, plans, specifications, delivery and construction schedules, and safety rider, referred to herein... Are specifically incorporated by reference... Subcontractor represents and agrees that **Subcontractor has carefully examined and understands this agreement, and all of the referenced and incorporated documents...**
  - b. ...if any provision of this Agreement conflicts with a portion of the reference documents, or if there is a conflict within this Agreement or within any of the reference documents, **the provision imposing the higher-quality, greater quantity or greater duty or obligation on Subcontractor shall govern...**
2. ConsensusDOCS 750 (2011).
  - a. The Subcontract Document shall include this Agreement, the prime agreement, special conditions, general conditions, specifications, drawings and addenda **issued and acknowledged** prior to the execution of this agreement...
  - b. ...the **Constructor shall provide** to the Subcontractor, prior to the execution of this Agreement, copies of the existing Subcontract Documents to which the Subcontractor will be bound... In the event of a conflict between ConsensusDOCS 750 ...and the other Subcontract Documents, **the ConsensusDOCS 750 shall govern.**
3. ASA Subcontract Addendum (2011).
  - a. Subcontractor shall have the benefit with respect to Customer of all the same rights, remedies and redress that Customer has pursuant to its contract with its own customer. No document included by reference in the subcontract is binding on subcontractor except for the following documents, copies of which have been provided to subcontractor...

## Scope:

1. Common Subcontract
  - a. The Work of Subcontractor includes, but is not limited to, such of the following as may be necessary to perform and complete the work... Subcontractor shall be responsible for all Work under the subcontract documents or reasonably inferable therefrom in order to provide a complete project....
2. ConsensusDOCS 750 (2011).
  - a. ... The Subcontractor [shall] provide all labor, materials, equipment, and services necessary or incidental to complete the work for the Project... In accordance with, and reasonably inferable from... The Subcontract Documents...
3. ASA Subcontract Addendum (2011)
  - a. Subcontractor's scope of work includes only the following: \_\_\_\_\_ excluding \_\_\_\_\_...
  - b. ...Subcontractor's obligation to examine documents, the project site, and materials and work furnished by others is limited to notification of Customer of any defects or deficiencies that a person in the trade of Subcontractor would discover by reasonable visual inspection...
  - c. ...Subcontractor is entitled to rely on the accuracy and completeness of plans, specifications, and reports of site conditions provided to Subcontractor....

## Payments:

1. **Base Rule.** All unpaid construction funds are payable to the contractor according to [the retention rules].
  - a. **Multiple Buildings.** Each building shall be considered individually in determining the amount to be paid the contractor.
  - b. **Partial Occupancy.** Partial occupancy requires payment in direct proportion to the value of the part of the building occupied.
2. **Timing, Interest and Fees.** When a contractor *receives* any construction funds from an owner or another contractor for work performed and billed, he shall pay each of his subcontractors and suppliers in proportion to the percentage of the work they performed under that billing, **unless otherwise agreed by contract**.
  - a. If ... **unless otherwise agreed by contract**, the contractor fails to pay for work performed by his subcontractors or suppliers within 30 consecutive days *after receiving* construction funds from the owner or another contractor for work performed ..., or after the last day payment is due under the terms of the billing, whichever is later, he shall pay to the subcontractor or supplier, in addition to the payment, interest in the amount of 1% per month of the amount due, beginning on the day after payment is due, and reasonable costs of any collection and attorney's fees.

“...the general rule is that such pay-when-paid provisions do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party. To the contrary, these provisions are viewed as only postponing payment for a reasonable time and merely establishing a convenient time for payment.” *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1565 (10th Cir. 1995)

3. **Retention.** These rules apply to all contractors and subcontractors:
  - a. **Maximum per payment.** The retention proceeds withheld and retained from any payment due may not exceed 5%.
  - b. **Total Maximum.** The total retention proceeds withheld may not exceed 5% of the total construction price.
  - c. **Proportion between general and sub.** The percentage of the retention proceeds withheld between the general contractor and a subcontractor or between subcontractors shall be the same retention percentage as between the owner and the general contractor if: 1) the retention percentage in the prime contract is less than 5%; or 2) after the prime contract is executed but before completion the retention percentage is reduced to less than 5%.
  - d. **Where retention is held.** If any payment is retained it shall be placed in an interest-bearing account and accounted for separately from other amounts paid under the contract.
    - i. **Interest.** The interest accrued belongs to the contractor and subcontractors; and must be paid after the project is completed and accepted by the owner.
    - ii. **Payment of Interest.** The contractor shall ensure that any interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis.
    - iii. **Held in Trust.** Retention proceeds and accrued interest are considered to be in a constructive trust for the benefit of the contractor and subcontractors who have earned the proceeds; and are not subject to assignment, encumbrance, attachment, garnishment, or execution levy for the debt of any person holding the retention proceeds and accrued interest.
  - e. **When Released.** Any retention proceeds and any accrued interest shall be released **pursuant to a billing statement** from the contractor within 45 days **from the later of**: 1) the date the owner receives the billing statement from the contractor; 2) the date that a certificate of occupancy or final acceptance notice is issued; 3) the date that a public agency or building inspector having authority to issue its own certificate of

occupancy does not issue the certificate but permits partial or complete occupancy of a newly constructed or remodeled building; or 4) the date the contractor accepts the final pay quantities.

- f. **Partial Occupancy.** If only partial occupancy of a building is permitted, any retention and any accrued interest shall be partially released within 45 days under the same conditions provided in (e) in direct proportion to the value of the part of the building occupied.
- g. **Lien Waivers/Releases.** The billing statement for retention shall include documentation of lien releases or waivers.
- h. **When General and Subs must pay Retention.** The general contractor or subcontractor who receives retention shall pay each of its subcontractors their share of the retention within 10 days from the day that all or any portion of the retention proceeds is received.
  - i. If a retention payment received by the general contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor.
- i. **Defective Work.** If a contractor or subcontractor is in default or breach of the contract, the owner may: 1) withhold from payment for as long as reasonably necessary an amount necessary to cure the breach or default of the contractor or subcontractor; or 2) if a project or a portion of the project has been substantially completed, the owner or public agency may retain until completion up to twice the fair market value of the work of the original contractor or of any subcontractor that has not been completed:
  - a) in accordance with the construction contract documents, plans, and specifications; or b) in the absence of plans and specifications, to generally accepted craft standards.
  - i. **45-Day Notice.** An owner shall describe in writing within 45 days of withholding such amounts what portion of the work was not completed according to the standards.
- j. **Penalties.** Attorneys fees and 24% interest.
- k. **No Waiver.** These rights and requirements cannot be waived by contract.
- l. **Lenders.** These rules do not apply to construction lenders.

#### Conditional Payment: (Ascent)

- 1. Pay-if-Paid:
  - a. the contractor is not required to pay unless it gets paid by the owner.
- 2. Pay-when-Paid:
  - a. the contractor must pay in a reasonable time even if the owner does not pay.
- 3. Example:

Subcontract § 3(f):

The parties agree that Contractor's actual receipt of **any** (*should say each*) progress, change order, claim, retention **or** (*should say and*) final payment from Owner **shall be a condition precedent** to Contractor's obligation to make any such payment to Subcontractor for the Subcontract Work. Subcontractor agrees that its recovery against Contractor for payments due hereunder is limited exclusively to the specific fund created by Owner actually making such payments to Contractor. Subcontractor assumes the risk of the Owner's nonpayment.

Subcontract § 4(e):

In no event will Subcontractor be entitled to receive any greater amount from Contractor than Contractor is entitled to and actually does receive from the Owner on account of Subcontractor's Work or claims, less any markups due to Contractor or costs or

professional fees incurred by Contractor in obtaining such recovery. Subcontractor agrees that it will accept such amount, if any, received by Contractor from the Owner as full satisfaction of all claims. Subcontractor's only claim against Contractor will be for payment of any amounts awarded to and actually received by Contractor from the Owner on Subcontractor's behalf.

“...the general rule is that such pay-when-paid provisions (*referring to the timing, interest and fees payment rule*) do not operate as conditions precedent under which the duty to pay is contingent upon receipt of funds from a third party. To the contrary, these provisions are viewed as only postponing payment for a reasonable time and merely establishing a convenient time for payment.” *In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1565 n. 4 (10th Cir. 1995).

4. Utah law:

- a. A party to a construction contract shall make all **scheduled payments** under the terms of the construction contract.
- b. The existence of a contingent payment contract is not a defense to a lien.
- c. A subcontractor may request from the contractor the financial information that the contractor has received from the owner (public or private) about: 1) the project financing; and 2) the owner.
- d. If financial information is requested the contractor shall provide the information before the subcontractor signs the subcontract.

## Indemnity:

1. Broad Form:
  - a. Subcontractor liable for fault of others without any negligence or mistake of subcontractor
  
2. Common Broad Form Examples:
  - a. **Subcontractor shall** reimburse, indemnify, hold harmless, and defend Contractor, Contractor's customer, the Project, and the Project owners... from and against **any** claim, lien, cause of action, lawsuit, demand, fine, penalty, assessment, loss, expense or damage, **of whatever kind or description** (including legal fees)...
  
  - b. ...including any special, incidental and consequential damages arising from or relating to Subcontractor's performance under this agreement...subcontractor, **at Subcontractor's sole expense**, shall promptly dispose of all such claims and liens, **defend all lawsuits** filed against Contractor or Contractor's customer...
  
  - c. ...**pay all judgments rendered against Contractor** in such lawsuits... Reimburse Contractor in cash upon demand for all reasonable expenses incurred by Contractor....
  
3. ConsensusDOCS 750 (2011)
  - a. To the fullest extent permitted by law, they Subcontractor shall indemnify and hold harmless the Constructor, the Design Professional, the Owner...from all claims for bodily injury and property damage, other than to the Work itself... **But only to the extent caused by the negligent acts or omissions of the Subcontractor...**
  
4. ConsensusDOCS 750 (2011)
  - a. ...the Subcontractor shall be entitled to reimbursement of any defense cost paid **above Subcontractor's percentage of liability** for the underlying claim to the extent attributable to the negligent acts or omissions of the Indemnitees.
  
5. ASA Subcontract Addendum (2011).
  - a. Any indemnification or hold harmless obligation of Subcontractor extends **only to claims relating to bodily injury and property damage**... And then **only to that**



**part or portion of any claim caused by the negligence or intentional act of Subcontractor...** Subcontractor shall not have a duty to defend....

6. Utah Law:
  - a. an indemnification provision in a construction contract is against public policy and is void and unenforceable, *unless*
  - b. the fault of the owner shall be apportioned among [the general subs and suppliers] pro rata based on the proportional share of fault

#### Additional Insured

1. Potential mismatch between additional insured endorsement (“AIE”) requirement and AIE actually provided. If AIE provided is less protective of GC than required, subcontractor’s own assets are exposed for the difference GC’s “accepting” your insurance certificate is NOT protection
  - Most subcontractors today cannot obtain the 2010 11 85 form
  - The CG 2010 10 01 and CG 2037 10 01 AIE forms--when used together--are generally considered “equivalent” to the 1985 version AIE
  - Beware the 2013 forms—similar numbers: CG 2010 04 13 and CG 2037 04 13--but drastically different
  - Many brokers do not understand the difference
  - Importantly, the 1985 and 2001 forms would cover the general contractor’s active negligence
  - The 2013 forms cover only to the extent of the indemnity allowed by law  
In California and many other states, indemnity for the GC’s active fault is prohibited
  - Or, argue for a limited AIE
  - ConsensusDocs, at Section 9.2.11, makes additional insured status optional
    - If the option is chosen, limits the additional insured coverage to liability caused by the acts or omissions of the subcontractor:

“[ ] ADDITIONAL INSURED. The Constructor shall be named as an additional insured on the Subcontractor's CGL specified, for operations and completed operations, but only with respect to liability for bodily injury, property damage, or personal and advertising injury to the extent caused by the negligent acts or omissions of the Subcontractor, or those acting on the Subcontractor's behalf, in the performance of Subcontract Work for the Constructor at the Worksite.”

If contractor agrees to limited AIE, then stipulate that the 2013 forms are “deemed equivalent”

## No damages for delay

1. Common Subcontract:
  - a. If the Subcontractor is delayed, accelerated, disrupted, interfered or hindered...  
The Subcontractor agrees that it shall have no claim nor right to any cost reimbursement, compensation or damages from the Contractor, except to the extent that the Contractor actually receives compensation therefore from Owner.
2. ConsensusDOCS 750 (2011).
  - a. Owner Caused Delay. If the commencement or progress of the Subcontract Work is delayed without the fault or responsibility of the Subcontractor, the Subcontract Time shall be extended...and the Subcontract Amount equitably adjusted to the extent obtained by the Constructor....
  - b. Nothing in this article shall preclude the Subcontractor's recovery of delay damages caused by the Constructor to the extent not otherwise precluded by this agreement.

## Acceptance of Final Payment

1. Common Subcontract:
  - a. Acceptance of the final payment by Subcontractor shall constitute the full and final acceptance and resolution of all outstanding claims of any nature which the Subcontractor may have or claim to have in connection with its performance of the Subcontract Work.
2. ConsensusDOCS 750 (2011).
  - a. Final payment shall constitute waiver of all claims by the Subcontractor relating to the Subcontract Work, but shall in no way relieve... The Constructor for claims made in writing by the Subcontractor as required by the Subcontract Documents prior to its application for final payment as unsettled at the time of such payment.
3. ASA Subcontract Addendum (2011).
  - a. Subcontractor shall be entitled to equitable adjustments of the contract price, including but not limited to, any increased cost of labor, supervision, equipment or materials, and reasonable overhead and profit for any modification of the project schedule... and for other delays, acceleration, out-of-sequence work...
4. ASA Subcontract Addendum (2011).
  - a. ...suspension of work for nonpayment or as ordered by Customer, or other delays caused by Customer or others....

## Warranty

One year warranty? Think again!

A201 (2007) gives warranty with no time limit:

Section 12.2.2.1 providing for a one-year correction period does not limit the warranty duration

“§ 12.2.2.1 In addition to the Contractor’s obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.”

Section 12.2.5 specifically avoids creating a one-year warranty

“§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor’s liability with respect to the Contractor’s obligations other than specifically to correct the Work.”

## Change Orders in Writing

1. Common Subcontract:
  - a. No Change Order shall be valid or enforceable unless signed in writing by XXX, President of Contractor and approved by owner. It is expressly understood and agreed to by Subcontractor that no other person has actual or apparent authority to sign Change Orders on behalf of Contractor.
2. ConsensusDOCS 750 (2011).
  - a. When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Subcontract Work, which are within the general scope of this Agreement. **Any adjustment in the Subcontract Amount or Subcontract Time shall be authorized by a Subcontract Change Order....**
3. ASA Subcontract Addendum (2011).
  - a. Subcontractor shall be entitled to **equitable adjustments of the contract time** for extra work it performs in accordance with the subcontract documents, and for extra work it performs pursuant to a written or verbal instructions of Customer, provided that Subcontractor gives Customer notice (except in an emergency threatening bodily injury or loss of property), prior to starting such extra work...
4. ASA Subcontract Addendum (2011).
  - a. ...identifying the date and source of the instructions considered as requesting extra work. Subcontractor shall also be entitled to payment for said extra work at the following rates and/or markups: \_\_\_\_\_. Subcontractor may also claim damages for cumulative impact of multiple changes on Subcontractor's efficiency...
5. ASA Subcontract Addendum (2011).
  - a. ...Subcontractor's entitlement to adjustments shall not be contingent upon, or limited to, adjustments received by Customer. Any request of Contractor to Subcontractor without a written order is a breach of the Subcontract.

## Design Responsibility

### 1. Utah Law

- a. An agreement between an owner and a contractor may not limit the owner's or a design professional's liability to the contractor for any claim arising from services performed by the design professional in connection with the development of land.
  - i. This does not apply if the owner and the contractor are the same person or entity or are controlled by the same person or entity.
- b. An agreement between a contractor and a subcontractor may not limit the owner's or a design professional's liability to the subcontractor for any claim arising from services performed by the design professional in connection with the development of land.

## Protection of Work

- 1.

## Disputes

1. Use mediation and arbitration where possible
  - a. Don't give up control of method or location (your state of the state of the project)
2. Common Subcontract:
  - a. Should Subcontractor and Contractor be unable to resolve said dispute(s) through mediation, any and all dispute(s), at the sole discretion of Contractor, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then pertaining.
3. ConsensusDOCS 750 (2011)
  - a. If the matter is unresolved after submission of the matter to... Mediation, the Party shall submit the matter to the binding dispute resolution procedure selected herein:  
 Arbitration  
 Litigation

## Forum Selection, Venue, Choice of Law.

1. Utah Law:
  - a. A provision in a construction agreement requiring a lawsuit to be filed outside Utah is void and unenforceable as against the public policy if: 1) one of the parties is located in Utah; and 2) the work involves a construction project in Utah.



# Waiver of Lien or Bond Rights

## Unconditional Lien Waivers Before Payment

### Prospective Lien Waiver

1. Common Subcontract
  - a. For good and valuable consideration, including the negotiated price for the Merchandise, Services or Work under this Agreement, **Subcontractor unconditionally waives and releases any and all mechanics' lien rights...**
2. ConsensusDOCS 750 (2011)
  - a. ... In no event shall the Constructor required the Subcontractor to provide unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what is being paid.
3. ASA Subcontract Addendum (2011)
  - a. Notwithstanding any provision to the contrary, Subcontractor may take all steps reasonably necessary to preserve and enforce its lien and bond rights.
4. Utah Law
  - a. A lien right or privilege may not be waived or limited by contract. A provision of a contract purporting to waive or limit a lien right or privilege is void.
5. Utah Lien Waivers
  - a. Final or Progress
  - b. Only enforceable when four conditions are met: 1) Check in the amount of the waiver; 2) Check payable to you; 3) You endorse the check; and 4) the holding the account honors the check.

## Deal Killers - Run from these Contracts

### 1. General Contractor: James N. Gray Company

#### Gray's Continuing Relationship with Owner

Subcontractor acknowledges the likelihood that Gray will have a continuing business relationship with the Owner, or at least the opportunity for a continuing business relationship, that may result in future work for Gray. Subcontractor agrees that it will not solicit, negotiate, or appropriate for itself future work with the Owner and that it will not interfere with Gray's prospects for future work.

### 2. General Contractor: National Contractors

#### Hidden Individual Liability Clause Failure to Comply

The failure of the Subcontractor to Comply with all final completion and final payment provisions as stated in the Contract Documents or General Conditions will constitute Contractors right to:

- 1) Disregard the Subcontractor's status as a corporation; and,
- 2) Hold the officers, directors, and shareholders personally liable for any amounts the Owner may be required to pay as a result of the Subcontractor's failure to comply with such provisions.

### 3. General Contractor: Campanella Construction

#### Letter Delivering Contract Form:

Please find enclosed a subcontract for the above referenced job. Please SIGN ALL PAGES OF THE CONTRACT and return all copies to the office and an executed copy will be returned to you. PLEASE DO NOT WRITE ON THE SUBCONTRACT, IF CORRECTIONS ARE NECESSARY, PLEASE DO SO ON A POST-IT NOTE AND ATTACH TO SUBCONTRACT

#### Two Page Subcontract:

- Contingent Payment (Pay-if-Paid)
- Retainage (10% despite what might be held by Owner)
- Written Change Orders (Written Order must be received prior to performance)
- Change Order Pricing (Shall not include premium time without the prior consent of Contractor, Changes must be approved by Owner and/or Architect)

- Prospective Lien Waiver (Contract is “No Lien” contract and also requires Waivers BEFORE each payment)
- Dispute Resolution (Arbitration v. Litigation in the sole election of Contractor and Arbitration held in Philadelphia in the sole election of Contractor)
- Indemnification (Subcontractor assumes entire responsibility for all Contractor’s liability for...virtually everything)
- Incorporation by Reference (Sub owes to Contractor all duties Contractor owes to Owner)
- Scope of Work (If work which should usually be the Subcontractor’s work is included in the contract between the Contractor and the Owner, even if not included in the Subcontract’s Scope, it is the Subcontractor’s responsibility)
- Acceptance of Final Payment (Acceptance of Final Payment is a Waiver of all claims by Sub)