Changing Contract Language on the Spot

by Quenda Behler Story

I have a lot of sympathy for small subs who are offered "take it or leave it" contracts. If they want the work, they have to sign the contract the general contractor offers just the way it is; otherwise, he'll offer the job to somebody else. Bigger subs are not immune from this kind of treatment, either. A recent legal brawl out of Missouri involved millions more than you or I will ever see, but had all the earmarks of a sub who needed the work too much to refuse the terms of the contract the GC offered.

In the Missouri case, the subcontractor agreed not only to a penalty clause if he failed to complete by a specified date, but he also agreed to a "no damages for delay" clause that limited his ability to collect damages until such time as the general contractor recovered damages for delay from the owner. The sub should have realized that "until such time" also meant "and if."

Fourteen months after the contract start date for the subcontractor, during which time the sub had suffered substantial damages by holding himself in readiness to start the job and by refusing work that otherwise would have been accepted, the job still was not at a stage where the sub could begin work.

Shared Risk

There are instances in which sharing certain risks with the general contractor is part of the deal. The Missouri sub was clearly willing to accept part of the GC's risk that the owner might cause delay. But the "no damages for delay" clause was written too narrowly. It did not anticipate the fact that there are all sorts of ways delay can happen. Quicksand could be discovered under the building; a fire could have destroyed the work completed to date; and the GC could also have caused a delay.

The way the clause was written, if the delay was not the owner's fault, the owner would not be liable to the GC; in that event, the subcontractor would lose out altogether.

Some states do provide partial relief to subcontractors caught in this bind. These states restrict "no damages for delay" clauses to those kinds of delay that could have been reasonably anticipated by the parties at the time of the contract. The rationale is that the parties didn't agree to waive damages for something neither of them was thinking about.

Inserting Contract Language

Unfortunately, the Missouri Court was not impressed when the sub's lawyer made that argument. The Missouri Court said these were two experienced parties in equal bargaining positions, and that the subcontractor could have protected himself by adjusting his bid in recognition of the fact that unforeseen delays can occur. (I can hear the bitter laughter from all you subs out there.)

To protect himself while still accepting part of the GC's risk, the subcontractor could have inserted language into the contract that restricted the "no damages for delay" exemption in one of several ways:

- ✔ put an end date on the blanket exemption
- ✔ restrict the exemption to reasonable and foreseeable delays
- ✔ restrict the exemption to those delays not caused by actions of the GC

Had the Missouri sub inserted any combination of these example restrictions — or even just one of them — into his contract, he would have been in better shape legally.

Marginalia

And when I say "insert," I mean literally "written" on the document. Retyping the document would always be the best action, but handwritten margin notes will do, if those notes are legible, are on the original and every signed copy, and make sense in the context of the contract.

In this case, the sub could have taken out his ballpoint pen and written exculpatory language (exculpatory is legalese for the language that could get you out of this mess) onto the margin with an arrow showing where to insert it. As long as the sub wrote the same thing on the original and all the signed copies, so that it was clearly part of what the general contractor agreed to, that's enough to be included as part of the contract.

For example, in the clause making the subcontractor liable for damages for not completing the job by a specified date, the sub should have inserted language like this: "except for delay caused by unforeseen circumstances, or caused by the general contractor, or by another subcontractor hired by the general contractor, or by the principal client."

I understand that it's hard to say no when you're struggling for business. But remember that the best job in the world can go sour through nobody's fault. If you're willing to accept the loss if that happens, fine, but whatever you decide to do, don't accept the risk without realizing what you're doing. ■

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