Workshop M1

Monday, October 9, 9:00 a.m.–noon and 1:30–4:30 p.m.

CONTRACTUAL RISK TRANSFER

"Contractual Risk Transfer: Managing Contract Risks"

Presented by

Gerald I. Katz
Senior Partner
Katz & Stone, L.L.P.

Although the content changes from year to year, this seminar is consistently one of our most popular sessions. In this session, you will learn strategies for allocating and insuring risks arising out of your construction projects, with attention to market conditions and coverage availability. Aimed at those new to construction risk allocation, but with an eye on current developments, this session is also a good refresher for veterans.

- Explores key risk allocation mechanisms, including indemnification, waivers, payment, differing site conditions, delay damages, force majeure, and more.
- Describes strategies for writing effective contract insurance requirements and verifying ongoing compliance.
- Provides an update on efforts by the insurance industry and state legislatures to limit additional insured coverage.

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Gerald I. Katz, Esq.
Senior Partner
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Mr. Katz is co-presenting Workshop M1, "Contractual Risk Transfer," on Monday. He is a partner in the law firm of Katz & Stone, L.L.P., with offices in Vienna, Virginia; Washington, D.C.; and Rockville, Maryland, and specializes in resolving complex construction disputes. He has extensive experience in representing owners, contractors, sureties, and designers in construction litigation.

In addition to his practice, Mr. Katz lectures and speaks frequently to owners, contractors, public building officials, subcontractors, suppliers, design professionals, sureties, and others involved in construction, on such topics as construction risk management, negotiating construction contracts, construction claims and claims prevention, liability of the design professional, and construction insurance issues.

Mr. Katz has conducted seminars for such construction trade associations as Construction Specifications Institute; Associated Builders and Contractors; National Electrical Contractors Association; National Utility Contractors Association; American Subcontractors Association; Institute of Bermuda Architects; World of Concrete; National Pavement Exposition; Associated General Contractors of America; Virginia Building Material Association; Maryland General Contractors Association; Construction Management Association of America; National Association of Surety Bond Producers; Reliance Insurance; The St. Paul Companies; Bermuda Contractors Association; American Contractors Insurance Group; Barbados Association of Quantity Surveyors; Korean Contract Management Association; China National Petroleum Corporation; and the Institute of Chartered Quantity Surveyors of Trinidad and Tobago.

Mr. Katz is a frequent speaker at the IRMI Construction Risk Conference on contractual risk transfer, surety bonds, and other construction risk topics. He is a recipient of IRMI's Words of Wisdom (WOW) award.

Mr. Katz received both a bachelor of arts with distinction and a juris doctor degree from the University of Virginia. Mr. Katz is a member of the Bars of the District of Columbia, Virginia, Maryland, United States Supreme Court, and United States Court of Federal Claims. He also serves as an arbitrator on the American Arbitration Association's Construction Industry Arbitration Panel, and is an Associate Member of The Chartered Institute of Arbitrators, United Kingdom.

Notes

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CONTRACTUAL RISK TRANSFER: MANAGING CONTRACT RISKS

Gerald I. Katz
Katz & Stone, L.L.P.

Workshop M1

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CONTRACTUAL RISK TRANSFER: MANAGING CONTRACT RISKS*

I. INTRODUCTION

In order to effectively manage, if not avoid, contract risks a party must have a complete understanding of the construction contract. The importance of the contract cannot be overemphasized. Ideally, the parties, in their contract, will assign the risks and liabilities to the party best-equipped to manage and minimize them. However, in reality, the more experienced and savvy party will shift the risks and liabilities associated with the project to the other parties in the construction project.

The contracting process provides the vehicle for each party to negotiate, define and limit its rights in accordance with its goals. The risks and responsibilities associated with a specific project must be clearly allocated within the contract. In the end, the contract serves as a framework of the law between the parties and will establish which party has assumed or negated a particular risk in connection with the project. Accordingly, we explore below the most common contractual provisions which transfer risk between parties in a construction contract.

Parties to a construction contract have two opportunities to avoid, or at least manage, risks. The first, and by far the best, opportunity is in the contract negotiation/preparation process. Here, the parties should identify potential risks in the contract documents they are asked to accept, and in the negotiation, seek to either transfer these risks or at least mitigate them, *i.e.*, to achieve a “level playing field.” The parties should understand that once they sign the contract, they have bought into, *i.e.,* they have accepted, those risks which the contract has allocated to them.

The second opportunity to manage contract risks is in the performance of the contract. Many risks that a party has accepted (knowingly or unknowingly) can still be avoided, or at least managed, in administration of the contract during performance. Indeed, certain contract clauses which the parties may have to accept, for example, notice clauses, virtually dictate that risk management continue during contract performance. For example, if a party is forced to accept a notice requirement which includes a waiver of claim provision for failure to give timely notice, then during contract performance, the party must be diligent about giving timely notice or otherwise it will suffer the loss of a claim.

Hence, both opportunities to avoid and manage contract risks should be exploited to the maximum allowed by a parties' leverage during negotiations and then in diligent risk management during performance.

As will be seen from the materials presented below, certain risk-creating clauses typically found in construction contracts require different approaches to risk management. Some clauses are best addressed through contract negotiation. Other clauses are best addressed through diligent and vigilant contract administration during performance. Yet other clauses require attention during the bidding process. What is

important is that the parties take advantage of all opportunities to identify and manage the risks inherent in every construction contract.

II. TYPICAL CONTRACT RISK PROVISIONS

A. Condition Precedent Clauses

SAMPLE CONTRACT PROVISION:

- Payment to the Contractor by the Owner shall be a condition precedent to the right of the Subcontractor to payment from the Contractor, unless failure of the Contractor to receive payment is solely the fault of Contractor. Payment shall be made ten days after receipt of same by the Contractor from the Owner.

TIPS:

- Know the difference between pay "when" paid and pay "if" paid.
- Look for condition precedent payment language throughout the contract. Such language may be contained in provisions dealing with progress payments, final payment, change orders, claims, extras, and delays.
- Know your options:
  - Just say no.
  - Use a "covenant not to sue."
  - Variations in state law.
  - Add language to preserve lien rights.
  - Is there a bond?
  - The implied duty of good faith.
- At the end of these materials, you will find a chart which summarizes the law regarding the enforceability of condition precedent payment clauses in each of the states. This chart is believed to be accurate, however, you should consult your legal advisor to ensure that there have been no new cases or statutory changes in your state, or where the project is located, since the chart was prepared.

CASE EXAMPLES:

- The U.S. Court of Appeals for the Second Circuit certified a question to the New York State Court of Appeals of whether the provision of the New York lien law providing that any contract waiving the right to file or enforce a lien is void against public policy prohibits a clause in a subcontract that makes payment by the owner a condition precedent to the subcontractor's payment. The effect of this case is to illustrate that the federal law, at least in the Second Circuit, is in flux regarding the enforceability of condition precedent payment clauses. **See** **West-Fair Electrical Contractors v. Aetna Cas. & Sur.**, 49 F.3d 48 (2d Cir. 1995).

- In a bankruptcy action, a secured creditor supplier sought funds retained by the project owner and due the bankrupt debtor contractor. The surety who provided the contractor's performance bond prevented the turnover of funds by demonstrating that the contractor's failure to pay its subcontractors/suppliers breached the contract with the owner and precluded the contractors' entitlement to the funds. The contract between the owner and the contractor contained a final payment clause that stated "neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the work . . . have been paid or otherwise satisfied," in addition to a provision that provided for contract termination if the contractor "failed to make payment to subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors." **See** **In Re Modular Structures, Inc.**, 27 F.3d 72 (3d Cir. 1994).

- Construction contractors sued the owner for breach of contract under various theories, and the owner defended based on a release clause which stated: "In consideration of payments made heretofore, or to be made based upon this invoice for labor, material, equipment, subcontract work, and any and all costs incurred for the performance of the contract work thus far, the contractor hereby unconditionally and without reservation releases and indemnifies [the owner] . . . from any and all liens, claims, demands, penalties, losses, costs, damages and liability in any manner whatsoever." The court held that this provision applied to all work, including extra work and work not invoiced, and that the waiver defeated the contractor's claim for additional compensation. **See** **Galin Corp. v. MCI Telecommunications Corp.**, 12 F.3d 465 (5th Cir. 1994).

B. No Damages for Delay

SAMPLE CONTRACT PROVISION:

- Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Times, to the extent permitted under Paragraph 12.1, shall be the sole and exclusive remedy of the Contractor for any: (1) delay in the commencement, prosecution or completion of the Work; (2) hindrance or obstruction in the performance of the Work; (3) loss of productivity; or (4) other similar claims (collectively referred to in this paragraph as Delays) whether or not such Delays are foreseeable. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages, or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling or correction of the Work or terminating this agreement for its convenience), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as active interference to the Contractor's performance of the Work. If the Contractor submits a progress report indicating, or otherwise expressing an intention to achieve, completion of the Work prior to any completion date required by the Contract Documents or expiration of the Contract Times, no liability of the Owner to the Contractor for any failure of the Contractor to so complete the Work shall be created or implied.[1]

TIPS:

- In contract review and negotiation, be careful to identify and try to remove “no damage for delay” clauses.
- Know the exceptions, state-by-state.
- Be familiar with the generally-recognized exceptions: active interference, bad faith, beyond contemplation at the time of contracting and abandonment.

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[1] 9A.14, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley (Supp. 1994).

- Give notice of delay in the context of one or more of the recognized exceptions and avoid use of the word “delay.”

- Understand the difference between delay damages and damages due to disruption, lost productivity and/or inefficiencies.

- Remember, if the no damage for delay clause limits your remedy to a time extension, the time extension must be timely requested.

- If you are using the 1997 AIA General Conditions, note that Article 4.3.10 provides for a waiver of consequential damages.

CASE EXAMPLES:

- Under Illinois law, exceptions to "no damages for delay" clauses exist for delays caused by bad faith, delays that were not in the contemplation of the parties, delays of unreasonable duration or delays attributable to the inexcusable ignorance or incompetence of the engineer. Thus, where the contract as a whole obligated the contractor to coordinate and work with the subcontractors, the general contractor could not prevail on summary judgment based on a "no damages for delay" clause when the subcontractors alleged the contractor's fault as the cause of the delay. **See J&B Steel Contractors v. C. Iber & Sons, Inc.**, 642 N.E.2d 1215 (Ill. 1994).

- The United States Court of Appeals for the Eleventh Circuit refused to grant the contractor relief even though evidence showed the owner had been responsible for delays, because the contract contained a "no damages for delay" clause which stated "to the fullest extent permitted by law, Owner . . . shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Owner . . . or [its] agents or employees, or any other Contractor or Subcontractor, or by abnormal weather conditions, or by any other cause, and Contractor agrees that the sole right and remedy therefor shall be an extension of time." The general contractor's failure to request an extension of time constituted breach of contract which barred recovery against the owner. **See Marriott Corp. v. Dasta Constr. Co.**, 26 F.3d 1057 (11th Cir. 1994)

C. Indemnification

SAMPLE CONTRACT PROVISION:

- The Subcontractor shall indemnify and hold the Contractor, Owner, Architect, their agents, consultants and employees harmless from and against all claims, losses, costs and damages, including but not limited to attorneys' fees, pertaining to the performance of the Subcontract and involving personal injury, sickness, disease, death or property damage, including loss of use of property resulting therefrom but not damage to the work itself, **but only to the extent** caused in whole or in part by the negligent acts or omissions of the Subcontractor, or any of the Subcontractors' subcontractors, suppliers, manufacturers, or other persons or entities for whose acts the Subcontractor may be liable. This indemnification agreement is binding on the Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor is obligated to provide indemnification. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity. [2]

TIPS:

- Beware of “sole” negligence indemnity clauses.
- Understand the scope of broad-form indemnity clauses.
- Try to add language providing for indemnity, but only “to the extent” as used in the AIA and AGC standard form documents.
- Is the indemnity clause overbroad and void as a matter of public policy and, therefore, unenforceable?
- What work is covered by the indemnity clause?
- Revise the indemnity clause to state that you will not be responsible for OSHA violations by others.
- Beware of the arbitration of indemnity claims.

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[2] AGC Document No. 640, Standard Form Construction Subcontract, 1994. (emphasis added).

- Be sure that the indemnity provisions in your contracts are reciprocal.

- Understand the differences between a duty to indemnify and a duty to defend.

CASE EXAMPLES:

- Although Tennessee law permits a party to be contractually indemnified for its own negligence, it must be clear and unambiguous from the language of the contract that this was the intention of the parties. The court found that the parties did not clearly and unequivocally express an intent that the contractor would indemnify the owner for the owner's own negligence and the court would not impose its opinion as to the proper interpretation of the indemnity agreement. The court noted that express language such as "including indemnitee's acts of negligence" would have been sufficient under Tennessee law. **See** **Olin Corp. v. Yeargin, Inc.**, 146 F.3d 398 (6th Cir. 1998), reh'g denied, 1998 U.S. App. LEXIS 21516 (6th Cir. 1998).

- An injured worker brought an action for negligence against the construction manager. The construction manager in turn brought a third-party action against the subcontractor who supplied the steel beams involved in the accident, and claimed that AIA A201 Article 3.18.1 entitled it to "full" indemnification. The court stated that indemnity contracts should be construed to give effect to the parties' intentions, and that the words "to the extent caused in whole or in part" obligated the subcontractor to indemnify the construction manager only to the extent that the award was attributable to its own negligence. **See** **Frank v. MSI Constr. Managers, Inc.**, 208 Mich. App. 340, 527 N.W.2d 79 (Mich. Ct. App. 1995), app. denied, 451 Mich. 851, 546 N.W.2d 254 (Mich. 1996). **Accord** **Brown v. Boyer-Washington Boulevard Assocs.**, 856 P.2d 352 (Utah 1993).

- The court found that the indemnification clause in a service agreement between the railroad and an electrical contractor violated the Illinois Construction Contract Indemnification for Negligence Act because it required the contractor to indemnify the railroad for its own negligence. Moreover, the court found that the savings clause portion of the indemnification provision, which required the contractor to indemnify the railroad for damages attributable to its own fault, was not indemnity but rather contribution, and thus violated the Illinois Contribution Act. **See**

Field v. Norfolk & W. Ry. Co., 1998 U.S. Dist. LEXIS 19261 (N.D. Ill. 1998).

D. Waiver of Liens

SAMPLE CONTRACT PROVISION:

- Subcontractor hereby waives and releases all liens or right of liens now existing or that may hereafter arise for any and all work or labor performed or material furnished under this Subcontract upon said facility, or monies due or to become due to Contractor, and agrees to furnish a good and sufficient waiver of lien in proper form for filing from every person or entity furnishing labor or materials for this Project under Subcontractor.

TIPS:

- Be sure you understand the required waiver and release form before you sign it.
- What is the extent of the waiver/release?
  - For money paid to-date?
  - For work performed to-date?
  - For all work to be performed?
  - Does it include claims and causes of action?
  - Does it include the surety?
- Be familiar with state law regarding waivers in the subcontract itself.
- Is the waiver form in the contract documents different from the one you are asked to sign?
- The first waiver could be the deadly one C read it carefully and modify it if necessary.

CASE EXAMPLES:

- Subcontractor executed a waiver of liens that stated, in part, that it would "look to and hold Contractor personally liable for all subcontracts, materials, furnished work and labor done so that there shall not be any legal or lawful claim of any kind whatever

against Owner for any work done or labor or materials furnished under the contract . . . or any under contract for extra work or for work supplement thereto . . . ." The subcontractor sought to avoid the waiver of liens on the ground that the contractor was "one in the same" as the owner. The court held that the owner and the contractor had observed all required formalities between related corporations, and the court gave the lien waiver was full effect. **See B&B Builders, Inc. v. TCR Byberry Creek LP**, 27 Phila. 556, 1994 Phila. Cty. Rptr. LEXIS 52 (Com. Pl. Phila. Cty. 1994).

- A lien waiver stated "This agreement waiving the right of lien shall be an independent covenant . . . and shall be enforceable by Owner and such other owners, or any of them, and their respective successors and assigns." In addition, the integration clause of the contract stated that all oral representations were superseded by the final contract. The general contractor sought to avoid the lien waiver on the ground that the owner had promised the general contractor that it would not transfer its interest to any new owners. The court held that the lien waiver was complete and binding, and that the parol evidence rule barred the general contractor from presenting any additional evidence of "false representations." **See HCB Contractors v. Liberty Place Hotel Associates**, 652 A.2d 1278 (Pa. 1995).

E. Scheduling

SAMPLE CONTRACT PROVISION:

- Schedules. It is agreed that time is of the essence in the performance under this Subcontract. Subcontractor shall prosecute and complete the Work timely, diligently, efficiently, and without hindering the work of Contractor or other subcontractors in accordance with the Contractor's schedule as amended by the Contractor from time to time. Subcontractors shall be liable to Contractor for failure to adhere to Contractor's schedules, including amendments, even if such schedules differ from the schedule set forth in the Contract Documents, the Subcontractor's proposed scheduled set forth in the Subcontractor's proposal to Contractor, or in the time of completion called for by the Contract Documents. If requested by Contractor, Subcontractor shall submit detailed written schedules for performance of the Subcontract, in a form acceptable to Contractor, which shall comply with all scheduling requirements of the Contract Documents and schedules issued by Contractor on the Project. Contractor may declare Subcontractor in default if Subcontractor fails to furnish Contractor said detailed written schedules in a timely manner or if Subcontractor's detailed

written schedules are not acceptable to Contractor. All requested changes to the schedule as a result of change orders submitted to Contractor by Subcontractor must contain a detailed request regarding the reasons for such changes, and are subject to the approval and modification of Contractor. Any claims made against Contractor by Subcontractor shall in no way modify the schedule or completion of the Work.

TIPS:

- Scheduling clauses need to be evaluated in the context of the implied duties to schedule and coordinate the work, and other implied duties, which the courts will read into a contract. These other duties include the duty to act in good faith, the duty to cooperate, the duty to not interfere with the contractor's performance and the duty to provide access to the site.

- Often, the implied duties trump written scheduling clauses where the contractor can show that the other party breached an implied duty.

- Add the work "reasonable" to any reference to the process schedule or updated schedule. "Mutually accepted" is another acceptable adjective to insert.

- Qualify your proposal/bid to state that it is based on a "mutually acceptable schedule."

CASE EXAMPLE:

- A masonry subcontractor sued the general contractor for delay damages and acceleration costs based on the general contractor's breach of its duty to cooperate with the subcontractor and avoid delay to the project. The contract contained a paragraph which stated "Subcontractor shall proceed with the work according to a progress schedule furnished by the Contractor, without interference of the work of Contractor . . . so that the Contractor . . . can complete the work in accordance with the project schedule . . . . Subcontractor acknowledges that it has been informed that the Contractor must complete the general contract [by a date certain] and it is therefore, understood and agreed that the work shall be entirely completed on or before . . . CPM schedule. Time is of the essence in this subcontract." This schedule of work provision obligated the general contractor to properly schedule and coordinate the subcontractor's work, and its failure to do so supported a judgment in favor of the subcontractor. **See** **Bat**

Masonry Company, Inc. v. Pike - Paschen Joint Venture III, 842 F. Supp. 174 (D. Md. 1993).

F. Changes

SAMPLE CONTRACT PROVISION:

- 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.[3]

TIPS:

- Changes and change orders present a number of potential legal problems which should be considered and addressed if possible in the contract review and negotiation stage. However, in practice, change order problems can only be resolved in contract performance. These problems include the following:

  - Duty to proceed with disputed work;
  - Change order as an "accord and satisfaction" of price, time and impact issues;
  - Reservation of rights regarding impact costs in change order proposals;
  - Quoting proposal language in the change order itself; and
  - Ensuring that that change orders are signed by the other party's authorized representative who is empowered to sign the change order.

- Always look for the word **"waiver"** in clauses dealing with change orders and extra work. If the word "waiver" appears in such clauses, then in the event of a dispute this will make it harder to recover if you did not receive written authorization for the extra work.

[3] AIA Document A201, General Conditions of the Contract for Construction, 1987.

- Beware of "tickets" signed in the field.

  - Tickets might be considered as separate contracts

  - Tickets might contain harmful, boiler-plate language on the back such as an indemnification clause.

  - Tickets might be signed by field personnel who are not concerned with risk management.

  - Adopt a policy for field personnel when they are asked to sign someone else's ticket, such that their signature merely verifies quantities or hours. Further, field personnel should be instructed to cross-out all other language on the ticket.

  - Develop your own ticket which makes the work subject to the terms of your contract.

CASE EXAMPLE:

- A contract for the erection of various site buildings stated "[Owner] reserves the right to make any changes in the specifications and plans which may be deemed necessary either before or after beginning any work under this contract, without invalidating this contract; provided that if alterations are made, the general character of the work as a whole is not changed thereby. If such alterations increase the quantity of work to be done, where unit prices are specified, such increase shall be paid for according to the quantity of work actually done at the unit price specified under this contract . . . ." It was held that notwithstanding numerous changes and alterations made by the owner which greatly increased the general contractor's cost in completion of the project, since the end product of the project had not changed, the alterations and changes were permitted, and did not constitute breach of contract. **See** **Mellon Stuart Constr., Inc. v. Metropolitan Water Reclamation District**, 1995 U.S. Dist. LEXIS 5376 (N.D. Ill. 1995).

G. Claims and Disputes

SAMPLE CONTRACT PROVISIONS:

- 4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also

includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Decision of Architect. Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

4.3.3 Time Limits on Claims. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.[4]

TIPS:

- Owners and general contractors often use claim notice and claim submission requirements to defeat claims on technicalities. In order to avoid such defenses, you must carefully comply with claim notice and claim procedure requirements.

- Distinguish between timely notice of a claim and when your pricing must be submitted. The two are not necessarily the same.

- Again, beware of the word **"waiver."**

- If you are a subcontractor, keep in mind the difference between claims which could be pass-thru's to the owner (for example, an

[4] AIA Document A201, General Conditions of the Contract for Construction, 1987.

error in the contract documents) versus claims that are the responsibility of the general contractor (for example, failure to manage and coordinate the other trades). Often, subcontract claim provisions attempt to restrict subcontractor claims if they have their origin in something done by the owner. You can avoid this depending upon how you give notice of, and describe, the claim so that it does not automatically become a pass-thru to the owner.

- Even if the claim becomes a pass-thru to the owner, keep in mind that the general contractor has the implied duty to act in good faith in his prosecution of the claim on your behalf.

CASE EXAMPLE:

- A contractor did not waive the right to arbitrate even though it failed to bring its claims to the “architect” as required by the contract. The contract contained a section which stated "the Architect will interpret and decide matters concerning performance under and requirements of the contract documents on written request of either the Owner or the Contractor. The Architect will make initial decisions on all claims, disputes, or other matters in question between the Owner and the Contractor . . . all other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon written demand of either party." The owner and the architect were defined as the same entity, however, and the owner was not a licensed architect. The court determined that submittal of change orders to the owner and the owner's rejection of the change orders fulfilled the contractor's requirement to bring claims to the attention of the "architect" as condition precedent to arbitration. **See** **Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc.**, 874 S.W.2d 526 (Mo. Ct. App. 1994).

H. Resolution of Claims and Disputes

SAMPLE CONTRACT PROVISION:

- 4.5.1 Controversies and Claims Subject to Arbitration. Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.3.5. Such controversies or Claims upon which the

Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered. [5]

TIPS:

- In reviewing language dealing with the resolution of claims and disputes, look for the following:
  - Arbitration versus litigation;
  - Forum selection clause;
  - Waiver of right to jury trial;
  - Controlling law clause;
  - Exhaustion of administrative remedies;
  - Notice requirements;
  - The architect's decision as a condition precedent; and
  - Distinguish between claims which are pass-thrus and claims which are not.
- Be aware of state laws which may trump forum selection clauses.
- Recognize that the 1997 AIA General Conditions contain a mandatory mediation clause.
- For general contractors, ensure you have reciprocal remedies provisions.

[5] AIA Document A201, General Conditions of the Contract for Construction, 1987.

CASE EXAMPLES:

- A general contractor and owner executed a contract with a claim/dispute resolution provision which stated "that the Engineer shall in all cases decide every question of an engineering character which may arise relative to the execution of the work under this contract on the part of the Contractor, and his decision shall be final and conclusive on both parties hereto: and such decision, in case any question which may arise, shall be a condition precedent to the right of the Contractor to receive any money or compensation for anything done or furnished under this contract." In construing this provision, the court held that the engineer had the power to evaluate the sufficiency and quality of materials furnished and work performed under the contract, that the engineer could determine all questions of an engineering character relating to the general contractor's performance, and that the engineer's decision was a condition precedent to the contractor's right to receive payment. Although the term "engineering character" was interpreted broadly, the court said that the engineer did not have authority to evaluate the owner's performance or lack of performance and that the owner's performance was a jury question. **See** **Mellon Stuart Constr., Inc. v. Metropolitan Water Reclamation District**, 1995 U.S. Dist. LEXIS 5376 (N.D. Ill. 1995).

- A general contractor sued the owner for additional sums in connection with change orders on a construction project. The owner sought arbitration but the general contractor resisted on the basis that it had never signed the standard AIA form contract incorporating AIA Document A201 by reference. The court held that notwithstanding the general contractor's failure to sign the contract, arbitration could still be compelled since the general contractor engaged in conduct which clearly evidenced its willingness to be bound by the General Conditions contained in AIA Document A201 which included the duty to arbitrate. **See** **Liberty Mgmt. & Constr. Ltd. v. Fifth Ave. & Sixty-Sixth Street Corp.**, 208 A.D.2d 73 (N.Y. App. Div. 1995).

- The contract between the owner and the architect contained an arbitration provision which stated in part "no arbitration arising out of or relating to this agreement shall include, by consolidation, joinder, or in any other manner, an additional person or entity not party to this agreement, except by written consent containing a specific reference to this agreement signed by the Owner, Architect, and any other person or entity sought to be joined." In partially overturning the arbitrator's award, the court held that the provision prevented the arbitrator from considering the architect's

subcontractor's claim. Additionally, the arbitrator did not have authority to arbitrate the architect's claim for work performed under a subsequent, unexecuted agreement for the "second phase" of the same project. **See** **Wild West Trading Co. v. gbs&h Architects**, 881 P.2d 1070 (Wyo. 1994).

I. Differing Site Conditions

SAMPLE CONTRACT PROVISION:

- 4.3.6 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.[6]

TIPS:

- Distinguish between a Type 1 and Type 2 condition.
- Is the unknown condition a subsurface condition or found elsewhere?
- Is there a remedy clause in the prime contract?

[6] AIA Document A201, General Conditions of the Contract for Construction, 1987.

- Written notice is essential.

- Look for disclaimers throughout the contract documents, including the geotechnical reports, technical specifications, etc.

- Look throughout the contract documents (*e.g.*, the drawings) for references to the geotechnical report which, it can be argued, overcome a disclaimer.

- Consider "superior knowledge" and/or misrepresentation.

- Remember, for a differing site condition claim to have any chance of success, you must have conducted a pre-bid site inspection.

CASE EXAMPLE:

- The contractor contracted to perform certain work with the Department of the U.S. Navy. After work had commenced on the project, the contractor sued the Government for various claims including a differing site condition claim. The parties' contract contained both a differing site conditions provision and a pre-bid site investigation provision. The Government argued that the contractor was precluded from its differing site condition claim because the contractor failed to make a pre-bid site inspection pursuant to the contract. The court stated that in order for the contractor to prevail on its differing site conditions claim, the contractor must show "that the conditions actually encountered were 'reasonably unforeseeable based on all the information available to the contractor at the time of bidding.'" In this case, the court found that the actual differing site conditions were reasonably foreseeable, for a reasonable contractor performing the requisite pre-bid site inspections would have foreseen such conditions. Accordingly, the contractor's claim was denied. **See** **Orlosky, Inc. v. United States**, 64 Fed Cl. 63, 2005 U.S. Claims LEXIS 28 (Fed Cl. 2005).

- A dredging subcontractor encountered subsurface conditions at one of the sites which was substantially different from those described in the contract documents provided by the Virginia Department of Transportation (VDOT). These subsurface conditions resulted in the subcontractor doing additional dredging, which the contractor claimed caused additional expenses. In the bid documents, VDOT had represented to the contractor through boring logs that the material was consistent between the two sites. However, VDOT actually knew that a ferry terminal had been operated by the Commonwealth at one of the sites, and that the remains of the terminal still existed in the area to be dredged.

Despite its obligation to do so, VDOT made no mention of it in the contract documents. The court remanded the case back to the trial court to determine if VDOT was responsible for the additional costs. **See** **Tyger Construction Co., Inc. v. Commonwealth of Virginia**, 17 Va. App. 166, 435 S.E.2d 659 (Va. Ct. App. 1993).

J. Liquidated Damages

SAMPLE CONTRACT PROVISIONS:

- LIQUIDATED DAMAGES. For each calendar day by which Substantial Completion of the Project (as adjusted by Change Orders and Construction Change Directives) is delayed beyond the date set for Substantial Completion of the Project as delineated in the Contract Documents and Project Schedule (except to the extent that such delay is caused by the Owner or delay that is expressly excusable under this Agreement), the Contractor shall pay to the Owner, as liquidated damages and not as a penalty, Three Thousand and No/100 Dollars ($3,000.00). The Contractor and Owner acknowledge that the damages that would be incurred by the Owner in the event of a delay in Substantial Completion are speculative and not susceptible of precise determination, and that the foregoing amounts are the best estimates as the damages that would actually be incurred and are agreed to be such amount.

- 13.3.3 LIQUIDATED DAMAGES. If the Contract provides for liquidated or other damages for delay beyond the completion date set forth in the Contract, and such damages are assessed by the Owner against the Contractor, then the Contractor may assess such damages against the Subcontractor in proportion to its share of the responsibility for such delay and damage, but no more. The amount of such assessment against the Subcontractor, if any, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay and damage and shall never exceed the amount assessed against the Contractor by the Owner.

  Nothing in Subparagraph 13.3.3 shall limit the Contractor's right to claim all actual damages sustained by the Contractor as a result of Subcontractor delay.[7]

TIPS:

- Utilize a liquidated damages clause if actual delay damages cannot be ascertained easily.

[7] AGC Document No. 640, Standard Form Construction Subcontract, 1994.

- Ensure that the liquidated damage amount is a reasonable amount and attempts to approximate the actual damages that would be incurred; damage amounts which are in excess of a reasonable estimate may be viewed as a penalty. Courts will strike down these provisions.

- Never refer to liquidated damages as a penalty.

- Must some amount of actual damage due to delay be suffered in order to reward liquidated damages?

CASE EXAMPLE:

- An owner contracted with a contractor construct a water line and pumping station for a new acute care hospital. The contract included a liquidated damages provision which stated that the contractor must pay the owner $500 for each day that the contractor was late in completing the project. The owner counterclaimed under the liquidated damages clause for $27,250 as the contractor was 55 days late in completing the project. The trial court struck down the liquidated damages claim of $500 per day because the owner had not met its burden of proving that the liquidated damages amounts were a reasonable estimate of the requisite damages. The appellate court upheld the trial court's decision, and held that mere agreement between the parties on a dollar value is not enough; the parties must actually perform some minimal calculations or use some benchmark for determining liquidated damages. The owner did not provide enough evidence to demonstrate that the calculations used in creating the $500 per day amount were based upon a reasonable estimate of the damages to be sustained by the owner. As such, the Tennessee Court of Appeals struck down the liquidated damages clause as an illegal penalty clause which was void for public policy and dismissed the owner's claim. **See Eatherly Construction Co. v. HTI Owner**, 2005 Tenn. App. LEXIS 575 (Tenn. Ct. App. 2005)

K. Termination for Convenience

SAMPLE CONTRACT PROVISION:

- Contractor shall have the right to terminate this Subcontract for its own convenience for any reason by giving notice of termination effective upon receipt thereof by Subcontractor. Termination for default under Paragraph 10, if wrongfully made, shall be treated as a termination for convenience. Settlement of the Subcontract upon termination shall be accomplished in accordance with a provision of

the Termination for Convenience clause in the Contract Documents. If no such clause exists, the Subcontractor shall be paid only the actual cost for work and labor in place, plus fifteen percent (15%), or a pro rata percentage of the Subcontract price equal to the percentage of completion, whichever is less. Subcontractor shall not be entitled to anticipated profits on unperformed portions of the Work.

TIPS:

- Generally, profit on unperformed work is not recoverable.

- Termination for convenience may be voided if there is bad faith, bad motive or failure to follow the requirements of the termination for convenience clause.

CASE EXAMPLE:

- A city housing authority elected to terminate a contract with the general contractor, although initially the housing authority did not rely upon the termination for convenience clause in the contract. The court held that the housing authority was entitled to the benefits of the termination for convenience clause under the doctrine of "constructive" termination for convenience, which arises when the circumstances between the government and a contractor change such that the original termination for cause is "converted" to termination for convenience. In this case, changed circumstances were found to result from the deterioration of the relationship between the housing authority and the contractor. Absent proof of bad faith or unfair dealing, the contractor was limited to compensation for the value of "work performed" up to the point of termination. **See** **Linan-Faye Constr. Co., Inc. v. Housing Auth.**, 49 F.3d 915 (3d Cir. 1995).

L. Flow-Down Clauses

SAMPLE CONTRACT PROVISION:

- Subcontractor is bound to the Contractor in the same way and to the same extent Contractor is bound to Owner by the terms of the Contract Documents and shall bear all rights and liabilities with respect to the Contractor as the Contractor has with respect to the Owner, except that the terms of this Subcontract shall govern any inconsistent provision herein and in the Contract Documents. Subcontractor shall not deal directly with or work directly for Owner, Architect or Engineers.

TIPS:

- Often, flow-down clauses are interpreted to apply only to the technical specifications of the contract documents which deal with the contractor's scope of work.

- Forfeiture provisions found in the general conditions, such as waiver of lien clauses or condition precedent payment clauses, usually don't "flow down" to the subcontractor.

CASE EXAMPLE:

- In this case, the contractor attempted to enforce the prime contract's forum selection clause against the subcontractor. The subcontract stated that it would be "governed by and in strict compliance with the terms of [the prime] contract . . . ." The court found that a forum selection clause was similar to a clause requiring arbitration, which had been previously held to flow down to the subcontract. Thus, the court held that the subcontractor was bound by the forum selection clause in the prime contract. **See** **Kessmann and Assoc., Inc. v. Barton-Aschman Assoc., Inc.**, 10 F. Supp. 2d 682 (S.D. Tex. 1997).

M. Site Inspection

SAMPLE CONTRACT PROVISIONS:

- 1.3 The Subcontractor represents and agrees that it has carefully examined and understands this Agreement and the other Subcontract Documents, has investigated the nature, locality and site of the Work and the conditions and difficulties under which it is to be performed, and that it enters into this Agreement on the basis of its own examination, investigation and evaluation of all such matters and not in reliance upon any opinions or representations of the Contractor, or the Owner, or of any of their respective officers, agents, or employees.[8]

- (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the

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[8] 16.2, Stephenson, James E., Esquire, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS, Wiley (Supp. 1994).

availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.[9]

TIPS:

- It is essential that the contractor conduct a pre-bid site investigation to protect his rights and a possible later claim in the face of site investigation clauses. Without a site investigation, it will be very difficult to challenge the risk allocation provisions of site investigation disclaimer clauses.

CASE EXAMPLE:

- A subcontractor sued the general contractor for additional sums expended after it encountered wet soil while sinking piers for a foundation. The contract contained a provision in which the general contractor "disclaim[s] any responsibility for the accuracy, true location and extent of the soils investigation," including data concerning "the presence, level and extent of underground water." Additionally, the contract stated "the [soil] report is not a warranty of subsurface conditions, nor is it a part of the contract documents." The subcontractor chose not to investigate the site independently but instead relied on the soil reports furnished by the contractor to assist in bid preparation which did not reveal the wet soil condition. The court held that the soil report disclaimer effectively barred the subcontractor's ability to recover for the unforeseen conditions. **See** **Millgard Corp. v. McKee/Mays**, 49 F.3d 1070 (5th Cir. 1995).

[9] (48 C.F.R. 52.263-3).

N. Force Majeure

CONTRACT PROVISION:

- Neither party shall be considered in default in the performance of its obligations hereunder to the extent that the performance of any such obligation is delayed, hindered or prevented by any cause which is beyond the reasonable control of the party affected thereby (hereinafter called "Force Majeure"). Force Majeure includes but is not limited to any of the following if reasonably beyond the control of the party claiming Force Majeure: war (declared or undeclared), fire, riot, storm, hurricane, earthquake, tornado, or any law, proclamation, order, regulation, or ordinance of any government agency or any court, or any other cause similar to those enumerated above, which is not reasonably within the control of the party claiming Force Majeure. The party affected by any Force Majeure shall give prompt written notice to the other party advising of the nature and extent of any Force Majeure and advising of the effects of the Force Majeure upon the completion and cost of the work hereunder. The parties shall consult promptly with each other concerning the Force Majeure and shall endeavor to agree upon mutually acceptable corrective action. In the event of a Force Majeure which prohibits performance by Contractor for more than sixty (60) days, Owner may terminate this Contract for convenience and shall have no further obligation to Contractor hereunder.

TIPS:

- Determine whether a party must give notice of a force majeure event. Noncompliance with notice provisions may void the protections encompassed with the force majeure clause.

- List examples of force majeure events which will excuse performance, such that the parties understand what does and does not constitute a force majeure event.

- Take special notice of provisions which require a party to take certain steps to limit the effects of certain force majeure events. Noncompliance may waive the benefits of this provision, and the non-complying party could ultimately be held in default as a result thereof.

CASE EXAMPLE:

- The U.S. Supreme Court considered the ramifications of a force majeure clause in a contract pertaining to the construction of levees on the Mississippi River. The Supreme Court indicated that unforeseeable causes "include, but are not restricted to, acts of God, or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes." The Court explained that "[n]ot every fire or quarantine or strike or freight embargo should be an excuse for delay under a [force majeure clause.]" For example, "the contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty" or "a strike may be an old and chronic one whose settlement within an early period is not expected." The normally expected high water in a stream over the course of a year, being foreseeable, is not an *unforeseeable* cause of delay, even though it is an act of God. **See** **United States v. Brooks-Callaway Co.**, 318 U.S. 120 (1943).

III. CONCLUSION

A successful project requires a good estimate, good supervision and productive field labor. However, these ingredients, alone, will not enable the unprepared contractor to effectively resolve construction problems. To be prepared, you must understand how construction contracts operate; you must be able to recognize risk provisions and negotiate, and then, manage them effectively.

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Alabama	Majority[1]	Crass v. Scruggs, 115 Ala. 258, 22 So. 81 (Ala. 1897).	"Payments based on engineer's estimates, and to be made on the 15th of each month, or as soon thereafter as said railroad company pays or causes to be paid the said J. T. Crass."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Alaska	Minority[2]	Industrial Indem. Co. v. Wick Constr. Co., 680 P. 2d 1100 (Alaska 1984).	"Final payment shall be made within five days after CONTRACTOR has received his final or complete payment involving SUBCONTRACTOR'S portion of work."	Clause enforced as creating a valid condition precedent to payment. Because the contractor was not required to pay the subcontractor unless and until the owner paid it, interest did not begin to accrue until the owner paid the contractor.	
Arizona	Majority	Pioneer Roofing Co. v. Mardian Constr. Co., 152 Ariz. 455, 733 P.2d 652 (Ariz. 1986).	"Contractor shall not, however, be liable for a greater sum than Contractor obtains from the Owner for such additional work . . . and the recovery by Subcontractor for such work shall be conditioned upon a prior recovery therefor by Contractor from the Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. Court looked for language specifying payment to be made "exclusively" or "only" from a particular area.	
		Watson Constr. Co. v. Reppel Steel & Supply Co., 123 Ariz. 138, 598 P.2d 116 (Ariz. 1979).	"THE CONTRACTOR AGREES . . . to pay the Sub-Contractor, promptly upon receipt thereof from the Owner, the amount received by the Contractor on account of the Sub-Contractor's work to the extent of the Sub-Contractor's interest therein . . . . At all times subcontractor shall be paid to the extent that the contractor has been paid on his account."	". . . [P]rovisions such as those found in the subcontracts in question do not create a condition precedent in the absence of additional language which clearly shows that the payments were to be made "exclusively" or "only" from the specified fund and no other."	
		Darrell T. Stuart Contractor of Arizona v. J.A. Bridges and Rust-Proofing, Inc., 2 Ariz. App. 63, 406 P.2d 413 (Ariz. 1965).	"The contractor shall pay the . . . subcontractor's pay estimate within ten days after receipt of payment by the Contractor . . . ."	"If the defendant did not receive all of its money from the contractor, the defendant nevertheless remained indebted to the [subcontractors] and the [subcontractors] were entitled to payment within a reasonable period of time following the completion of the performance of their contract obligation."	

1 For purposes of this handout, the majority rule is that, unless the parties explicitly and unambiguously provide otherwise, a general contractor must pay a subcontractor within a "reasonable time" after the subcontractor completes its work, regardless of whether the owner has paid the general contractor for the work.

2 For purposes of this handout, the minority rule is that contract language which provides that payment is due after receipt thereof from the owner is an enforceable conditional payment clause and shifts the risk of owner nonpayment to a subcontractor.

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Arkansas	Majority	Trinity Universal Ins. Co. v. Smithwick, 222 F.2d 16 (8th Cir. 1955), cert. denied, 350 U.S. 837, 100 L.Ed 747, 76 S.Ct. 74 (1955).	Exact contract language not given in case.	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
California	Clause void as against public policy	William R. Clark Corp. v. Safeco Ins. Co., 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (Cal. 1997).	"Receipt of funds by Contractor from Owner is a condition precedent to the Contractor's obligation to pay Subcontractor under this Agreement, regardless of the reason for Owner's nonpayment, whether attributable to the fault of the Owner, Contractor, Subcontractor or due to any other cause. Subcontractor shall assume the risk that if [sic] the Owner does not, for any reason . . . pay Contractor money owing to it for the work provided by Subcontractor. Accordingly, Subcontractor agrees that: 1. Contractor shall have no obligation, legal, equitable or otherwise, to pay Subcontractor for Work performed by Subcontractor. Furthermore, in the event Contractor is never paid by Owner for Subcontractor's Work, then Subcontractor shall forever be barred from making, and hereby waives, in perpetuity, any claim against Contractor therefore. . . ."	Condition precedent payment clauses are not enforceable in California. The clauses are against public policy because they amount to a waiver of mechanic's lien rights. In California, mechanic's lien rights can only be waived under certain circumstances. Neither the general contractor nor its payment bond surety could rely on the clause.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Colorado	no cases - related case indicates application of quasi-majority rule	Mularz v. Greater Park City Co., 623 F.2d 139 (10th Cir. 1980).	Architect to be paid final 20% of fee after completion of bidding and negotiations phase.	"An intent to create a condition [precedent] in a contract must appear expressly or by clear implication . . . . [S]uch rule of construction is founded on a policy of avoiding, if possible, forfeitures . . . . It is logical to infer that [the architect's] agreement to defer the balance of his fee until the time that the construction financing became available was made as an accommodation to [the owner]. It was made in anticipation of the bidding and negotiation phase being carried out. There is not the slightest indication that [the architect] intended to risk a portion of his fee on the non-occurrence of events over which he had no control . . . . [W]here, as here, a debt constitutes an absolute rather than a contingent liability, and payment was agreed to be made on occurrence of an event which does not occur, payment must be made within a reasonable time . . . . The clause regarding payment was indeed facially ambiguous, and the trial court was correct in its ruling as to the admissibility of parol evidence."	
Connecticut	Majority	Star Contracting Corp. v. Manway Constr. Co., 32 Conn. Supp. 64, 337 A.2d 669 (Conn. Super. Ct. 1973).	"Partial payments by the Contractor to the Subcontractor hereunder shall be made only at such time or times as payments made by the Owner to the Contractor shall include work completed by the Subcontractor, and then only in the ratio that work performed by the Subcontractor bears to all work to be done by him under this subcontract or the extent that the Contractor has received payment for such work, whichever is the lesser. . . . payment will not be made . . . until the Owner has made payment to the Contractor for the work."	Clause enforced as creating a valid condition precedent to payment. The contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Subcontractor must allege that the condition precedent is fulfilled in order to recover from surety.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Connecticut (cont.)		Related case: Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc., 239 Conn. 708, 687 A.2d 506 (Conn. 1997).	"[P]ayment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the Contractor of his payment from the Owner."	Even if language constituted a condition precedent, that condition was satisfied. The general contractor was paid less money than it sought, but was nonetheless required to pay the subcontractor the entirety of the amounts owed to it: "[The general contractor] was paid for the work performed by the [subcontractor], albeit based on adifferent schedule of values than those agreed to by the [subcontractor] and [general contractor] in the subcontract. Although the project engineer for [the Owner] disallowed some of the value for the work performed, it is the subcontractual value that the [subcontractor] and [the general contractor] placed on the work performed that controls."	
Delaware	Majority	Acierno v. Worthy Bros. Pipeline Corp., 1996 Del. Super. LEXIS 347 (Del. Super. Ct. 1996), aff'd, 693 A.2d 1066 (Del. 1997).	"Final Payment . . . shall be made . . . when the Subcontractor's work is completed. If an Architect and/or Engineer represents the Owner for the work and if the agreement between the Prime Contractor and/or Owner and/or Architect provides . . . that the Prime Contractor must receive payment from the Owner prior to paying the Subcontractor, neither the certificates of payment nor prior payment to the Subcontractor and final payment to the Subcontractor shall be made on demand by the Subcontractor." On the front of the contract, the subcontractor's representative had written: "Payment schedule: 30 day draws upon payment from Owner with 10% retainage till (sic) release & payment from Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
District of Columbia	Majority	Urban Masonry Corp. v. N&N Contractors, Inc., 676 A.2d. 26 (D.C. 1996).	"1(a) Payments will be made to the Subcontractor promptly as they are received. Receipt of payment by Contractor shall be a condition precedent to payment being owed to Subcontractor . . . . 1(e) Invoices for work performed by Subcontractor will be paid within five (5) days after receipt of the corresponding payment from General Contractor. . . . Late payments shall bear an interest at the rate of ten percent (10%) per annum . . . ."	Although the court noted that it would normally enforce the clause as creating a valid condition precedent to payment, it refused to do so in this case because the contractor had failed to defend the subcontractor's interests in settlement negotiations with the owner. The court held that the contractor may only assert the pay-when-paid clause as a defense if it has not done anything to hinder the satisfaction of the condition precedent.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Florida	Majority	OBS Co. v. Pace Constr. Co., 558 So.2d 404 (Fla. 1990) (superseded by statute).	". . . Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied . . . . receipt of Final Payment for Subcontractor's work by Contractor from Owner . . . .by the Owner."	Although the subcontract clearly made payment from the owner a condition precedent, the general contract required the general contractor to submit an affidavit certifying that its subcontractors had been paid before final payment became due. The court found that the conflict between the subcontract and the general contract created an ambiguity. In these circumstances, "the intent to shift the risk of nonpayment is not clearly expressed, the payment provision must be interpreted as establishing a reasonable time to pay by the contractor rather than creating a condition precedent to the Contractor's obligation to pay the subcontractor."	SURETY: FLA STAT. § 713.245 (1996): "[i]f the contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT."
	Majority	Peacock Constr. Co. v. Modern Air Conditioning, 353 So.2d 840 (Fla., 1977).	Final payment to be made "within 30 days after the completion of the work included in this sub-contract, written acceptance by the Architect and full payment therefor by the Owner."	"[The] intent in most cases is that payment by the owner is not a condition precedent to the general contractor's duty to pay the subcontractors . . . . There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor."	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Georgia	Minority	St. Paul Fire & Marine Ins. Co. v. Georgia Interstate Electric Co., 187 Ga. App. 579, 370 S.E.2d 829 (Ga. Ct. App. 1988).	". . . no payment shall be due Subcontractor for such changed or extra work until Contractor has received payment from the Owner for said changes or extra work performed by Sub-contractor."	Clause enforced as creating a condition precedent to payment. Court noted that the condition precedent to payment was clearly expressed in this subcontract.	
		Sasser & Co. v. Griffin, 133 Ga. App. 83, 210 S.E.2d 34 (Ga. Ct. App. 1974).	Subcontractors to be paid "as the work progresses, based on estimates and certificates of the Architects or Contractor and payments will be made from money received from the owner only and divided Pro Rata amount [sic] all approved accounts of subcontractors labor and material."	"A provision in a contract may make payment by the owner a condition precedent to a subcontractor's right to payment if >the contract between the general and the subcontractor should contain an express condition clearly showing that to be the intention of the parties' . . . . The condition is clearly expressed in this subcontract."	
		Peacock Constr. Co. v. West, 111 Ga. App. 604, 142 S.E.2d 332 (Ga. Ct. App. 1965).	"Final payment shall be made within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect, and full payment therefor by the Owner."	"[A]s we construe the plain and unambiguous language of the agreement, there are clearly expressed conditions precedent to defendants' liability for the final payment of the contract price."	
Hawaii	No cases				
Idaho	Minority	Hoff Cos. v. Danner, 121 Idaho 39, 822 P.2d 558 (Idaho 1991).	Language not given: Court concluded that parties, through their language and conduct, had impliedly agreed that the contractor's payment obligation was conditioned on its first receiving payment.	Pay-When-Paid terms of the parties' agreement created a valid condition precedent to payment. However, this is only the case when the payment by the Owner is not under the control of the Contractor.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Illinois	Minority	Premier Elec. Constr. Co. v. American Nat'l Bank of Chicago, 276 Ill. App. 3d 816, 656 N.E.2d 157 (Ill. App. Ct. 1995), modified, 276 Ill. App. 3d 816, 658 N.E.2d 877 (Ill. App. Ct. 1995).	"The amount retained by the General Contractor shall be disbursed to the Subcontractor upon the last to occur of . . . the Owner has paid the General Contractor the entire balance related to the work due to the General Contractor . . . ." "Final payment shall be held no more than the stated three months in the event that other subcontractor's [sic] or the General Contractor [sic] not completed their work . . . . "	Pay-when-paid clause in contract was superseded by unambiguous language of final payment clause in same contract. The court concluded that the second clause overruled the pay-when-paid clause.	"Any provision in a contract, agreement, or understanding, when payment from a contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party including a private or public owner, shall not be a defense by the party responsible for the payment to a claim brought under Section 21, 22, 23 or 28 of the Act against the party." 770 Ill. Comp. Stat. 60/21.
		A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp., 132 Ill.App.3d 325, 477 N.E.2d 30 (Ill. App. Ct. 1985).	Material invoices submitted before the 25th of the current month will be paid by the 28th of the following month . . . if payment for invoiced material has been received . . . . . [I]f the work has been satisfactorily performed and invoice as rendered is approved and if payment for such labor and material so invoiced has been received . . . the subcontractor will be paid . . . ."	"We do not believe that the record supports [the subcontractor's] claim that its right to payment . . . was absolute and not in any way contingent upon [the general contractor] receiving payment from the owners under the general contract. Our analysis of [the subcontract provisions] convinces us that the language is clear and unambiguous and, thus, there is no need to resort to rules of construction nor extrinsic evidence . . . plain, unambiguous language contained in the contract binds the parties to a condition precedent."	
	Surety case - void under statute	Brown & Kerr Inc. v. St. Paul Fire & Marine Ins. Co., 940 F. Supp. 1245 (N.D. Ill. 1996).	Final Payment . . . [shall be made] when . . . the Contractor has received final payment from the Customer under the Prime Contract."	By statute, the clause cannot create a condition precedent to payment. The clause merely establishes a reasonable time for payment. A surety cannot defeat a subcontractor's claim on a payment bond by asserting the contractor's pay-when-paid clause defense.	
Indiana	Majority	Midland Eng. Co. v. John A. Hall Constr. Co., 398 F. Supp. 981 (N.D. Ind. 1975).	". . . the last payment, which the said contractor shall pay to said subcontractor immediately after . . . final payment received by the contractor."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Iowa	Majority	Grady v. S.E. Gustafson Constr. Co., 251 Iowa 1242, 103 N.W.2d 737 (Iowa 1960).	"Contractor shall pay [] Sub-contractor in full within three (3) days after final acceptance of the project and payment of the final estimate by the Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Kansas	Majority	Shelley Elec., Inc. v. United States Fidelity & Guaranty Co., 1992 U.S.Dist. LEXIS 16978 (D. Kan. 1992).	"Payment shall be made to Subcontractor within ten days after payment has been received by Contractor respecting such work or material, less any applicable percentage thereof retained in accordance with the aforesaid General Contract."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed. (It noted that there was no express condition precedent language or use of terms like "if" or "unless.")	
Kentucky	Majority	A.L. Pickens Co. v. Youngstown Sheet & Tube Co., 650 F.2d 118 (6th Cir. 1981).	'We will pay you a sales commission of 5% on our F.O.B. net realized mill value of our products covered by this agreement. This commission will be paid once each month on sales of our products on the invoices which have been fully paid."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Louisiana	Majority	Southern States Masonry, Inc. v. J.A. Jones Constr. Co., 507 So.2d 198 (La. 1987). C.Bel for Awnings, Inc. v. Blaine-Hays Constr. Co., 532 So.2d 830 (La. Ct. App. 1988).	". . . Contractor shall pay to Subcontractor, upon receipt of payment from the Owner, an amount equal to the value of Subcontractor's complete work, to the extent allowed and paid by Owner on account of Subcontractor's Work. . . . final payment. . . shall be made within forty-five (45) days after the last of the following to occur. . . (c) final payment by Owner to Contractor. . . ." 'The contractor agrees to pay the subcontractor . . . as the work progresses on estimates made and approved by the Contractor and/or Architect and payment received from the owner.' Additionally, by subsequent agreement: '[t]he parties acknowledge that . . . Subcontractor is not entitled to receive payment from [the general contractor] until [the general contractor] receives payment from [the owner].'"	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. (Note: Louisiana courts appear willing to consider extrinsic evidence.) The subsequent agreements remove this case from the factual context of Southern States. The provision creates a condition precedent	

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STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Maryland	Majority	Gilbane Bldg. Co. v. Brisk Waterproofing Co., 86 Md. App. 21, 585 A.2d 248 (Md. Ct. Spec. App. 1991).	"Monthly and final payments will be made to the trade contractor within five (5) days after receipt of payment by the construction manager from the owner. . . It is specifically understood and agreed that the payment to the trade contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments, including retainer from the owner."	Clause was enforced as creating a condition to payment because the parties utilized express condition precedent language to shift the risk of owner non-payment or owner insolvency. (Case preceded statute).	"(b) A provision in an executory contract between a contractor and a subcontractor that is related to construction, alteration, or repair of a building, structure, or improvement and that conditions payment to the subcontractor on receipt by the contractor of payment from the owner or any other third party may not abrogate or waive the right of the subcontractor to: (1) Claim a mechanics' lien; or (2) Sue on a contractor's bond . . . . (c) Any provision of a contract made in violation of this section is void as against the public policy of this State." Maryland Real Property Code, § 9-113. (Applies only to contracts executed after 10/1/94.)
Massachusetts	Majority	A.J. Wolfe Co. v. Baltimore Contractors, Inc., 355 Mass. 361, 244 N.E.2d 717 (Mass. 1969).	"Payments were to be made, '. . . within 10 days after . . . [the owner's] payment of such monthly progress payments . . . [has] been received by . . . .[general contractor]. The balance of the contract price shall be paid . . . within thirty . . . days after full and final payment for the work by . . . [the owners]. . . . '"	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Michigan	Minority	Berkel & Co. Contractors v. Christman Co., 210 Mich. App. 416, 533 N.W.2d 838 (Mich. Ct. App. 1995), appeal denied sub. nom., 450 Mich. 1019, 549 N.W. 2d 562 (Mich. 1996).	"The contract clearly provides that all payments to the subcontractor are to be made only from equivalent payments received by Christman for the work done, 'the receipt of such payments received by the Christman Company being a condition precedent to payments of the subcontractor.'"	Clause enforced as creating a valid condition precedent to payment. Therefore, the contractor was not required to pay the subcontractor unless and until the owner paid the contractor. Court held that, because the pay-when-paid clause did not contain any language limiting the condition precedent and requiring payment in a reasonable amount of time, the court refused to read the limitation into the clause.	

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STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Minnesota	Majority	Mrozik Constr., Inc. v. Lovering Assoc., Inc., 461 N.W.2d 49 (Minn. Ct. App. 1990).	"At all times the Subcontractor shall be paid to the extent that the Contractor has been paid on the Subcontractor's account."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
Mississippi	Majority	LaFayette Steel Erectors, Inc. v. Roy Anderson Corp., 71 F.Supp.2d 582 (D. Miss. 1997), aff'd, 198 F.3d 242 (5th Cir. 1999).	"Final payment will be made within ten days after the GENERAL CONTRACTOR receives final payment from the Owner . . . ."	" . . . [S]uch agreement is in the nature of a 'pay-when-paid' contract allowing the defendant a reasonable amount of time to pay the plaintiff for work done pursuant to the contract."	
Missouri	Majority	Havens Steel Co. v. Randolph Eng. Co., 613 F. Supp. 514 (W.D. Mo. 1985), aff'd, 813 F.2d 186, (8th Cir. 1987).	Payment due ". . . after Supplier/ Subcontractor has satisfied Havens . . . and Owner of its compliance with all the terms and conditions hereof and, if also satisfied, twenty (20) days after Havens has received final payment from the . . . Owner."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment but that intention must be clearly and unambiguously expressed.	Mo. Rev. State § 431.183 (1996): "Any provision in a contract, agreement or understanding that provides that a payment from a contractor to a subcontractor, trade contractor, specialty contractor or supplier is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien pursuant to the provisions of Chapter 429, RS Mo."
		American Drilling Service Co. v. Springfield, 614 S.W.2d 266 (Mo. Ct. App. 1981).	"Upon complete performance of this subcontract by [the subcontractor] . . . [the general contractor] will make final payment to [the subcontractor] of the balance due to [the subcontractor] under this Subcontract within 30 days after full payment for such work and materials has been received by [the general contractor] from [the owner]."	"A clause which provides that the contractor shall pay a subcontractor within a stated number of days after the contractor has received payment from the owner merely fixes the time when payment is due and does not establish a condition precedent to payment."	

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STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Montana	Unclear	Zielanski v. West Won Development, LLC, 2003 ML 1473, 2003 Mont. Dist. LEXIS 2400 (Mont. Dist. Ct. 2003)	" . . . Payment of the approved portion of subcontractor's work order shall be conditioned upon receipt by the contractor of payment from the owner. All payments to the subcontractor are solely made out of the funds actually received by the contractor from the owner, and from no other source. Subcontractor acknowledges that it is sharing, to the extent of payments to be made to the subcontractor, in the risk that the owner may fail to make one or more payments to the contractor for all or a portion of the contract work."	"No statute or public policy prevents the parties from negotiating and entering into a contract which distributes the risk of payment and affects the timing of payment."	Mont. Code Ann, § 28-2-2102 (2005) ("Performance entitles contractor or subcontractor to payment. (1) Performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner. (2) Performance by a subcontractor of a subcontract entitles the subcontractor to payment from the contractor."); Mont. Code. Ann. § 28-2-723 ("Construction contracts requiring lien or bond waiver void. A construction contract may not contain provisions requiring a contractor, subcontractor, or material supplier to waive the right to a construction lien or a right to a claim against a payment bond before the contractor, subcontractor, or material supplier has been paid for the labor, materials, or both labor and materials, furnished by the contractor, subcontractor, or material supplier.")
Nebraska	Majority	D.K. Meyer Corp. v. Bevco, Inc., 206 Neb. 318, 292 N.W.2d 773 (Neb. 1980).	"[T]he Contractor shall not be liable for, nor bound in any respect to the Sub-contractor for the payment to him of his monthly or final estimates of any monies in excess of the amount which the Contractor receives from the Owner for the Subcontractor's work."	Clause not enforced as creating a condition precedent to payment, the clause merely established a reasonable time for payment by the contractor to the subcontractor.	

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STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Nevada	No cases				
New Hampshire	No cases - related case indicates	Holden Eng'g & Surveying v. Pembroke Rd. Realty Trust, 137 N.H. 393, 628 A.2d 260 (N.H. 1993)		"We first note that 'conditions precedent are not favored, and we will not so construe such conditions unless required by the plain language of the agreement. As a rule of thumb, provisions which commence with words such as 'if,' 'on condition that,' 'subject to' and 'provided' create conditions precedent." (citations omitted).	
New Jersey	Majority	Seal Tite Corp. v. Ehret, Inc., 589 F. Supp. 701 (D. N.J. 1984).	"The contract price [ ] shall be payable in the following manner: Ninety (90) percent monthly of work completed, within seven (7) days of receipt of payment by the Owner, or his Agent . . . [t]he balance to be paid within thirty (30) days after acceptance and receipt of final payment by the owner. . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
New Mexico	No cases				
New York	Quasi-Majority	West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co., 87 N.Y.2d 148, 638 N.Y.S.2d 394, 661 N.E.2d 967 (N.Y. 1995).	"It is specifically understood and agreed that the payment to the Trade Contractor is dependent, as a condition precedent, upon the construction manager receiving contract payments including retainer from the owner. . ."	Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
	Void as against public policy	Com-Tec, Inc. v. Bilt-Rite Steel Buck Corp., 1996 U.S. Dist. LEXIS 8310, (S.D.N.Y. 1996) supp. op., 1996 U.S. Dist. LEXIS 11996 (S.D.N.Y. 1996).	"Contractor agrees to pay Subcontractor the amount stated in this subcontract expressly conditioned upon and subject to Contractor's prior receipt of funds from Owner for the work properly applied for, invoiced and performed by Subcontractor . . . The retained percentage and final payment shall not be paid to Subcontractor unless: . . . (3) Contractor has been fully and finally paid by Owner for the work . . . ."	Clause not enforced as creating a condition precedent to payment, because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
North Carolina	Clauses void by Statute (Previous to Statute, Courts followed Majority Rule)				"Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with whom it contracts. Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable." N.C. Gen. Stat. § 22C-2 (1995).
North Dakota	No cases				
Ohio	Majority	Thos. J. Dyer Co. v. Bishop Int'l Eng. Co., 303 F.2d 655 (6th Cir. 1962).	"The total price to be paid to Subcontractor shall be . . . ($115,000.00) . . . no part of which shall be due until five (5) days after Owner shall have paid Contractor therefor, provided however, that not more than . . . (90%) thereof shall be due until thirty-five (35) days after the entire work to be performed and completed under said contract shall have been completed to the satisfaction of Owners, and provided further that Contractor may retain sufficient money to fully pay and discharge any and all liens, stop-notices, attachments, garnishments and executions . . . . "	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Ohio (cont.)	Majority	Power & Pollution Services, Inc. v. Suburban Power Piping Corp., 74 Ohio App.3d 89, 598 N.E.2d 69 (Ohio Ct. App. 1991), mot. overruled, 62 Ohio St. 3d 1441, 579 N.E.2d 214 (Ohio 1991).	"[General contractor] shall not be required to pay any such monthly billing of the subcontractor prior to the date [the general contractor] receives payment of its corresponding monthly billing from the Owner . . .. Within ten (10) days after said final payment by the Owner, [the general contractor] shall pay the subcontractor the balance of the subcontract sum."	"[Although] a promise to pay 'if and when funds are available' was conditional and did not impose any obligation to pay until funds were available . . . the provision in dispute here does not set a condition precedent to the general contractor's duty to pay the subcontractor, but rather constitutes an absolute promise to pay, fixing payment by the owner as a reasonable time for when payment to the subcontractor is to be made. If the parties intended to shift the risk of solvency of the owner to the subcontractor, such intention should have been unambiguously expressed."	
Oklahoma	Majority	Byler v. Great American Ins. Co., 395 F.2d 273 (10th Cir. 1968).	"Contractor . . . will pay to the said Subcontractor, in monthly payments . . . as follows: . . . (100%) of all labor and material which has been placed in position and for which payment has been made by said 'Owner' to said Contractor, . . . except the last payment, which the said Contractor shall pay to said Subcontractor immediately after said materials and labor installed by said Subcontractor have been completed, approved by the said Architect, and final payment received by the Contractor . . .."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment, by the contractor to the subcontractor. (See also, Moore v. Continental Cas. Co., 366 F. Supp. 954 (W.D.Okla. 1973) (following Byler)).	
Oregon	Majority	Mignot v. Park Hill, 237 Ore. 450, 391 P.2d 755 (Or. 1964).	"It is fully understood by and between the parties hereto that Contractor shall not be obligated to pay Subcontractor for any of the work until such time as Contractor has himself received the money from Bate Lumber Co. . . . In consideration of the prompt and faithful performance by Subcontractor . . . Contractor agrees to pay without interest thereon the . . . total value and price of the road construction work. . . ."	The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed. Where, as here, the contract contains a definite and unambiguous promise to pay for labor and materials performed and furnished, or for other services, the pay-when-paid clause will not be enforced.	

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STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Pennsylvania	Majority	United Plate Glass Co. Div. of Chromalloy American Corp. v. Metal Trims Indust., Inc., 106 Pa. Commw. 22, 525 A.2d 468 (Pa. Commw. Ct. 1987).	"Subject to the terms and conditions of this contract, final payment will be made to the subcontractor upon final acceptance of the work by the owner . . . ."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	8 Pa. Stat. § 194 (1996) 73 Pa. Stat. §§ 501-516 (1996) 73 Pa. Stat. § 507 (1996). "A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of payments from the owner. Notwithstanding any other provision of this act, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established [elsewhere in the act] were met by the owner." 73 Pa. Stat. § 507(b) (1996).
Rhode Island	No cases				
South Carolina	Majority	Elk & Jacobs Drywall v. Town Contractors, Inc., 267 S.C. 412, 229 S.E.2d 260 (S.C. 1976).	"Subject to the receipt of corresponding payments by the Contractor covering the work requisitioned by the Subcontractor, and subject to the approval of quantities in place by the Contractor, ninety (90%) percent of the value of the work actually completed by the Subcontractor during said period shall be paid to the Subcontractor . . . . The retainage will be paid sixty (60) days after the later of the following events. . . iv) Full and final payment to the Contractor of all the funds due him for this project; and. . . . Subcontractors have been paid in full."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor.	
South Dakota	No cases				

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STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Tennessee	Majority	Koch v. Constr. Technology, Inc., 924 S.W.2d 68 (Tenn. 1996).	"Partial payments subject to all applicable provisions of the Contract shall be made when and as payments are received by the Contractor. The Subcontractor may be required as a condition precedent to any payment to furnish evidence satisfactory to the Contractor that all payrolls, material bills, and other indebtedness applicable to the work have been paid."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment by the contractor to the subcontractor. The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed.	
Texas	Majority	Wisznia v. Wilcox, 438 S.W.2d 874 (Tex. 1969), (superseded by statute in part on other grounds). Gulf Constr. Co. v. Self, 676 S.W.2d 624 (Tex. Ct. App. 1984).	"The engineer shall be paid in the same proportionate manner as the architect is being paid by the Overlook Development Corporation." "Under no circumstances shall the general contractor be obligated or required to advance or make payments to the sub-contractor until the funds have been advanced or paid by the owner or his representative to the general contractor."	Clause not enforced as creating a condition precedent to payment. The clause merely established a reasonable time for payment. The clause was simply a modification of the time for payment provision preceding it and did not create a condition precedent to payment.	
Utah	Majority	Zions First Nat'l Bank v. Christiansen Bros., Inc., 66 F.3d 1560 (10th Cir. 1995).	[Statutory language:] "a contractor must pay his suppliers 'within 30 consecutive days after receiving construction funds from . . . another contractor . . . or after the last day payment is due under the terms of the billing, whichever is later . . . .'"	"[T]he 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 only as postponing payment for a reasonable time and merely establishing a convenient time for payment."	
Vermont	No cases				

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Virgin Islands	Void as against public policy	Shearman & Assocs., Inc. v. Continental Cas. Co., 33 V.I. 192, 901 F. Supp. 199, (D.V.I. 1995).	"Subcontractor agrees that as a CONDITION PRECEDENT to the contractor's obligation to make any payment to subcontractor under the subcontract agreement, including final payment, the contractor must receive payment therefor from the owner. In the event the contractor does not receive all or any part of the payment from the owner with respect to the subcontractor's work, whether because of a claimed defect or deficiency in the subcontractor's work, or for any other reason, the contractor shall not be liable to the subcontractor with respect to any sums thereto."	A surety cannot defeat a subcontractor's claim on a payment bond, which replaces the mechanic's lien remedy, by asserting the contractor's pay-when-paid clause defense. It is against public policy in light of the Construction Lien Law as a whole.	
Virginia	Quasi-minority	Galloway Corp. v. S.B. Ballard Constr. Co., 250 Va. 493, 464 S.E.2d 349 (Va. 1995).	"'The Contractor shall pay the Subcontractor each progress payment within three working days after the Contractor has received payment from the Owner. . . . Final Payment, constituting the entire unpaid balance of the Subcontract sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Contract Documents, the Architect has issued a Certificate of Payment covering the Subcontractor's Completed Work and the Contractor has received payment from the Owner.'"	In the absence of a clear and unambiguous statement of the parties' intent as to the time of payment, an absolute pay-when-paid defense is available to a general contractor only if it can establish by parol evidence that the parties mutually intended the contract to create such a defense.	
	surety case	Moore Bros. Constr. Co. v. Brown & Root, Inc., Civ. No. 96-1809-A (E.D.Va. 1997).	"Notwithstanding any other provision hereof, payment by Owner to General Contractor is a condition precedent to any obligation of General Contractor to make payment hereunder; General Contractor shall have no obligation to make payment to Subcontractor for any portion of the Sublet Work for which General Contractor has not received payment from the Owner."	Surety could not rely on pay-when-paid clause in its principal's subcontract because the language was not explicitly incorporated into the payment bond.	

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STATE	RULE	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Washington	Majority	Amelco Elec. v. Donald M. Drake Co., 20 Wash. App. 899, 583 P.2d 648 (Wash. Ct. App. 1978), rev. denied, 91 Wash. 2d 1020 (Wash. 1979).	"Contract Cancellation: If the Contract between Owner and Contractor is cancelled in whole or in part through no fault of Contractor this Subcontract may be cancelled by Contractor in whole or in part without liability for damages and Contractor shall be liable to Subcontractor only for the reasonable value of Subcontractor's work completed to the extent that Contractor has received payment for said work from Owner."	Clause did not create a condition precedent to payment, the clause merely established a reasonable time for payment by the contractor to the subcontractor.	
West Virginia	Surety case / Public construc-tion case	Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 614 S.E.2d 680 (W. Va. 2005)	"Contractor [Wellington and Tomko] agrees and acknowledges that payment of the Contract Sum shall be made only form [sic] funds which are due from [WVU] that [Dick] has actually received in hand from [WVU] and designated by [WVU] for disbursement to Contractor. Contractor agrees to look solely to such funds for payment. Contractor understands and agrees that [Dick] shall have no liability or responsibility for any reason whatsoever for any amounts due or claimed to be due to Contractor except to the extent that [Dick] has actually received funds from [WVU] that are due from [WVU] specifically designated for disbursement to Contractor."	". . . we conclude that the public policy of freedom of contract outweighs the public policy found in the public bond statute in cases involving a subcontractor's action on a surety bond. Accordingly, we hold that in a *public* construction project, a pay-if-paid condition precedent clause in a contract between a subcontractor and a contractor does not violate the public policy of this State found in the public bond statute, W.Va. Code § 38-2-39 (2004). Thus, a pay-if-paid clause which prevents a subcontractor from proceeding against a contractor in the absence of the owner's payment to the contractor, also prevents the, subcontractor from proceeding against the contractor's surety under a payment bond acquired by the contractor pursuant to W.Va. Code § 38-2-39 (2004)." (emphasis added).	

STATE-BY-STATE SUMMARY ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS					
STATE	**RULE**	**CASE NAME**	**CONTRACT LANGUAGE**	**HOLDING**	**STATUTES**
Wisconsin	Void by statute.				“The following provisions in contracts for the improvement of land in this state are void: . . . (3) Provisions making a payment to a general contractor from any person who does not have a contractual agreement with the subcontractor or supplier a condition precedent to a general contractor’s payment to a subcontractor or a supplier. This subsection does not prohibit contract provisions that may delay a payment to a subcontractor until the contractor receives payment from any person who does not have a contractual agreement with the subcontractor or supplier.” Wis. Stat. § 779.135 (2006).
Wyoming	No cases				

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