

Workshop W5

Wednesday, October 29, 9:00 a.m.–noon

TIPS AND TACTICS FOR MANAGING CONTRACT RISKS

Presented by



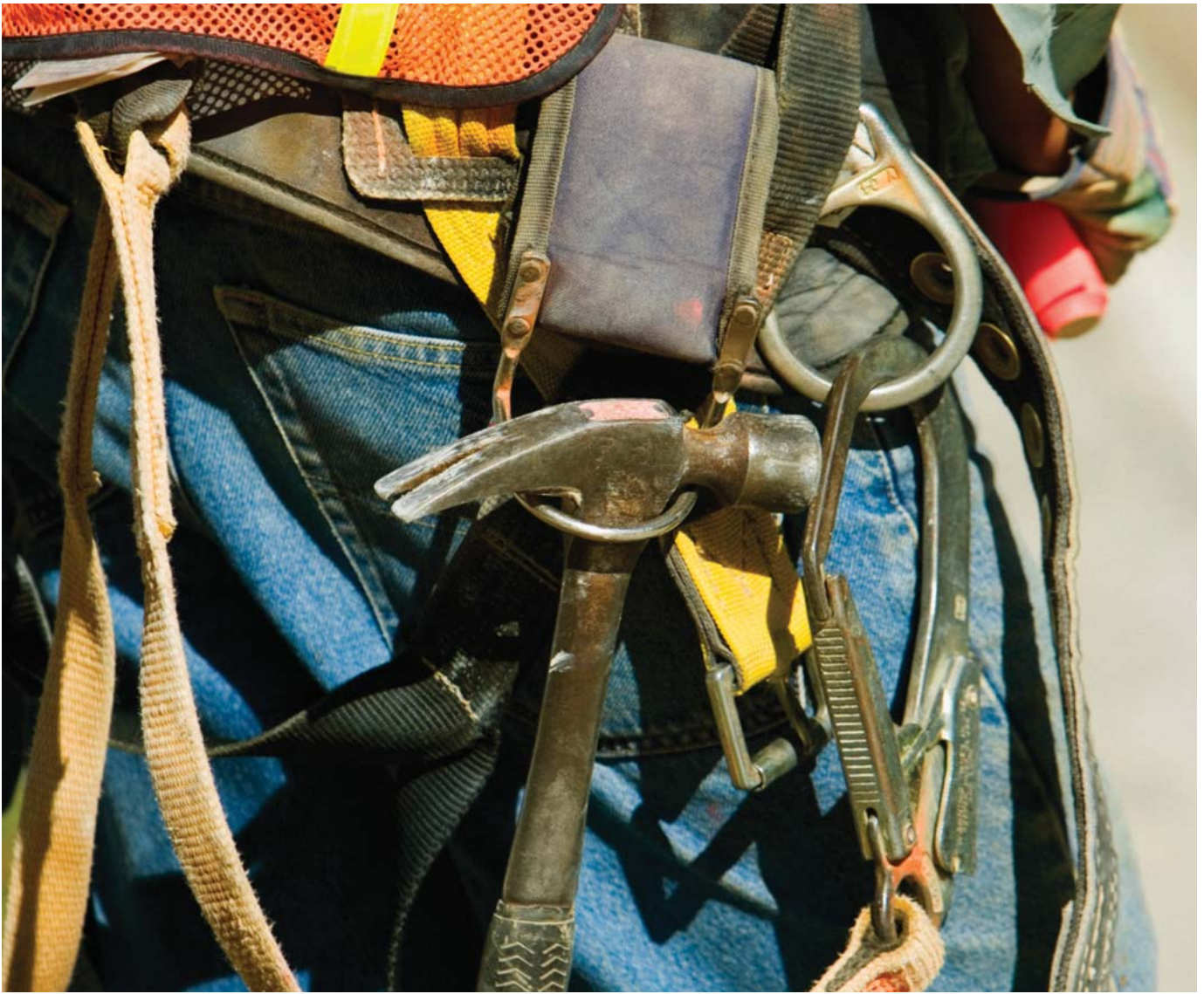
Gerald I. Katz
Senior Partner
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Frank Keres
President
Construction Risk Associates, Inc.

Many of the most critical risks for contractors flow through the construction contract. Learning how to analyze and manage these risks is critical for a contractor's long-term success and profitability. This workshop brings together two popular speakers to provide a fast-paced discussion of proven tips for managing and mitigating contract risks.

- Provides suggestions for ensuring enforceable indemnity provisions.
- Identifies troublesome contract provisions and offers recommendations for modifying them.
- Provides a practical list of strategies for a successful contract negotiation.



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

Mr. Katz is copresenting Workshop W5, "Tips and Tactics for Managing Contract Risks," on Wednesday morning. 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 contract preparation and negotiation and in complex construction litigation.

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.

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 design-build procurement, construction risk management, negotiating construction contracts, construction claims and claims prevention, design liability, and construction insurance issues.

Mr. Katz has spoken and presented seminars for such construction trade associations as the Institute of Surveyors of Trinidad & Tobago; Urban Development Company of Trinidad & Tobago; Petroleum Company of Trinidad & Tobago; St. Lucia Ministry of Communication, Works, Transport and Public Utilities, Caribbean Electric Utilities Services Corporation; Construction Specifications Institute; Associated Builders and Contractors; National Electrical Contractors Association; National Utility Contractors Association; American Subcontractors Association; 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; Institute of Bermuda Architects; American Contractors Insurance Group; Barbados Association of Quantity Surveyors; Korean Contract Management Association; and China National Petroleum Corporation.

Mr. Katz also is a speaker in the annual Construction Risk Conference presented by International Risk Management Institute, where he has spoken on contractual risk transfer, surety bonds, completed operations coverage, and other construction risk topics. In addition, in association with Martyn Bould of Cayman, and through their alliance, Caribbean Construction Advisory Services, Mr. Katz has an active practice in the Caribbean.

Frank Keres
President
Construction Risk Associates, Inc.

Mr. Keres is copresenting Workshop W5, "Tips and Tactics for Managing Contract Risks," on Wednesday morning. He is principal of Construction Risk Associates, Inc., with a main office near Chicago. He works with contractors and brokers, insurers, and owners who deal with contractors. He works on specific assignments, general consulting, and the majority of his work is as an outsourced risk manager. Before forming Construction Risk Associates, Mr. Keres was risk manager for Safway Services, one of the nation's largest subcontractors with more than 70 locations. Mr. Keres had also worked within Aon Risk Service's Construction Group, working with contractors on developing risk programs and with owners of larger construction projects. He was one of the earliest construction risk managers when he worked for James McHugh Construction Co. in Chicago.

Mr. Keres believes in the full integration of insurance, claims management, loss control, and operations to have a comprehensive and productive risk management program. He utilizes his legal training and background, a thorough knowledge of coverage, a realistic approach to claims, and his safety experiences to provide a unique focus to risk management. Mr. Keres is well recognized as a leader in the area of construction risk. Among the groups to whom he has made presentations are the National Safety Council, International Conference on Construction Safety and Health, National Inland Marine Underwriter's, Construction Safety Conference.

Mr. Keres holds a B.A. from the University of Notre Dame and a J.D. from John Marshall Law School.

TIPS AND TACTICS FOR MANAGING CONTRACT RISKS

Gerald I. Katz
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Frank Keres
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Contract Basics

Contracts for “CONTRACTors”

- The very name of the business we are in, and deal with, is defined in terms of a contract. Everything is defined, controlled by, mandated, prohibited, etc., by a contract. It is what we do and what we are.
- It is critical that we understand the basics of contracts as well as some of the “rules” of contracts. It is what we do with contracts and how we act as a result of a contract and how we enforce a contract that allows the process of construction to begin, continue, and end.
- Knowing HOW to contract is just as important as knowing how to build.

Contracts and Risks

- Contract Performance Mandate—“CPM”. The word “contract” is also a verb. It requires actions and reactions. All contracts require each party to DO things. The contract is the document that requires action. Therefore, we can look at it as defining the “critical path” of all the activities of the particular project.
- The construction contract is important to not only Owners and the Contractors but to all who deal with Owners and Contractors. It is important to these “partners” that they also understand the contract. Every contract for construction requires some actions by others, by the partners of the Owner and Contractor and Subcontractor. These partners can be insurance brokers and carriers, sureties, suppliers, banks, etc. These partners are active

participants of every contract. They, too, have to know the “CPM” and the risks. They are instrumental in making the contract live.

- Contracts are ALIVE! The construction contract is somewhat unique in that it is usually made up of several documents: Bids, Contract, General Conditions, Supplementary Plans and Specs, Change Orders, etc. Also, it has its own “CPM” to define what to do and when. This all combines to make the construction contract a “living thing.” Thus, it is the reference point for action. It also requires constant re-examination.
- Contracts allocate risks. It will deal with payment, site conditions, who pays for what, what each party is responsible to do, etc. It defines the risks each party will accept and perform. It will define what will be the risk of failure and what will happen if there is failure.
- Contractual Interplay. There are other contracts that depend on what the construction contract mandates. Obviously, Subcontracts are dependent and are really part of the “construction contract.” There are other contracts too.... There are lien waivers, warranties, etc., that are part of the process of construction. Yet, there are also surety bonds that guarantee the contract, there are leases that are dependent on construction, there are “build to suit” contracts between an Owner and the purchaser/tenant. Numerous types of insurance policies depend on contractual terms and allow the various parties to accept and perform contract risks.

TIPS

- Reading it twice is nice.
- It’s only words. Do not be afraid of contracts.
- Make sure that you have contract-knowledgeable people. Estimators, project managers, and superintendents should all understand the contract and contract process.
- Don’t wait to negotiate. Many times we put off talking about those difficult terms/deal killers until it is too late. Get those out of the way.

Proposal Terms

Promissory Estoppel

Promissory estoppel is a legal concept whereby courts enforce a promise even though it was made without consideration in order to prevent the injustice of a promisee

detrimentally relying on a promisor's promise that is later revoked. Within the context of construction bidding, promissory estoppel is applied by the courts when a general contractor relies upon a subcontractor's low bid to prepare its prime bid but has not yet formally accepted the subcontractor's offer. More often than not the subcontractor's bid was accepted because it was the lowest. Therefore, if the subcontractor subsequently withdraws its offer prior to formal acceptance the general contractor will be faced with an unexpected increase in costs for the project. In addressing the question of whether a subcontractor shall be liable to the general contractor for its loss, courts have adopted two methods of analysis with contradictory results. The minority approach is based on traditional notions of contract law and requires a formal acceptance of an offer to constitute a binding contract. The majority approach permits recovery against a subcontractor for its withdrawal of a bid only when the general contractor's reliance on the bid was foreseeable, reasonable, and justifiable. Additionally, substantial determinant to the general contractor must result if the subcontractor's bid is not enforced.

TIPS:

- Know the law in your state regarding the application of promissory estoppel.
- To receive the protections of promissory estoppel the general contractor must accept the precise terms of a subcontractor's bid. Any variance in acceptance by the general contractor may be construed as a counteroffer, thus a rejection of the bid.
- Formal acceptance of a subcontractor's bid must occur within a reasonable amount of time after the prime contract has been awarded.
- If a subcontractor's bid is exceptionally low a general contractor should notify the subcontractor of that fact; otherwise, it risks defeating the reasonable reliance requirement of promissory estoppel.
- If a subcontractor's bid was not put into writing the Statute of Frauds may prevent the general contractor from seeking judicial application of promissory estoppel.

Letters of Intent

The enforceability of precontractual agreements has not met with great favor in the courts. However, there is a growing trend of permitting precontractual agreements to bind parties to an actual contract despite the presence of open terms left in the precontract agreement. A less drastic alternative is for the court to find a duty of the

parties to continue negotiating in good faith toward a final contract. Finding a precontractual agreement, such as a letter of intent, to possess the same effectiveness as a contract requires the parties to have a clear understanding of the terms of an agreement and an intention to be bound by those terms. If a precontractual agreement references a future contract to be signed, a court will be less likely to find the requisite present intent to be bound by the precontractual agreement.

TIPS:

- Most insurance policies/endorsements relating to Additional Insured and/or indemnity require a “written agreement before the occurrence that gives rise to the claim.” Therefore, strongly consider having insurance and indemnity requirements in a Letter of Intent.
- Keep all documentation and correspondence with the other party, as courts may rely on extrinsic evidence to determine the parties’ intent to be bound.
- Make sure that the letter of intent possesses the essential elements with respect to subject matter required for a contract.
- Express clearly that the precontractual agreement is to have a binding effect upon the parties.
- Rather than attempt to have the entire pre-contractual agreement serve as a binding contract, terms may be inserted into the pre-contractual agreement imposing a duty to continue negotiating in good faith toward a final contract.

Purchase Orders

In contracts for the sale of goods, the traditional contract rule that the terms of the offer and acceptance must be “mirror images” of each other in order to form a binding contract has been abandoned by the Uniform Commercial Code (the “U.C.C.”). The U.C.C. favors a more liberal approach in determining whether the parties to a sales contract have formed a binding agreement. According to the U.C.C., §2-207 (1), a “definite and seasonable expression of acceptance” is potentially binding, despite the fact that it contains additional or different terms. Courts interpreting such scenarios have come to varying conclusions when the terms in the acceptance are different from those in the offer. It is quite possible that a court may find that the different terms in both the buyers and sellers forms are “knocked out” and are supplanted by U.C.C. gap-fillers. Alternatively, a court could find that any different terms contained in an acceptance “fall out” and the terms of the initial offer control, or possibly that different terms are saved similar to additional terms under §2-207(2). Ascertaining whether a term is an additional

or different term is a difficult task, the importance of which should not be understated. Additional terms are treated as proposals necessitating further communication by the parties, unless both parties are merchants in which case they become part of the contract provided the additional terms do not fall into one of the categories of exceptions carved out by §2-207 (2)(a)-(c). Lastly, the U.C.C., §2-207(3), permits the formation of a contract based on the conduct of the parties, rather than the usual formation via the parties' writings.

TIPS:

- Whether the offeror is the buyer or seller it possesses the power to control the offer by stipulating the precise manner of acceptance. To prevent the inclusion of an offeree's additional or different terms the offeror may consider the following methods:
 - State that acceptance can only be by a writing that explicitly accepts all of the offeror's terms and adds no others.
 - Require the offeree to sign and return the offeror's form without any additions or changes.
- Take the time to negotiate over all terms prior to sending a purchase order and have that order include all those prenegotiated terms.
- If an acknowledgement form contains additional terms unacceptable to a buyer the buyer should provide prompt written notice to the seller of the objection.
- A seller's acceptance that includes additional or different terms and makes acceptance expressly conditional on the buyer's assent to those terms is not a valid acceptance.
- With P.O.s for materials verify that whatever Builders Risk coverage that is in place provides coverage: In transit? Sub-limits adequate? (FOB?)
- Use of Purchase Order for "furnish and install": Many P.O.s do not contain insurance requirements or indemnity agreements. Is the time saved in just using a P.O. worth the risk of not having enforceable insurance/indemnity provisions?

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:

- Flow down of insurance/indemnity language? Some states say yes, some say no. In most cases, depends on the requirement of “clean and conspicuous.”
- Often, flow-down clauses are interpreted to apply only to the technical specifications of the contract documents that 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.

Specialized Contract Terms

Condition Precedent Payment 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 10 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 adviser 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.

Site Inspection

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.
- Along with a site inspection, determine and understand local ordinances on subsidence and/or notice to adjoining landowners.

Differing Site Conditions

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?
- 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.

Delay and Default

No Damages for Delay

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.
 - 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.

Liquidated Damages

TIPS:

- Utilize a liquidated damages clause if actual delay damages cannot be ascertained easily.
- Ensure that the liquidated damage amount is a reasonable amount and attempts to approximate the actual damages that would be incurred; damage amounts that 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?

Force Majeure

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 that will excuse performance, such that the parties understand what does and does not constitute a force majeure event.
- Take special notice of provisions that 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 noncomplying party could ultimately be held in default as a result thereof.

Indemnity

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.¹

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.

¹© AGC Document No. 640, Standard Form Construction Subcontract, 1994.

- Beware of the arbitration of indemnity claims.
- Be sure that the indemnity provisions in your contracts are “reciprocal.”
- Understand the differences between a duty to indemnify and a duty to defend.

Additional Insured

Additional Insured Coverage

There are many reasons for an entity to desire additional insured status. Many basically think it solely provides a defense. There are other reasons to seek this status. The reasons give greater weight to the coverage.

- The Additional Insured is basically covered by the Named Insured’s policy, subject to the terms and conditions of the policy and endorsements. It makes available a liability policy to that Additional Insured and thereby reduces the exposure to the Additional Insured’s own policies. The coverage is directly from the Named Insured’s policy and the Additional Insured has direct rights as to that policy.
- It is independent of the indemnity provision of the contract. If the indemnity provision should fail, there could be coverage as an Additional Insured. Many consider this a “belt and suspenders” approach to contractual risk transfer. As the coverage is not based on the terms of any contractual term, then unenforceability of contract terms will not affect Additional Insured coverage.
- Most insurance policies today require that there be a written agreement requiring additional insured status. Remember though that the coverage is not determined by the terms of the contract but by the terms of the policy and endorsements.
- Among some of the reasons to seek Additional Insured status are
 - avoids waiver of subrogation by the Additional Insured’s own policy
 - provides coverage for Coverage B personal injury/advertising but the claim must be based on the Named Insured’s business or advertising
- As Additional Insured coverage is not defined nor limited by the contractual language of the construction contract, it is generally considered to be broader.

Scope of Coverage

- The coverage provided to the Named Insured will be made available to the Additional Insured, subject to terms of the policy and endorsements. Example: The indemnity provision is of an “intermediate form.” Thus, the indemnified party cannot get coverage for its sole negligence. Yet, the Named Insured’s policy may not restrict coverage. Thus, the Indemnified Party, who is most likely an Additional Insured, can seek coverage as an Additional Insured under the Named Insured’s policy.
- Vicarious Liability. Many believe that additional insured coverage by its nature only applies to the derivative liability of the Additional Insured. In other words, that the liability must derive or arise out of the Named Insured’s acts or omissions. This would be a limitation of coverage. The language of the policy/endorsements has to be clear about the applicability of coverage and whether it is dependent on some act of the Named Insured.
- What is an “Additional Named Insured”? Not clear, causes confusion, ever seen this in a Policy?
- DEFENSE is the one coverage that is most sought by and provided to an Additional Insured.

Policy and Endorsement Language

As it is the language of the policy itself that can provide/limit coverage, examining various terms and endorsements will provide the best insight. In fact, the insurance policy of the Named Insured is a Contract that is part of the construction process. It is not a Contract Document but almost just as important.

- “Additional Insured Status when Scheduled” endorsement provides coverage to an entity when the policy “schedules” that entity. If you are the additional insured, get the actual endorsement that schedules you.
- “Broad Form.” A type of endorsement that is becoming less used. It made any entity that was required, not necessarily in writing, to be an additional insured.
- “When required by Contract.” This is becoming the standard type of endorsement. There must be a requirement in a written contract “or agreement” for the Additional Insured coverage to extend to the Additional Insured. Note that it says an “agreement.” It does not necessarily have to be a contract. Agreement is less restrictive, may not require consideration, mutual acceptance, etc.

- “When required by a contract executed before there is an occurrence which is the basis for claim of coverage.” Get it in writing!!! Go back to the discussion of Letters of Intent, etc.
- “Ongoing Operations.” Thus, there is no completed operations coverage. Does NOT mean that the Named Insured does not have this coverage, but only that it is not extended to the Additional Insured. Also, what actions of the Named Insured constitute “ongoing operations”? Courts have held that there need not be a causal connection but merely some sort of nexus. Mere presence of the Named Insured at the site will provide the nexus to initiate coverage.
- “Your Work” this is interpreted to include completed operations extended to the additional insured.
- Limits Language. The greater of what the policy contains OR what the contract requires.
- Many newer endorsements say:

“with respect to liability for bodily injury, property damage, or personal and advertising injury caused in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

In the performance of your ongoing operations for the additional insured....”

This language does not say “your work” but requires acts or omission by the Named Insured. Does this mean that there must be negligence by the Named Insured to provide coverage to the Additional Insured?

- Primary. The coverage provided by the Named Insured’s policy will be primary to the Additional Insured’s coverage. There is no need for the word “Noncontributory.”
- As with Contractual Coverage, many policies have language dealing with notice, appointment of counsel, cooperation, etc.

OCP v. Additional Insured

- An OCP policy provides the Named Insured coverage for the specific project and for only the length of the project.

- An OCP covers claims alleging improper supervision of the contractor by the OCP policy's Named Insured. The policy covers the vicarious liability arising from the activities of independent contractors. It does not provide indemnity for its own act of negligence,
- Some believe that an OCP is necessary when they cannot get indemnity coverage or full additional insured status. It does provide a separate limit, can provide a defense, and is primary.
- The advantages have to be specifically examined in light of the status of indemnity in the jurisdiction and the terms of the particular contract. A "perfect" indemnity would not require the "belts, suspenders, AND an OCP" approach of many Owners, Contractors, Brokers, and Carriers.

TIPS:

- In reality you have to get the endorsements and any language that restricts coverage as to Additional Insured if you are the Additional Insured.
- In every tender of a claim, tender under both the Contractual Coverage and Additional Insured coverage.

Contract Performance Mandates

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.²

TIPS:

- Changes and change orders present a number of potential legal problems that should be considered and addressed if possible in the contract review and

²© AIA Document A201, General Conditions of the Contract for Construction, 1987.

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 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.
 - 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 that makes the work subject to the terms of your contract.

Resolution of Claims and Termination

Resolution of Claims and Disputes

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 that are pass-thrus and claims that are not.
- Be aware of state laws that 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.

Contractual Risk Strategies

Specific Contract Coverage Provisions

- Remember that all contract requirements have a cost. This is especially true as to insurance. Some insurance requirements may have a cost to the one asked to provide, which will have to be passed on directly or indirectly.

- Just because you ask for it does not mean it is available. The “completed operations coverage” for additional insured was an example. A suggestion: if you can not get a type of coverage, assume that others cannot also. Attempts to transfer that risk are fruitless and lead to disputes.
- Employer’s Liability. Can be the coverage for the typical third-party-over action. Do not consider this as unimportant coverage. Make sure the limits are acceptable. Should seek to have your own coverage limits be satisfactory.
- In the workers compensation coverage, require an Alternate Employer Endorsement that will address the “borrowed servant” situation.
- Per-Project Aggregate. This coverage should be requested and not assumed as provided. Additionally, many policies will only grant the coverage when required by a written contract. If you utilize a “Master Agreement” make sure that the requirement is applicable to each project under the agreement. Get the endorsement.
- “Horizontal Exhaustion” Language. A new case that reiterates an often unknown application of limits. Before ANY umbrella pays, all policies applicable to the claim must pay first. For example, in the typical third-party-over action, the employing subcontractor’s GL policy pays, then the General Contractor’s GL policy pays, then the employing subcontractor’s umbrella pays. Anticipate language to deal with this application.
- Waiver of Subrogation. Ask for it on all lines of coverage. Again, insurers are adding language that this only applies if it is requested in a written contract that is entered into before the applicable loss. Get the endorsement, if requested.
- XCU Exclusion Deleted. We still see this. It was language required under the comprehensive form, not the commercial form (so also get rid of requests for “comprehensive”).
- Professional Coverage. In every contract for construction have a provision that requires professional coverage if the work involves any professional activity. Performance specifications are becoming more prevalent.
- Do not reference the indemnity provision with the insurance provision. Do not use language similar that requires coverage to “cover the indemnity provision.” You risk losing the coverage if the indemnity is invalid. In other word, that attempt to link goes both ways.
- Request copies of all endorsements that detail any self-insured retentions. Get at least the amount of any deductible (a Certificate of Insurance is adequate

- for the deductible amount). Self-insurance should be treated like a separate policy when tendering. Tender to the Named Insured itself under the SIR.
- Separation of Insureds is typically standard in a CGL policy. You have to decide if you think that requirement is necessary if you know of some lower-tier insurers who eliminate the coverage.
 - Limits of Liability. This is often subject to local insurance markets and the region. Yet, these common “factors” should really not deter requesting safe limits. Do not base your limits on size of contract but apply to the risk. (The \$10,000 window washer contract.) You can have various levels to request depending on the risk.
 - Language that allows you to buy the required insurance. You have the right but not the obligation. Include language that you can charge the party for getting that coverage.
 - Insert language that says failure to get proof of coverage is not a waiver of the requirement.
 - Every contract should be explicit in saying that any failure to provide the coverage required constitutes a material breach.
 - The insurance provided shall in no way act as a limit on the coverage afforded nor shall it act as a limit on the obligations. In other words, the insurance is not a limit to obligations.
 - There should be no limitation of liability endorsements for contractual coverage
 - There should be no limitations of liability for additional insured coverage.
 - Railroad protective if work is within 50 feet of a railroad.
 - Environmental coverage if that risk is present.
 - Products liability coverage for materials. Remember many contracts are for “furnish and install.” If buying directly from a manufacturer, request a Vendors Endorsement. (And yes, get a copy.)
 - Safety Provisions. We often generalize safety provisions in construction contracts. This is where one can require and implement safe practices via

contractual requirements. Consider specificity. **Safety is the first step in risk management practices.**

- Builders Risk. Be specific as to “in transit” and “off-site” coverage. Be specific as to what is covered. The words “all risk” are in quotes for a reason.

Umbrella Coverage

- Require that the umbrella has the same coverage as the underlying policies. More and more often Umbrellas are leaky in that they do not afford the same coverage as the underlying GL, EL, Auto, etc. Common exclusions are per-project aggregate, any design coverage, incidental environmental coverage. Many of these coverage restrictions are in the policy itself and not an endorsement. You have to become familiar with umbrella forms.

Wrap-Ups

- If you are to be enrolled in a wrap-up request the following:
 - the workers compensation policy itself
 - at a minimum, the Declarations page of the GL
 - the limits and how they are applied: annually, life of the project, etc.
 - details of the completed operations coverage
 - if it is a rolling wrap-up, what are the limits and is there really a per-project aggregate?
 - copies of all loss runs quarterly as they apply to you

Certificates of Insurance

- Read the upper right-hand corner. The Certificate provides no coverage. All coverage is in the policy itself.
- The Certificate does provide valuable “Identification Information”:
 - names of carriers
 - the name of the coverage, if it is occurrence or claims made

- the dates of expiration
- the limits
- Yes, do eliminate the endeavor to language at the bottom right-hand corner.
- Does the statement on a certificate provide Additional Insured status? There are a few decisions that say yes, but not what the extent of that coverage is. Still the language of the policy will prevail.

TIP:

ONE CANNOT ELIMINATE ALL RISKS; BE A RISK MANAGER, NOT A RISK ELIMINATOR.

Exhibit 1

Case Examples

Tips and Tactics for Managing Contract Risks

Promissory Estoppel

CASE EXAMPLES

- A general contractor for the construction of a school formulated its prime bid based on the bid for paving work submitted by a subcontractor. After the contract was awarded to the general contractor the subcontractor notified the general contractor that it had made an error in calculating the cost to complete the paving work and could not perform for the bid price. The subcontractor argued in court that no enforceable contract existed, because it had revoked its offer prior to the general contractor's formal acceptance. The court reasoned that the general contractor's change in position in reliance on the bid prevented the subcontractor from revoking such offer. The court awarded the general contractor damages in the amount of the difference between the subcontractor's bid and the actual cost to complete the paving work. **See Drennan v. Star Paving Co.**, 333 P.2d 757 (Cal. 1958).
- General contractor, Allen M. Campbell Co., sued subcontractor, Virginia Metal Industries "Virginia Metal", for that damages that resulted when Virginia Metal refused to perform in accordance with its bid to supply all the doors and frames in a housing construction project at a stipulated price. Virginia Metal argued that promissory estoppel could not apply in this instance because the offer was for the sale of goods, and in the alternative that the Statute of Frauds barred its oral offer from being enforceable. The Fourth Circuit Court of Appeals applying North Carolina law ruled in favor of the general contractor. The court held that North Carolina's doctrine of promissory estoppel permitted recovery in reliance of an offer for the sale of goods, and in the appropriate circumstance could withstand a Statute of Frauds defense. **See Allen M. Campbell Co., General Contractors v. Virginia Metal Industries** 708 F.2d 930 (4th Cir. 1983).

- A rigid application of common law principles of contract formation prevented a general contractor from collecting damages from a subcontractor whose bid was used to prepare the prime bid, but was later revoked. The subcontractor indicated that it would be receiving its AAA license prior to commencement of the project. However, due to several deferrals in issuance of the license from the state licensing office the subcontractor revoked its bid. Here the court held that without more merely using a subcontractor's bid in the prime bid does not constitute a valid acceptance. **See Mitchell v. Siquerios**, 582 P.2d 1074 (Ida. 1978).

Letters of Intent

CASE EXAMPLES

- A subcontractor filed a breach of contract claim against a general contractor based solely on the letter of intent the parties had executed. An Illinois Circuit Court dismissed the action, but on appeal the Illinois Supreme Court held that although letters of intent were enforceable, such letters were not necessarily enforceable, unless the parties intended them to be contractually binding. The court reasoned that although the letter contained detailed terms of the agreement, the letter referred to the execution of a formal agreement, thus indicating that the intent was not to be bound by the letter. The court did, however, on remand allow the submission of extrinsic evidence to prove intent. **See Quake Construction, Inc., v. American Airlines, Inc., et al**, 565 N.E.2d 990 (Ill. 1990).

Purchase Orders

CASE EXAMPLES

- A purchaser set out a specific method for acceptance in its purchaser order for specially manufactured goods. When those goods never materialized the purchaser sued the seller for breach of contract. The terms of the purchaser's purchase order required the seller to sign the purchase order for there to exist a binding agreement between the parties. However, since the seller never signed such purchase order the court ruled against the purchaser's breach of contract claim, due to its failure to prove the existence of a binding agreement. The purchaser as master of the offer found out the hard way that its terms

dictating acceptance of an offer are controlling. **See Smith v. Boise Kenworth Sales, Inc.**, 625 P.2 417 (Idaho 1981).

- The United States Courts of Appeals for the First Circuit found that a seller's additional terms to the purchase order were not incorporated into the contract, despite the buyer's failure to object to such terms after their receipt. In rendering its decision the court relied heavily upon the U.C.C. §2-207, comment 6, which states "[i]f no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict[,] each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result[,] the requirement that there be notice of objection which is found in subsection (2) [of § 2-207] is satisfied and the conflicting terms do not become part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act." **See Ionics, Inc. v. Elmwood Sensors**, 110 F.3d 184 (1st Cir., 1997).
- Applying what is known as the "knock-out rule" the U.S. Court of Appeals for the Tenth Circuit held that a manufacturer's offer limiting warranty protections for its machines for one year was not applicable. This was due to the offeree's acceptance that explicitly reserved all warranty protections available for such purchase of goods. As a result, the court found that the conflicting terms cancelled each other out, and were replaced with U.C.C. gap-filler terms. **See Daitom, Inc. v. Pennwalt Corp.**, 741 F.2d 1569 (10th Cir. 1984).

Flow-Down Clauses

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).

Condition Precedent Payment Clauses

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).

Site Inspection

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).

Differing Site Conditions

CASE EXAMPLES

- 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).

Delay and Default

No Damages for Delay

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)

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)

Force Majeure

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).

Indemnity

Indemnification

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).

Contract Performance Mandates

Changes

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).

Resolution of Claims and Termination

Resolution of Claims and Disputes

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).

Exhibit 2

Agreement for Site Access

(General Contractor) and (Subcontractor) are in the process of negotiating a Subcontract for the (Name of Project). In order to allow Subcontractor to get access to the site to perform work prior to final execution of said Subcontract, Subcontractor hereby agrees as follows:

- 1) This is the only Agreement that applies to this work until such time as a Subcontract is fully executed.
- 2) That Subcontractor shall fully comply with any and all Safety provisions of (General Contractor) and of any other applicable provision, such as an Owner's Safety Rules, etc.
- 3) That the consideration for this Agreement is being allowed access to the site.
- 4) That if not Subcontract is executed the terms of this Agreement and the attached Insurance and Indemnity Agreement shall be in full force and effect until agreed to in writing by both (General Contractor) and Subcontractor.
- 5) That there is no promise by (General Contractor) to enter into any Subcontract with Subcontractor.
- 6) Subcontractor agrees that site access is contingent upon receipt of all the documents required by the attached Exhibit
- 7) SUBCONTRACTOR FULLY AGREES TO ALL THE TERMS AND PROVISIONS OF THE ATTACHED INSURANCE AND INDEMNITY EXHIBIT.

Dated: _____

(General Contractor)

By: (Subcontractor)

Title

Title

Exhibit 3

USE OF EQUIPMENT AGREEMENT

THIS AGREEMENT, made between _____, hereinafter called First Party, and _____, hereinafter called Second Party,

WHEREAS, First Party erected one or more scaffolds, cranes or hoists and has various items of equipment such as trucks, mobile cranes, generators etc. (hereinafter "Equipment") for its own use and convenience in connection with the work performed or to be performed by it on the _____ building located at _____; and

WHEREAS, _____, desires to use First Party's equipment in the performance of its work at said location;

NOW, THEREFORE, First Party hereby consents to the use of such equipment by Second Party at the convenience of First Party, subject to and on the following terms and conditions:

1. The Second Party shall pay to the First Party the sum of \$_____ for the use of _____. Payment shall be due within five (5) working days of invoice and if payment is not made, all rights of the Second Party to use the equipment shall cease.

2. Second Party agrees to defend, indemnify and save First Party harmless against any and all loss, damage or expense sustained by First Party at common law or by reason of any statute arising out of any personal injuries or property loss of the parties hereto, or their employees or of any other person, firm or corporation because of the existence, maintenance or use of said equipment by Second Party.

3. Second Party further agrees to maintain insurance acceptable to First Party covering the Second Party's liability under the Workmen's Compensation Act, and to maintain public liability insurance covering Second Party's public liability, including the contract liability assured by Second Party in the preceding paragraph in connection with the operations of Second Party at the premises described above, and agrees to furnish First Party certificates of insurance showing such coverage naming First Party as Additional Insured.

4. First Party does not guarantee the equipment or suitability of any equipment for the purpose of Second Party nor does First Party agree to leave in place or to put in place any particular equipment at any particular time for Second Party's use.

5. Second Party accepts the equipment "as is" and shall return them in as good condition as received.

6. Second Party shall assume responsibility for any and all injuries to any persons, including operators of any said equipment, while said persons are working under the direction of Second Party. At the very minimum these persons will be considered "loaned servants" of Second Party.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate by their duly authorized representatives this _____ day of _____, 20_____.

NAME OF COMPANY: _____
BY: _____

NAME OF COMPANY: _____
BY: _____

Workshop WS

Exhibit 4

Subcontractor Insurance Questionnaire

In the mutual interest of dealing with changes and potential changes in Insurance and Risk Issues, we are asking you to please take the time and respond to this as expeditiously as possible. Your Broker will probably have to provide some of this information. We appreciate your and your insurance Broker's cooperation in this effort. Thank you.

1. Insurance Coverage: Please attach a Sample Certificate of Insurance showing ALL coverage (Commercial General Liability, Worker's Compensation, Auto, Umbrella/ Excess and Property/Inland) the Certificate should show all limits.
2. Insurance Broker: Please provide the name of your Insurance Broker for all lines of coverage, the individual who handles your Account, his/her phone number and e-mail.
3. Deductible/ Self Insured Retention: Please provide for each line of coverage any deductibles or self insured retentions that you have. For each line of coverage, please provide of copy of the endorsement detailing any Deductible/SIR.
4. Please provide the name of any Third Party Administrator you may have for claims on any line of coverage.
5. Worker's Compensation:
 - a. Please provide the Declarations page (premiums and other financial information can be deleted) showing which states have coverage or if there is an All State's Endorsement.
6. General Liability:
 - a. Please relate if your coverage is on an ISO Form and what year. If not on an ISO form, please have Broker relate if it is on your Carrier's standard form.
 - b. Please provide a copy of your Additional Insured Endorsement
 - c. Please provide a copy of any Policy language/Endorsement that describes/limits coverage for pollution
 - d. Please provide a copy of any Policy language/Endorsement that describes/limits coverage for mold
 - e. Please provide a copy of any Policy language/Endorsement that describes or limits coverage for any design or engineering work you do for yourself and others.
 - f. Please provide a copy of any Policy language/Endorsement that describes or limits coverage for any contract or contract term; including indemnity.
 - g. Please provide a copy of any Policy language/Endorsement that defines your Completed Operations Coverage, including any time limitations.
 - h. Please relate if there is Independent Contractors coverage.
 - i. Please provide a copy of your Waiver of Subrogation Endorsement

- j. Please provide a copy of any Policy language/Endorsement that allows for your policy to be Primary and Non-Contributory
 - k. Please provide a copy of any Policy language/Endorsement that defines or limits “sharing”, co-insurance, or any other relationship with other coverage.
7. Property/Inland Marine:
- a. Please provide any Policy language/Endorsement that defines or limits coverage for property on site.
 - b. Please relate the valuation for any loss. (Replacement, co-insurance, stated value, etc)
8. Sub-Subcontractor/Suppliers:
- i. If you use Sub-Subcontractors, please provide a copy of your Standard Subcontract including any Insurance Requirements.
 - j. Please provide a copy of any Purchase Orders, including Insurance Requirements, you use for material suppliers.
 - k. Please relate any internal procedures utilized to review Subcontractor/Material Suppliers insurance.

9. Renewal:

We fully understand that it is realistically impossible to know what your renewal will have in areas of pricing etc. You may even be changing Carriers, as the number of Carriers willing to write Construction Risks is becoming restricted. Yet, one of the reasons we are undertaking this Questionnaire is that there HAVE been and WILL BE changes in the types of coverage provided by Carriers. We, too, are faced with this reality. Therefore, we appreciate your best efforts in working with us in order that we all can plan accordingly. These questions are not only important to us but should also be important to you.

- a. Are you or your Broker aware of any changes to the Additional Insured and/or Contractual Coverage that you will have to consider? Has your present carrier notified you of any Changes?
- b. If you are aware of Changes to Additional Insured/Contractual Coverage please relate what these changes will entail.
- c. What other material changes to your coverage do you anticipate?
- d. If you presently have Umbrella limits under \$10 Million, what financial implication would you incur to achieve this limit?

10. Other:

If you or your Broker wishes, we welcome you comments and observations on your Insurance/Risk Management program that will assist us in continuing to work with you now and in the future.

THANK YOU for your cooperation and assistance.

STATES' POSITIONS ON CONDITIONAL PAYMENT CLAUSES IN CONSTRUCTION SUBCONTRACTS

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Katz & Stone, L.L.P.

This table contains a summary of recent cases and statutes that interpret and affect the enforceability of conditional payment clauses in construction contracts.

STATE	FOUND	CASE NAME	CONTRACT LANGUAGE	HOLDING	STATUTES
Alabama	PWP ¹ ; would enforce PIP ² if clearly stated	<i>Crass v Scruggs</i> , 115 Ala. 258 (1896).	"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 enforced as a PWP clause, requiring payment within a reasonable period of time.	
	PWP	<i>Fed. Ins. Co. v. I. Kruger, Inc.</i> , 829 So. 2d 732 (Ala. 2002)	"... 'within thirty (30) days after the last of the following to occur: (a) ..., (b) ..., (c) ..., and (d)...' -- is reasonably read as merely specifying the time for payment, rather than as creating a condition precedent to payment."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time.	

¹ "PWP" means a Pay-When-Paid clause, requiring a general contractor pay its 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 "PIP" means a Pay-If-Paid clause, conditioning payment by a general contractor on the general contractor's receipt of payment from the owner, effectively shifting the risk of owner nonpayment and insolvency to a subcontractor.

Alaska	PIP	<i>Industrial Indem. Co. v Wick Constr. Co.</i> , 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	No cases have applied the statute since enactment in 2000.	<i>L. Harvey Concrete v. Agro Constr. & Supply Co.</i> , 189 Ariz. 178 (Ariz. Ct. App. 1997)	“...subcontractor agrees as a condition precedent to payment, of either progress or final payment, that the owner shall have first paid the payment applied for to the contractor, and that payment for either progress payments or final payment is not due and owing to the subcontractor as provided for herein until the owner has made such payment to the contractor. The subcontractor recognizes that the source of funding for this subcontract agreement are [sic] the progress and final payments that are to be made by the owner to contractor.”	Clause enforced as creating a valid condition precedent to payment. “The language here sufficiently reflects the concept of exclusivity necessary to demonstrate that the parties clearly and unequivocally intended to create a condition precedent shifting the risk of nonpayment.”	A.R.S. § 32-1129.02 (2007) Enacted in 2000. “A. Notwithstanding the other provisions of this section, performance by a contractor, subcontractor or material supplier in accordance with the provisions of a construction contract entitles the contractor, subcontractor or material supplier to payment from the party with whom the contractor, subcontractor or material supplier contracts. B. If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the contractor shall pay to its subcontractors or material suppliers and each subcontractor shall pay to its subcontractors or material suppliers, within seven days of receipt by the contractor or subcontractor of each progress payment or final payment, the full amount received for such subcontractor's work and materials supplied based on work completed or materials supplied under the subcontract.”

Arizona (cont.)		<i>Watson Constr. Co. v Reppel Steel & Supply Co.</i> , 123 Ariz. 138 (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.”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. “... [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.”	
Arkansas	PWP; would enforce PIP if clearly stated	<i>Trinity Universal Insurance v Smithwick</i> , 222 F.2d 16 (8th Cir. 1955), <i>cert. den.</i> , 350 U.S. 837 (1955).	Exact contract language not given in case.	No clause was enforced as creating a condition precedent to payment. The court found, without ruling on whether such a waiver would be permitted if expressly made, that the clause did not expressly waive the subcontractor’s rights.	
California	PIP void against public policy	<i>William R. Clark Corp. v Safeco Ins. Co.</i> , 15 Cal. 4th 882 (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.	

<p>California (cont.)</p>	<p>PIP void against public policy</p>	<p><i>Capitol Steel Fabricators, Inc. v Mega Constr. Co.</i>, 58 Cal. App. 4th 1049 (1997).</p>	<p>“Contractor agrees to pay Subcontractor in monthly payments of 90 of labor and materials which have been placed in position as condition precedent and for which payment has been made by Owner to Contractor. The remaining 10 shall be retained by Contractor until he receives final payment from Owner, but not less...”</p> <p style="text-align: center;">* * *</p> <p>“Under no conditions shall Subcontractor make any changes either as additions or deductions without the written order of the Contractor and Contractor shall not pay any extra charges made by the Subcontractor that have not been agreed upon in writing by Contractor, and in no event, shall Contractor make payment for any such extra charges unless and until the Contractor itself receives payment from Owner ...”</p>	<p>Following the holding in <i>William R. Clark Corp. v Safeco Ins. Co.</i>, the stop notice and payment bond statutes are meant to protect subcontractors from defaulting contractors. The general contractor’s liability to its subcontractor for work performed on a public works project may not be made contingent on the governmental entity’s payment to the general contractor. Both general contractor and surety were liable for payment to subcontractor.</p>	
<p>Colorado</p>	<p>PWP</p>	<p><i>Main Elec., Ltd. v. Printz Servs. Corp.</i>, 980 P.2d 522 (Colo. 1999)</p>	<p>Form agreement between Contractor and Subcontractor stated Contractor would pay the respective Subcontractor “provided like payment shall have been made by Owner to Contractor.”</p>	<p>Clause enforced as a PWP clause, requiring payment within a reasonable period of time. The clause “created a promise to pay the subcontractor that remains unconditional, although payment may be delayed because of the owner’s failure to pay the general contractor. To create a pay-if-paid clause in a construction contract, the relevant contract terms must unequivocally state that the subcontractor will be paid only if the general contractor is first paid by the owner and set forth the fact that the subcontractor bears the risk of the owner’s nonpayment.”</p>	

Connecticut	PWP; would enforce PIP if clearly stated	<i>Blakeslee Arpaia Chapman, Inc. v El Constructors, Inc.</i> , 239 Conn. 708 (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.”	The court did not rule on the enforceability of a condition precedent clause because the general contractor had already paid. The court did reference, however, a string of case law from other jurisdictions finding that such clauses merely required payment within a reasonable time.	
Delaware	Statute governs payment clauses				<p>6 Del. C. § 3507 (2007) Enacted in 2002.</p> <p>“(e) If a subcontractor performs in accordance with the provisions of its contract, the subcontractor shall be entitled to payment from the party with whom the subcontractor has contracted in accordance with the payment terms of its contract or this section, whichever applies; provided, however, that a provision in a contingent payment clause in a construction contract which:</p> <ul style="list-style-type: none"> (1) States that a contractor assumes the risk of nonpayment of the owner; (2) Requires a contractor to waive any statutory or other right to commence litigation or arbitration until payment is made to the general or prime contractor; (3) Makes subject to payment by the owner the obligation of a contractor and its surety under any payment or performance bond to make any payment to a claimant under such bond; or (4) States that a contractor relies on the credit of the owner and not on the credit of the general or prime contractor or of a bonding company; <p>is contrary to the public policy of this State and shall be void and unenforceable.”</p>

<p>District of Columbia</p>	<p>PIP</p>	<p><i>Urban Masonry Corp. v N&N Contractors, Inc.</i>, 676 A.2d 26 (D.C. 1996).</p>	<p>“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...</p> <p>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 ... ”</p>	<p>Clause not enforced as creating a condition precedent to payment because the contractor failed to defend the subcontractor’s interests in settlement negotiations with the owner. If the contractor had defended the subcontractor’s interests, the court suggests it would enforce as a PIP.</p>	
<p>Florida</p>	<p>PIP</p>	<p><i>Everett Painting Co. v. Padula & Wadsworth Constr., Inc.</i>, 856 So.2d 1059 (Fla. 4th DCA 2003)</p>	<p>Court summarized the contractual language as “final payment from the owner is a condition precedent to Contractor’s obligation to make final payment to [Subcontractor].”</p>	<p>Clause enforced as creating a condition precedent to payment. The court found the language to be “clear and unambiguous.” The clause did not extend to the contractor’s surety, however, because the surety failed to comply with Fla. Stat. § 713.245.</p>	<p>Fla. Stat. § 713.245 (2007): Enacted in 2001.</p> <p>“(1)...if 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...</p> <p>(a) The bond is listed...as a conditional payment bond...</p> <p>(b) The words "conditional payment bond" are contained in the title of the bond...</p> <p>(c) 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</p>

Florida (cont.)	PWP	<i>Peacock Constr. Co. v Modern Air Conditioning</i> , 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.”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. “[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.”	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.”
	Surety case	<i>North American Specialty Ins. Co. v Hughes Supply</i> , 705 So.2d 616 (Fla. 1998).	Bond issued by surety incorporated the clause as required in § 713.245(1)(c). Surety wanted the bonds to be deemed conditionally restricted.	Bond clause not enforced as creating a condition precedent when the general contractor does not include such language in its subcontracts. Since the obligations of the general contractor and the surety are coextensive, where general contractor does not have a valid PWP clause in the subcontract, the surety may not invoke it as a defense.	
Georgia	PIP	<i>Associated Mech. Corp. v. Martin K. Eby Constr. Co.</i> , 67 F. Supp. 2d 1375 (M.D. Ga. 1999)	Exact contract language not given in case.	Georgia law provides that no payment is due a subcontractor where a subcontract was conditioned upon the receipt of payment by contractor from the owner.	O.C.G.A. § 13-11-4(b) (2007) Enacted in 1994. “When a subcontractor has performed in accordance with the provisions of its subcontract and the subcontract conditions precedent to payment have been satisfied, the contractor shall pay to that subcontractor and each

Georgia (cont.)	PIP	<i>St. Paul Fire & Marine Ins. Co. v Georgia Interstate Electric Co.</i> , 187 Ga. App. 579 (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 Subcontractor."	Clause enforced as creating a condition precedent to payment. "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 contractor and the subcontractor should contain an express condition clearly showing that to be the intention of the parties.'"	subcontractor shall pay to its subcontractor, within ten days of receipt by the contractor or subcontractor of each periodic or final payment, the full amount received for such subcontractor's work and materials based on work completed or service provided under the subcontract, provided that the subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work as the contractor in his or her reasonable discretion may require, including but not limited to a payment and performance bond."
	PIP	<i>Peacock Constr. Co. v West</i> , 111 Ga App. 604 (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."	Clause enforced as creating a condition precedent to payment. "[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	Statute governs public contract payment clauses				HRS § 103-10.5 (2007) (applies to public contracting) Amended in 2000. "(a) Any money paid to a contractor shall be disbursed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes on which the procurement officer has withheld payment."

Idaho	PWP	<i>Schlueter v. Nelson</i> , 74 Idaho 396 (1953).	Contractor agreed to pay laborer 25% of his contract fee during performance, with the remainder conditioned on the sale of the two dwellings on which the laborer worked. The laborer brought suit before either dwelling had been sold.	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "When the payment of a debt for services performed is conditioned on the happening of some event, which is under the control of the obligor, the event must happen or a reasonable time must elapse before payment becomes due, and the obligor must make some reasonable effort to cause the event to happen. Such a condition in a contract for payment of services does not mean that the debt can never become due until the event on which it is conditioned actually happens. A reasonable time for the happening of the event must be measured by the circumstances or conditions surrounding each individual case."	
Illinois	PWP	<i>A.A. Conte, Inc. v Campbell-Lowrie-Lautermilch Corp.</i> , 132 Ill. App. 3d 325 (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 ..."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "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."	770 ILCS 60/21 (2007) Enacted in 1991. "(e) 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 payment to a claim brought under...this Act...against the party."

Indiana	PWP; would enforce PIP if clearly stated	<i>Envirocorp Well Servs. v. Camp Dresser & McKee, Inc.</i> , 2000 U.S. Dist. LEXIS 16088 (S.D. Ind. 2000)	“ENGINEER ... shall pay SUBCONTRACTOR within fifteen (15) days of the time ENGINEER receives payment from OWNER on account thereof. It is intended that payments to SUBCONTRACTOR will be made as ENGINEER is paid by OWNER under the Prime Agreement and that ENGINEER shall exert reasonable and diligent efforts to collect prompt payment from OWNER.”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time.	
	PWP; would enforce PIP if clearly stated	<i>Midland Eng. Co. v John A. Hall Constr. Co.</i> , 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 enforced as a PWP clause, requiring payment within a reasonable period of time.	
Iowa	PIP	<i>Booth v. Pilot Corp.</i> , 2001 Iowa App. LEXIS 414 (IA Ct. App. 2001)	“[A]s a condition precedent, like payment has been made by Owner to Contractor...”	Clause enforced as creating a condition precedent to payment. The court found the condition satisfied, however, when the general contractor did not request money from owner for change order work requested and approved by general contractor.	
	PWP	<i>Grady v S.E. Gustafson Constr. Co.</i> , 251 Iowa 1242, 103 N.W.2d 737 (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 enforced as a PWP clause, requiring payment within a reasonable period of time.	

Kansas	PIP void by statute				<p>K.S.A. § 16-1803 (2006) Enacted in 2005.</p> <p>“(c) Any provision in a contract for private construction providing that a payment from a contractor or subcontractor to a subcontractor 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 or bond to secure payment of claims pursuant to the provisions of article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.</p> <p>(f) A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor.”</p>
Kentucky	PWP; would enforce PIP if clearly stated	<i>A.L. Pickens Co. v Youngstown Sheet & Tube Co.</i> , 650 F2d 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 enforced as a PWP clause, requiring payment within a reasonable period of time.	<p>KRS § 371.405 (2007) Enacted in 2007.</p> <p>“(8) A contractor shall pay its subcontractors any undisputed amounts due within fifteen (15) business days of receipt of payment from the contracting entity, including payment of retainage if retainage is released by the contracting entity...”</p>

Louisiana	PWP; would enforce PIP if clearly stated	<i>Southern States Masonry, Inc. v J.A. Jones Constr. Co.</i> , 507 So.2d 198 (La. 1987).	“... 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 ... ”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. (Note: LA courts appear willing to consider extrinsic evidence.)	
	PIP	<i>C. Bel for Awnings, Inc. v Blaine-Hays Constr. Co.</i> , 532 So.2d 830 (La. Ct. App. 4th Cir. 1988).	“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: [the] “parties acknowledge that ... Subcontractor is not entitled to receive payment from [the general contractor] until [the general contractor] receives payment from [the owner].”	Clause enforced as creating a condition precedent to payment. The subsequent agreements remove this case from the factual context of <i>Southern States</i> .	
Maine	Statute governs payment clauses				10 M.R.S. § 1114 (2007) “Payment to a subcontractor for work is subject to the following conditions. ... Notwithstanding any other provision of this chapter, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor or material supplier, the contractor or subcontractor is obligated to pay the subcontractor or material supplier as though the 20-day due dates in section 1113, subsection 3 were met.”

Maryland	PWP	<i>Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.</i> , 165 Md. App. 262 (Md. Ct. Spec. App. 2005)	"...the Sub-Contractor hereby waives any rights it otherwise might have against the Contractor, and agrees never to look to the Contractor for payment on account of any such claim except to such extent, if any, as the Contractor may be paid by the owner on account of any such claim of the Sub-Contractor."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "Where the language in the contract is doubtful, we will interpret the 'language as embodying a promise or constructive condition rather than an express condition.'"	Md. REAL PROPERTY Code Ann. § 9-113 (2007) Amended in 1995. "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."
	PIP	<i>Gilbane Bldg. Co. v. Brisk Waterproofing Co.</i> , 86 Md. App. 21 (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 nonpayment or owner insolvency. (Case preceded statute.)	
Massachusetts	PWP; would enforce PIP if clearly stated	<i>Framingham Heavy Equip. Co. v. Callahan & Sons, Inc.</i> , 61 Mass. App.Ct. 171 (2004)	"Article 11.3 of the subcontract requires the contractor to pay the subcontractor "each progress payment within three working days after the Contractor receives payment from the Owner," and Article 9.6.2 of the General Conditions requires the contractor to 'promptly pay each Subcontractor, upon receipt of payment from the Owner, <i>out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work</i> , the amount to which said Subcontractor is entitled . . .'"	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "A condition precedent to payment may not be inferred; the contract must clearly state 'that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner.'"	

Massachusetts (cont.)	PWP; would enforce PIP if clearly stated	<i>A.J. Wolfe Co. v. Baltimore Contractors, Inc.</i> , 355 Mass. 361 (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 enforced as a PWP clause, requiring payment within a reasonable period of time. "A condition precedent to payment may not be inferred." Rather, the contract must clearly state "that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner."	
Michigan	PIP	<i>Arco Constr., Inc. v. Thomas M. Keranen & Assocs., P.C.</i> , 2007 Mich. App. LEXIS 1292 (Mich. Ct. App. 2007)	"Subcontractor agrees that payment by the Department of Transportation to Principal Contractor for work performed by Subcontractor shall be a condition precedent to any payment obligation of the Principal Contractor to Subcontractor. . . ."	Clause enforced as creating a condition precedent to payment.	
	PIP	<i>Berkel & Co. Contractors v. Christman Co.</i> , 210 Mich. App. 416 (1995), <i>appeal den sub nom</i> , 450 Mich. 1019 (1996).	"All 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 condition precedent to payment. Therefore, the contractor was not required to pay the subcontractor unless and until the owner paid the contractor. In describing the clause as "pay-when-paid" and not a "pay-if-paid," treatment of a true "pay-when-paid" clause varies.	
Minnesota	PWP; would enforce PIP if clearly stated	<i>Mrozik Constr. Inc. v. Lovering Assoc., Inc.</i> , 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 enforced as a PWP clause, requiring payment within a reasonable period of time. The court suggested that it would enforce a pay-if-paid clause if stated in unequivocal language.	
Mississippi	PIP	<i>Aladdin Constr. Co. v. John Hancock Life Ins. Co.</i> , 914 So. 2d 169 (Miss. 2005)	"Notwithstanding any other provision of this Agreement, Construction Manager shall be under no obligation to make payment to the Contractor under any provision hereof except to the extent that Construction Manager has received funds from Owner, payment by Owner being a condition precedent to payment of the Contractor."	Clause enforced as creating a condition precedent to payment. The court, however, described this statement as a "pay-when-paid" clause, rather than a "pay-if-paid" clause, as enforced.	

Missouri	PWP; would enforce PIP if clearly stated	<i>Meco Sys., Inc. v. Dancing Bear Entertainment, Inc.</i> , 42 S.W.3d 794 (Mo. Ct. App. 2001)	"...payment of the approved portion of Subcontractor's Application for Payment shall be conditioned upon receipt by [Contractor] of his payment from [Owner]. In the event, [Owner] does not make payment to [Contractor] on the Application for payment submitted by Subcontractor, [Contractor] is relieved and discharged herein from making payment to Subcontractor until payment is made..."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "If a "pay-if-paid" provision is clear and unambiguous, it will be interpreted as setting a condition precedent to the general contractor's obligation to pay. Conversely, if such a provision is ambiguous, it will be interpreted as fixing a reasonable time for the general contractor to pay."	§ 431.183 R.S.Mo. (2007) Enacted in 1995. "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, RSMo."
		<i>American Drilling Service Co. v Springfield</i> , 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]."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time.	
Montana	No cases				
Nebraska	PWP; would enforce PIP if clearly stated	<i>D.K. Meyer Corp. v Bevco, Inc.</i> , 206 Neb. 318 (1980).	"[T]he Contractor shall not be liable for, nor bound in any respect to the Subcontractor 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 enforced as a PWP clause, requiring payment within a reasonable period of time.	
Nevada	Statute governs payment clauses				Nev. Rev. Stat. Ann. § 624.624 (2007) Enacted in 2001. "5. Except as otherwise allowed in subsections 2, 3 and 4, a higher-tiered contractor shall not withhold from a payment to be made to a lower-tiered subcontractor more than the retention amount."

New Hampshire	No cases				
New Jersey	PWP; would enforce PIP if clearly stated	<i>Seal Tite Corp. v Ehret, Inc.</i> , 589 F Supp 701 (D. NJ 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 enforced as a PWP clause, requiring payment within a reasonable period of time. “The [conditional] clause was merely a provision ‘designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor.’ (internal citations omitted)”	
		<i>Titan Stone, Tile & Masonry, Inc. v. Hunt Constr. Group, Inc.</i> , 2007 U.S. Dist. LEXIS 19489 (D.N.J. 2007)	Receipt of payment by Hunt from the Owner is a condition precedent: (a) to the right of [Titan] to receive payment from Hunt, unless the failure to have received payment from the Owner shall have been caused solely by the fault of Hunt; and (b) to [Titan's] right to make any claims against Hunt's payment bond, if a payment bond is posted for the Project.	Court denied a motion for summary judgment, finding there to be a genuine issue of material fact as to whether such language constituted a PIP provision.	
New Mexico	Statute governs payment clauses				N.M. Stat. Ann. § 48-2-10 (2007) Amended in 2007. “A contingent payment clause in a contract shall not be construed as a waiver of the right to file and enforce a mechanic's or materialman's lien pursuant to Sections 48-2-1 through 48-2-17 NMSA 1978.”

New York	PWP	<i>West-Fair Elec. Contractors v Aetna Cas. & Sur. Co.</i> , 87 NY2d 148 (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 enforced as a PWP clause, requiring payment within a reasonable period of time. Clause not enforced as PIP because shifting the risk of payment to the subcontractor violates New York public policy as stated in its Lien Law.	NY CLS Lien § 34 (2007) Enacted in 1977. “Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable.”
	Surety case	<i>General Accident Ins. Co. of America v Merritt-Meridian Constr. Co.</i> , 975 F Supp 511 (S.D. NY 1997)	Contractor was obligated to make payment to the subcontractors only upon the conditions of completion and acceptance of the subcontractor’s work by the owner, as evidenced by the owner’s final payment to contractor.	Where the payment bonds expressly incorporated the prime contract with the owner by reference but there was no similar language incorporating the subcontracts, the subcontracts and any condition precedent to payment contained in them are not incorporated into the bonds.	
North Carolina	PWP	<i>Statesville Roofing & Heating Co., Inc. v. Duncan</i> , 702 F. Supp. 118 (W.D.N.C. 1988)	“Final payment shall be paid to the Subcontractor . . . conditioned upon payment having been received by the Contractor for all of Subcontractor’s Work. . . .”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. Such clauses “do not set conditions precedent but rather constitute absolute promises to pay, fixing payment by the owner as a reasonable time for when payment to the Subcontractor is to be made.” Since enactment of the statute, NC courts have held all PIP and PWP clauses void by statute, though the courts never distinguish between the two. A reasonable reading of the statute would invalidate PIP clauses, but permit PWP clauses.	N.C. Gen. Stat. § 22C-2 (2007) Enacted in 1987. “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.”

North Carolina (cont.)	Void by statute	<i>Am. Nat'l Elec. Corp. v. Poythress Commer. Contrs., Inc.</i> , 167 N.C. App. 97 (N.C. Ct. App. 2004)	Claims for extra or altered work, changes, modifications, changed conditions, subsurface conditions or obstructions at the site, any Act of God, the elements, delays, equitable adjustments, and the damages resulting from requirements, acts or omission of the Owner or any third party, or from any cause beyond the control of the Contractor shall be governed by the provisions of the General Contract and the Contractor shall make payments to the Subcontractor on account of such claims only to the extent that the Contractor is paid thereof by the Owner.	Clause severed from the contract as a conditional payment clause void by statute.	
North Dakota	No cases				
Ohio	PWP; would enforce PIP if clearly stated	<i>Thos. J. Dyer Co. v Bishop Int'l Eng. Co.</i> , 303 F2d 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 therefore"	Clause enforced as a PWP clause, requiring payment within a reasonable period of time.	
	PWP; would enforce PIP if clearly stated	<i>Chapman Excavating Co. v. Fortney & Weygandt, Inc.</i> , 2004 Ohio 3867 (Ohio Ct. App. 2004)	"All progress payments are conditioned upon the Sub furnishing to F & W 1) a signed copy of this work order...Partial payments of the Subcontract Sum shall be made within ten (10) days after payment is received by F & W from Owner..."	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. "With regard to the substantive law, we note that there is a distinction between "pay-when-paid" and "pay-if-paid" contract provisions. Under a "pay-if-paid" provision, the general contractor is required to pay a subcontractor only if the owner pays the general contractor; the risk of owner non-payment falls upon the subcontractor. <i>Cf. Kalkreuth Roofing & Sheet Metal v. Bogner Constr. Co.</i> (Aug. 27, 1998), Perry App. No. 97 CA 59, 1998 Ohio App. LEXIS 4694. Under a "pay-when-paid" clause, however, a general contractor agrees to pay a subcontractor within a period of time after the general is paid by the owner, and the risk of owner non-payment falls	

				upon the general contractor. <i>Power & Pollution Services, Inc. v. Suburban Power Piping Corp.</i> (1991), 74 Ohio App.3d 89, 598 N.E.2d 69.”	
Oklahoma	PWP; would enforce PIP if clearly stated	<i>Byler v Great American Ins. Co.</i> , 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 enforced as a PWP clause, requiring payment within a reasonable period of time. (See also <i>Moore v Continental Cas. Co.</i> , 366 F Supp 954 (WD Okla 1973) (following <i>Byler</i>)).	
Oregon	PWP; would enforce PIP if clearly stated	<i>Mignot v Park Hill</i> , 237 Ore. 450 (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 ...”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. The parties may shift the risk of payment, however, 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.	

Pennsylvania	PWP; would enforce PIP if clearly stated	<i>United Plate Glass Co. Div. of Chromalloy American Corp. v Metal Trims Indust., Inc.</i> , 106 Pa. Commw. 22 (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 enforced as a PWP clause, requiring payment within a reasonable period of time.	73 P.S. § 507 (2007) Enacted in 1994. “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.”
Puerto Rico	No cases				
Rhode Island	No cases				
South Carolina	Void by Statute				S.C. Code Ann. § 29-6-230 (2006) Enacted in 2000. “Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.”
South Dakota	No cases				

Tennessee	PWP; would enforce PIP if clearly stated	<i>Koch v Constr. Technology, Inc.</i> , 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 enforced as a PWP clause, requiring payment within a reasonable period of time. The parties may shift the risk of payment, but that intention must be clearly and unambiguously expressed.	
Texas	Statute governs payment clauses				Section 35.521, Business & Commerce Code Enacted in 2007. “(B) A contingent payor or its surety may not enforce a contingent payment clause to the extent that the obligor's nonpayment to the contingent payor is the result of the contractual obligations of the contingent payor not being met, unless the nonpayment is the result of the contingent payee's failure to meet the contingent payee's contractual requirements.”
Utah	PWP; would enforce PIP if clearly stated	<i>Zions First Nat'l Bank v Christiansen Bros., Inc.</i> , 66 F3d 1560 (10th Cir 1995).	Contractual language not provided.	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. “[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.”	Utah Code Ann. § 13-8-4 (2007) Enacted in 1997. “(4) If a construction contract is a contingent payment contract: (a) the subcontractor may request from the contractor the financial information that the contractor has received from the public or private party regarding: (i) the project financing; and (ii) the public or private party; and (b) if information is requested by the subcontractor under Subsection (4)(a), the contractor shall provide the information prior to the subcontractor signing the construction contract between the contractor and the subcontractor.”

Vermont	No cases				
Virgin Islands	Void as against public policy	<i>Shearman & Assocs., Ind. v Continental Cas. Co.</i> , 33 VI 192 (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	PWP; would enforce PIP if clearly stated	<i>Galloway Corp. v S.B. Ballard Constr. Co.</i> , 250 Va 493, 464 SE2d 349 (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.”	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. 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. The court found that “use of term ‘condition precedent’ in ‘pay when paid’ clause clearly establishes intent of parties to shift credit risk of owner’s insolvency to subcontractor.”	

	PWP; would enforce PIP if clearly stated	<i>James River Iron, Inc. v. Turner Constr. Co.</i> , 2004 Va. Cir. LEXIS 230 (Va. Cir. Ct. 2004)	Clause not included in the opinion.	Clause enforced as a PWP clause, requiring payment within a reasonable period of time. Unambiguous pay-if-paid clauses are enforceable in Virginia.	
Washington	PWP; would enforce PIP if clearly stated	<i>Amelco Elec. v Donald M. Drake Co.</i> , 20 Wash App 899, 583 P2d 648 (1978), <i>rev. den.</i> , 91 Wash 2d 1020 (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 enforced as a PWP clause, requiring payment within a reasonable period of time.	
West Virginia	PIP	<i>Wellington Power Corp. v. CNA Sur. Corp.</i> , 217 W. Va. 33 (W. Va. 2005)	“[Subcontractor] agrees and acknowledges that payment of the Contract Sum shall be made only from [sic] funds which are due from owner that contractor has actually received in hand from [owner] and designated by [owner] for disbursement to [subcontractor]. [Subcontractor] agrees to look solely to such funds for payment. [Subcontractor] understands and agrees that [General Contractor] shall have no liability or responsibility for any reason whatsoever for any amounts due or claimed to be due to [Subcontractor] except to the extent that [General Contractor] has actually received funds from [owner] that are due from [owner] specifically designated for disbursement to [Subcontractor].”	Clause enforced as creating a condition precedent to payment. “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).”	

Wisconsin	Statute governs payment clauses				<p>Wis. Stat. §779.135 (2006) Amended in 2005.</p> <p>“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.”</p>
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Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.