Have our Contracts Become too One-Sided?

By Thomas L. Rosenberg

Times have changed. We all recognize it. They have changed in the way we interact with people, in the way we do business, engage in commerce, socialize, and pursue many of our daily activities. Changes have been brought on by technology and other factors. To hear about the grand old days, one looks back in amazement and questions whether things were better then or better now.

Take our contracts. In the old days, we did not have 100-page subcontracts. We did not have front end documents containing general conditions, instructions to bidders, supplemental general conditions, safety regulations and the like that went on for pages and pages. More often than not, the subcontract was a few pages. It set forth the rules of engagement and indicated how much a subcontractor was to be paid. Was this better?

One could say that times are better now. Our contracts clearly spell out the rights, obligations, and duties of the parties. It makes clear what everybody's expectations are. Less inclusive contracts leave a lot of room for dispute. They leave out things which can lead to arguments over whether or not a task or responsibility was to be incurred by one party or the other. We have made it clear when and if payment will be made. We have made it clear how disputes will be resolved. We have made the contract clearer as to all of the rights and responsibilities of the parties, but are lengthier contracts better? Are they one-sided?

LENGTHY CONTRACTS

There is no absolute answer to these questions. However, I contend that lengthier and lengthier contracts are not good for the industry. They are a reflection upon the changes that have been made by the courts, by the ever-increasing complexity of the projects, by the greater mobility of contractors and subcontractors to work outside their local jurisdictions, and other factors.

So what does all this mean to one-sided contracts? Are our contracts more one-sided today?

Pay if paid and pay when paid clauses are prevalent in our contracts. We now tell lower tier subcontractors they only get paid if I get paid. Subcontractors contend that this places all financial risk of the project on them. Contractors contend that they are not guaranteeing payment to a subcontractor but rather providing the subcontractor with an opportunity to work on a project with the understanding that if one gets paid everyone gets paid.

ABOUT THE AUTHOR

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We shift risk. Risk for precedent work is placed on a subsequent performing subcontractor. We typically say to a subcontractor in the contract that if you perform work, you accept all of the work that came before you that could impact your work. Think of the painting subcontractor who now is responsible for defects in the drywall that could impact its painting. Does that painting subcontractor proceed when there may be issues with the drywall that could impact the quality of its painting work?

Dispute resolution clauses are different. We now provide for prevailing party provisions meaning the winning side gets its legal fees and costs. We add provisions that indicate the choice of arbitration or litigation may solely be made by one party to the dispute, not both. We indicate in arbitration, that the arbitration must proceed in a location favorable to the party creating the contract. This may be far from the project and make it very difficult for a party to pursue a small dollar claim as a result.

We provide documents that indicate in return for payment, one has to waive all rights to additional payment for that work, claims, and the like. This places a burden upon the contractor or subcontractor that may be in need of payment but has to realize that if it accepts payment, it does not have the right to claim for extras.

We insist that upon beginning work, a contractor affirms that it has thoroughly inspected the premises and is aware of all known and reasonably unknown conditions that could impact its price. We establish notice requirements that sometimes are placed in contract documents to trip a contractor or subcontractor into failing to meet a notice requirement and therefore waiving a claim. Notice requirements often require a contractor or subcontractor to provide written notice to a specific person within a very short period of time of an incident occurring that could result in an extension of time or request for additional compensation. It must be revised and updated pursuant to very specific timelines. The failure to meet any notice requirement could be deemed a waiver of all rights to receive payment. We communicate by email but indicate that the notice requirements must be done differently.

We have provisions in contracts upstream and downstream that indicate that a contractor or subcontractor could be forced to perform work even when it disputes the costs of doing so. We tell contractors that they can be issued a construction change directive demanding that they perform work and seek recovery through the dispute resolution provisions that in some jurisdictions could take years to be resolved.

CONCLUSION

Is the above fair? Most people would say no. However, we create our contracts from the standpoint of protecting our own interests. Is this going to change? Probably not. Do we have to be more careful looking at one-sided contracts? Absolutely. Is it going to make more work for contractors, subcontractors, and their lawyers? Likely, yes. ■