

Mastering Subcontract Performance and Scope Requirements



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Disclaimer: This publication does not contain legal advice. The discussion is intended to provide information and guidance to individual subcontractors. Specific circumstances vary widely, so subcontractors may need to consult their attorneys before acting on the premises described herein. Each subcontractor should decide for itself the contract terms and conditions which it believes will best protect its interests. Subcontractors should not agree among themselves as to the form of contract terms and conditions they will use. Such agreements may violate federal or state antitrust laws and could result in the imposition of civil and/or criminal penalties.

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Case Study

A subcontractor lost \$250,000 on a project after the prime contractor put scope requirements into the subcontract that were beyond those agreed upon during bid negotiations. To prevent this from happening again, the subcontractor revamped its entire order entry system and closely examined scope wording in future documents.

Introduction

Scope is the sum of all product-related requirements that apply to a prime contractor or subcontractor on a construction project.

The scope of work to be performed is impacted by many subcontract forms and references, as well as the specifications. A subcontractor often is given a thick project manual and told to bid on the basis of any and all requirements affecting its work. In other cases, the subcontractor is given only the specification section of its own work, and is left to guess what the general requirements include.

Further, sometimes subcontract terms are vague and open-ended. The following is an example:

The Subcontractor shall furnish all material, labor and equipment, necessary or incidental, to satisfy the Contractor's obligations to the Owner with respect to the sheet metal portion of the project. Such work shall be in compliance with any and all general and subcontract requirements, including any work reasonably inferable from any Contract Documents.

Ambiguous requirements such as those above do not benefit anyone. Bidding uncertainties lead to disputes, confrontations and coordination problems for both the prime contractor and subcontractor. As a result, prime contractors usually agree to reach a firm understanding on scope once they see the implications of leaving so much to chance.

One way for a subcontractor to bid with reasonable certainty is for the subcontractor to spell out—in its bid—the scope and terms upon which its price applies.

At a minimum, subcontractor bids could be clarified, such as shown here:

Our bid is predicated upon the understanding that our work is fully set forth in Division ___ of the specifications, that we shall be entitled to the rights, remedies and redress, as well as subject to the obligations of the general contract documents identified in Attachment No. 1 as they relate to the bid and that any resulting Subcontract shall be subject to the terms of the current edition of the ConsensusDocs Form 750, Standard Agreement Between Constructor and Subcontractor.

Subcontract Considerations

A subcontractor should obtain copies of all documents that are identified as being part of the subcontract whether directly or by reference. The subcontractor should be aware of any unusual obligations, such as liquidated damages. The prime contract also may include some beneficial terms from the owner, negotiated by the prime contractor, that a subcontractor can obtain. For example, if the prime contractor gets a good interest rate, the subcontractor usually can get the same good rate, as well.

Be forewarned that documents clearly identified as being incorporated in a subcontract by reference are legally binding on a subcontractor, even if they're not attached to the subcontract or otherwise supplied to the subcontractor.

The Project Manual or Instructions to Bidders generally identifies each applicable subcontract document. It may include a copy of each document or identify one or more by reference. The following are examples of documents that might be referenced:

- The Owner-Contract Agreement (Prime Contract)
- General Conditions
- Supplementary General Conditions
- Special Conditions
- Addenda
- Specifications and Plans
- Subcontract Agreement

Owner-Contractor Agreement (Prime Contract)

Subcontractors may be bound to provisions in the Owner-Contractor Agreement by subcontractor provisions known as conduit clauses. The following is a sample of a one-way conduit clause that binds the subcontractor to the provisions of the prime contract:

The Subcontractor agrees to be bound to the Contractor by all terms of the General Contract with respect to the work to be performed by the Subcontractor

and to assume toward the Contractor all of the duties, obligations and responsibilities that the Contractor, by those Contract Documents, assumes toward the Owner with the same force and effect as though every such duty, obligation or responsibility were set forth herein in full.

Case Study

A general contractor pointed out at the time of bid that the owner would escrow the 10 percent retainage in an interest-bearing bank account. However, the general contractor's subcontract form had a one-way conduit clause that passed through only the prime contract obligations to subcontractors. Later, the general contractor contended that its earlier remarks were intended only to assure subcontractors that their retainage was being safeguarded. The general contractor refused to pass along any interest it had received by citing the one-way conduit clause, which failed to state that the subcontractor was entitled to prime contract benefits.

The prime contractor may be reluctant to supply a subcontractor with a copy of its prime contract with the owner under the pretext that certain parts of the agreement, such as price and bonus terms, are confidential. However, by making the prime contract a part of the subcontract by reference, the prime contractor has an obligation to either:

- 1) Furnish a copy of the portion of the prime contract that is applicable to the subcontract.
- 2) Delete the prime contract from the list of subcontract documents.
- 3) Write a provision into the subcontract stating that the subcontractor is not bound by provisions in any document that is not provided to the subcontractor.

A subcontractor should make every effort to get a copy of the prime contract with any of the inapplicable provisions omitted. A subcontractor also should make sure that it is entitled to all of the rights that have been afforded to the prime contractor in the prime contract. For example, the language in the last example is called a one-way conduit clause. Again, this clause passes the obligations, but not the benefits, of the prime contract through to the subcontractor.

A subcontractor also should look for any obligations not previously known and those not included in its bid price and subcontract amount. Any such extra cost items should result in a price increase or be deleted.

Conduit Clauses

The following example shows a typical two-way conduit clause, that can be used to minimize possible misunderstandings:

Our acceptance of the terms of the Owner-Contract Agreement, dated _____ (copy attached), is conditioned upon the understanding that we shall be entitled to all rights, remedies and redress contained in that document applying to our portion of the project work.

A prime contractor may find it difficult to defend the fact that it did not give to a subcontractor certain rights that it already has. The [ConsensusDocs Form 750, Standard Agreement Between Constructor and Subcontractor](#), states:

“3.1 OBLIGATIONS Parties are mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontract Work, then Constructor hereby assumes toward Subcontractor all the obligations, rights, duties, and redress that Owner under the prime agreement assumes toward Constructor. In an identical way, Subcontractor hereby assumes toward Constructor all the same obligations, rights, duties, and redress that Constructor assumes toward Owner and Design Professional under the prime contract. In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.”

General Conditions

For private construction work, the most commonly used general conditions are contained in the current edition of the [ConsensusDocs Form 200, Standard Agreement Between Owner and Constructor](#), or the American Institute of Architects Form A201, *General Conditions of the Contract for Construction*. Public work usually has general conditions prescribed by law or are contained on standard forms that have been developed for consistent use. Many of these documents are fair and apply to all parties on the project. Therefore, changes to terms in such general conditions may be difficult to obtain.

Other general conditions depart from the norm, and contain terms that are unfair or justify price additions for items that were not identified at bid time. In any event, a subcontractor should review the general conditions and be comfortable that these represent a level-playing-field document.

Supplementary General Conditions

A subcontractor should review carefully the Supplementary General Conditions for each project. This document identifies changes that have been made to the general conditions. Thus, it can become a summary of potential problem areas that are unusual enough to justify special attention. For example, provisions such as special warranties

and liquidated damages usually are placed in the Supplementary General Conditions section.

The Supplementary General Conditions section is a good checklist of unusual scope and other features under a particular subcontract. It also may contain items involving extra cost that were not identified earlier in the bidding and negotiation process. In the latter case, either additional compensation should be obtained, or the offending supplementary general condition should be deleted with a clarification, such as the following:

Our price as agreed upon does not include work described in Supplementary General Condition #__. Accordingly, we do not accept that provision as being a part of our Subcontract.

Special Conditions

Special Conditions usually are project-specific requirements that go beyond the customary terms and conditions. An example of this is alternates. To avoid later disputes, a subcontractor may want to clarify alternates for which there are no time limitations on which the owner or prime contractor may elect to use them. Other examples of special conditions include equal employment or disadvantaged business enterprise provisions on the job. The same basic approach applies to these requirements as for the Supplementary General Conditions. If the provisions were not previously identified, either extra compensation should be obtained or the added requirement should be eliminated.

Addenda

During the bidding process, it is not unusual for addenda to be issued. These reflect late changes, modifications or clarifications that often affect the scope of the work. Addenda are intended to minimize bidding uncertainties and eliminate conflicting requirements. They also are used to add new items. The cost impact often is significant.

Because addenda ordinarily are numbered sequentially and may be issued nearly up until bid time, it often is difficult to be sure that the last addendum was received. To avoid any uncertainty, a subcontractor should identify the addenda numbers when bidding, and be sure that the same numbers are reflected in the list of subcontract documents as identified in the subcontract.

Specifications and Plans

Division 1 (General Requirements). Division 1 of the specifications applies to all trades. It includes jobsite information, such as who will cut and patch, and who will furnish temporary utilities and services along with any ground rules for the use of those services by subcontractors. It also includes information about substitutions, warranties, project meetings, etc. This section is another good source of information for planning

jobsite work. When reviewing Division 1, a subcontractor should watch for any surprises, such as pro rata charges for overall project clean-up costs.

In most cases, subcontractors are provided with copies of Division 1 specifications prior to bidding. However, some prime contractors make a practice of giving subcontractors only those pages that relate to their specific trade prior to bid. In these situations, a subcontractor should review closely the Division 1 specifications when they are received after the bid.

Technical Specifications. With the exception of Division 1, specifications are organized into individual sections or divisions by technical trades. Each of the mechanical, electrical, roofing, grading and other major trades has its own uniformly numbered division describing its work. These specifications nearly always are made available to subcontractors prior to bid so that any exceptions and clarifications can be made prior to subcontract negotiations.

Plans and Drawings. Often, important technical—and even contract terms and conditions—are contained in the project plans and drawings. For example, on one set of subcontract documents, complicated and time-consuming procedures for additional subsurface investigations that were necessary to complete the foundation design were shown only on the civil and structural drawings. This led to a major dispute. Therefore, a subcontractor should carefully review and compare subcontract terms, performance characteristics and requirements to the plans and drawings.

Specific Problem Areas

Temporary Facilities and Utilities

A subcontractor should seek a clarification if there is any doubt about who will provide and maintain temporary facilities and utilities, or who will pay for them. For example, some prime contractors make a practice of prorating utility expenses to subcontractors that are not alert enough to disclaim liability for such costs.

A second concern is whether the services will be provided in a timely manner, so as not to slow down installation work. If the requirements are not clear on any of these points, a subcontractor could make a clarification such as the following:

All jobsite services and utilities including but not limited to power, water and sanitary facilities, shall be made available in reasonable, sufficient times and amounts, and in such a manner reasonably permitting the Subcontractor to perform its work promptly.

Work by Others

A subcontractor should identify and address any inadequate description of work by other trades that effects a subcontractor's performance. For example, if the subcontract work is contingent upon timely power being furnished, this should be spelled out in the clarification of scope and timing of performance. The same logic applies to the timing for approval of drawings and other submissions. The following is a sample of how to address such an issue:

Our acceptance of the schedule for our work is conditioned upon the timely furnishing of power by others at no cost to us and the timely approval of our drawings, layouts and product characteristic forms.

Prescriptive v. Performance Specifications

Most technical specifications are prescriptive. That is, they include details such as components, dimensions, characteristics, brand names and other identifying features. In such cases, the design is supplied to the subcontractor and it is the subcontractor's responsibility to furnish proper material and workmanship to comply with the specific requirements.

A subcontractor should avoid design responsibility for the results specified by others, such as agreeing to make a system function as intended by the design professional. For example, a subcontractor may encounter a provision such as:

The installed equipment shall operate in full compliance with all existing codes, regulations and industry standards applicable to the work.

Case Study

A roofing contractor accepted a job involving a roof that was designed and specified in detail by an architect. The specifications also contained a catch-all provision that the completed roof must be waterproof. The architect contended that the roofing contractor, as an expert, should have recognized problems with the plans, delayed its installation and raised questions about the roof design. The roofing contractor wound up paying for repairs by getting caught with both prescriptive and performance specifications.

When in doubt, a subcontractor should consider countering with a clarification, such as the following:

Notwithstanding anything to the contrary, the Subcontractor shall only be required to perform its work in accordance with and as specified in the Contract Documents, and shall not be responsible for the suitability of performance or operation of such work or that when completed, the work shall be suitable for any particular purpose. The Subcontractor warrants only that its work shall be free of defects in material or workmanship, and that this express warranty excludes ordinary wear and tear, misuse and neglect by others, and is in lieu of any other warranties, express or implied.

Warranty Period

Generally, it is accepted industry practice that each subcontractor's warranty continues for a period of one year from the date of substantial completion of that subcontractor's work. Nonetheless, a subcontractor may be faced with unsatisfactory warranty provisions that would extend the start of warranty beyond completion of its work. For example:

Warranty shall extend for the duration specified and shall commence upon final completion of all project work as demonstrated by final payment from the Owner.

The following shows one way to defuse the clause:

Notwithstanding anything to the contrary, our warranty period is for one year from the date of Substantial Completion of our Work and in no event for more than one year from the date of first occupancy by the Owner.

Ambiguities and Inconsistencies

A subcontractor should be watchful for provisions such as the following:

In the event of any conflict between any of the work requirements contained in the Subcontract Documents, the Subcontractor shall be required to comply with the most stringent or expensive such requirement.

Such generalized wording in the documents might override very specific work descriptions and at a far higher cost. When that happens, the owner and prime contractor are rewarded for having sloppy specifications and related requirements.

A subcontractor should report and obtain immediate clarification of any observed ambiguity or conflicting requirement. It is best to take such action before bidding or, if it would not disqualify the bid, at least through a bid clarification or qualification.

Even after bidding, a subcontractor should address promptly any conflict in the specifications and reach a satisfactory understanding prior to entering into a subcontract and, if possible, prior to ordering material and laying out work.

Generally speaking, if there is contradictory information in the contract documents, then more specific and detailed requirements take precedence over generalized wording. Consideration also may be given to such factors as prevailing industry practice, and whether the subcontractor regularly employs the class of field employees designated to do the work (e.g., ironworkers, electricians, etc.) in resolving conflicting requirements and ambiguities in specifications. The courts usually hold ambiguities against the party drafting the subcontract provision, unless the subcontract states otherwise.

Case Study

A mechanical subcontractor was taken by surprise when a public owner demanded that the subcontractor pay \$100,000 in extra costs for work that the specifications called for to be done by others. The prime contractor relied on a general, broadly worded provision in the prime contract. The underlying problem was a provision in the subcontract stating that in the event of conflict or inconsistency, the most stringent or expensive requirement would prevail. A settlement was finally reached, but only after major legal costs and work disruptions were incurred, in addition to many meetings.

Substitutions

To the extent practical, any intent by a subcontractor to substitute alternative material or methods in lieu of those specified should be pre-approved before bidding or else identified in the bid submission. In any event, during scope negotiations, a subcontractor should identify any planned deviations to avoid later misunderstandings.

Work Specified Elsewhere

It is normal practice to identify the work of a given trade entirely within the specification division for that trade. For example, all electrical work typically is contained in the electrical specifications. Related specifications are often cross-referenced to another division. However, one must be alert for a dragnet provision, such as:

The organization of the Specifications into divisions is solely for administrative purposes. Each Subcontractor shall be responsible for work customarily accomplished by its trade, regardless of the division in which the work is specified.

One way to respond to this provision is as follows:

Unless otherwise specifically agreed to by us in writing, the scope of our work shall be limited to that set forth in Division ____ of the Specifications.

Performance Criteria

It is generally accepted in the construction industry that finished work must meet a standard of commercial acceptability, rather than being judged on a standard of perfection. For example, ¶ 3.12 of the ConsensusDocs 750 states: "... the Subcontract Work shall be free from material defects not intrinsic in the design or materials required by the Subcontract Documents."

Examples of performance criteria terms to guard against in subcontracts are:

- Strict standards of *absolute compliance with all subcontract documents or in perfect alignment.*
- Generalized language requiring prime contractor and owner satisfaction with quality.
- Language that calls for end results perhaps not achievable by doing the work as specified, such as an "absolutely weather-tight roof system."

Instead of these severe requirements, a subcontractor may want to consider substituting wording such as the following:

The Subcontractor agrees to good faith performance of the work as specified, and warrants that its completed work shall be of commercially acceptable quality and free of defects not inherent in the nature of the work performed.

Protection of Work

A subcontractor may encounter protection of work provisions in the technical specifications, in Division 1 or in the subcontract itself. A typical example of this is:

The Subcontract shall protect its work hereunder and shall be liable for any loss or damage to any work in place and to any of the Subcontractor's material and equipment on the jobsite.

This provision conflicts with the practically universal custom of the owner or prime contractor providing all risk property damage insurance on material delivered to the jobsite or already installed. Only tools or equipment not incorporated in the work are excluded from coverage of most risk policies. All risk coverage generally includes the risks of fire, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm and similar hazards. It also provides extended coverage.

There are several reasons a subcontractor can use for not agreeing to such a provision:

- The subcontractor is not responsible for – or in control of – overall site security.
- The subcontractor is not on the job 24 hours a day.
- The owner’s or prime contractor’s all-risk insurance covers most property damage or loss with respect to construction material at the jobsite.
- It is not reasonable for the subcontractor to continue to bear the risk of damage to its work by others once the subcontractor’s work is completed.

An example of substitute language follows:

The Subcontractor shall provide reasonable protection for its jobsite material and work, but shall be liable for losses only to the extent caused by the Subcontractor’s negligence. It is understood and agreed that Owner’s all-risk insurance includes coverage for the full value of loss or damage to the Subcontractor’s work in place, for its stored material and for its material in transit.

Subcontract Agreement

A subcontractor should read carefully the description of work contained in the subcontract to be sure that it does not expand the scope of work or related terms beyond those contemplated in its bid. Many subcontractors have been saddled with expensive obligations beyond those bid upon and negotiated simply because they did not double check the scope descriptions against bid and estimate documents.

A subcontractor may encounter the same mischievous terms in the specifications and in the scope description portion of the subcontract. These may include imprecise, conflicting, over-reaching and other unsatisfactory scope language. The subcontract scope description also may omit the clarifications and exceptions that are contained in the subcontractor’s bid.

Unless the subcontract scope description represents a concise, complete description of the work as a subcontractor contemplated performing it, a subcontractor could substitute its own work description, similar to the following:

The Subcontractor shall furnish the labor, material, equipment and supervision necessary to construct plumbing and related work in accordance with specification sections [insert specific citations]. Such work shall be subject to clarifications and qualifications contained in the Subcontractor’s bid, dated August 1, 2017 (copy attached), which shall take precedence over any conflicting terms.

Scope and Performance Terms Negotiations

When discussing scope with a prime contractor, a subcontractor should emphasize that it is beneficial to both parties to address potential problems up front, instead of waiting for actual problems to arise.

A subcontractor should call attention to what its price does and does not include by referring to its bid submissions. This is especially useful in addressing scope-related additions and terms having a cost impact that were not identified by the prime contractor prior to the subcontractor's bid.

Here are some typical arguments that can be used when negotiating scope provisions:

- We can't agree to prime contract terms "sign unseen." Our preference is to get copies of the prime contract and respond to those. If they are not provided, the document references in the subcontract need to be deleted.
- We see the prime contract terms as a two-way street. We've agreed to take on the obligations for our portion of the work. In return, we have to count on the rights in the prime contract flowing through to us.
- The documents currently contain many added cost items we didn't know about when we bid to you. We can either work out pricing with you on those items or go back to the earlier requirements.
- We shouldn't be asked to wade through all of the technical specifications of other trades to see whether there are isolated references to our work. We bid on our division of the specifications. If you are looking for something more from us, let us know what it is specifically.
- We need an understanding up front with regard to our schedule being contingent upon your getting prior work and drawing approvals done fast enough so as not to delay our installation work.
- We bid based upon our warranty running for a year after the owner starts using the installation or on substantial completion of our work, whichever is earlier. We've clarified the subcontract to reflect that.
- It's too much to ask that we always provide the most expensive alternative if there is some ambiguity or inconstancy. We've deleted that provision. We believe that specific requirements in the specifications and industry practice for our trade should prevail over your proprietary document.
- We're fully committed to providing a first-rate, commercially-acceptable job that you and the owner will find at least meets the specifications. Your subcontract implies a standard of perfection. None of us in construction can achieve that. Our clarification wording is in step with standard industry practice.

- The description of work in the subcontract includes some items that you asked be omitted when we negotiated the price. We either need to reinstate the earlier deductions or delete those items from the subcontract.

Conclusion

The primary aim of scope-related negotiations is to reduce the description of a subcontractor's work to a precise statement of performance obligations as contemplated by the subcontractor in bidding its work. Thus, the scope definition should coincide with cost elements used in estimating and establishing the subcontract price.

A subcontractor should be able to sell the prime contractor on the mutual benefit of having a good understanding about which work the subcontract does and does not include.

Ambiguous wording and vague clauses should be replaced by clear scope language. To the extent practical, the actual wording of the bid should be used in the subcontract to confirm the scope agreed upon by the parties.

In the same way that a subcontractor double checks the amount of money shown in the subcontract, it is equally important that a precise, accurate scope definition be part of the subcontract agreement for each job.