

# The Prime Contractor Factor

## *A Guide to Analyzing the Business Practices and the Subcontracts of Prime Construction Contractors*



***Authored by***

**David R. Hendrick, Esq.**

***Published by***

**American Subcontractors Association, Inc.**  
**Foundation of the American Subcontractors Association, Inc.**  
1004 Duke Street  
Alexandria VA 22314-3588  
(703) 684-3450  
[ASAOffice@ASA-HQ.com](mailto:ASAOffice@ASA-HQ.com)  
[www.ASAonline.com](http://www.ASAonline.com)

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### About the Author

David R. Hendrick, Esq. (1946-2014) wrote the original edition of this manual in 1992. With a B.S. in chemical engineering from Tufts University and a law degree from the University of Virginia, Mr. Hendrick practiced construction law in Atlanta for 40 years. He had an insatiable appetite for immersing himself in activities relating to construction law and the construction industry. He was a founding partner of Hendrick, Phillips, Salzman & Flatt.

### About Hendrick, Phillips, Salzman & Flatt

[Hendrick, Phillips, Salzman & Flatt](#) has earned a national reputation for providing sophisticated legal services and counseling to businesses and entities involved in the construction industry for over 25 years. Its practice concentrates on the unique and specialized legal needs of such businesses and entities and spans all phases of construction law and construction-related transactions and dispute resolution. Its clients include owners, contractors, manufacturers, design professionals, insurance and surety companies, and the professional and trade associations that serve the construction industry. In addition, the firm offers a full range of legal and business planning services necessary for the successful formation, operation and guidance of construction-related businesses.

The firm's guiding principle is to provide effective, efficient, experienced and personalized legal services to each of its clients. It is dedicated to providing high quality legal services on the basis of a full understanding of each client's needs, objectives and operations. The firm emphasizes advance counseling with its clients to avoid or minimize their legal and business risks and reduce the impact of such risks. Emphasis on such preventive measures aids clients in avoiding disruptive and costly disputes and facilitates resolution of those disputes which do arise in a "business" rather than a "litigation" context.

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## Selective Subcontracting

Subcontractors and specialty trade contractors assume the greatest risks and reap the smallest rewards of all the participants in the construction business.

In such a hostile environment, subcontractors must take all reasonable precautions to minimize or control risks. One of the surest ways for a subcontractor to reduce risks is to be highly selective in choosing its prime contractor partners. Not only is it appropriate for a subcontractor to discriminate when selecting contractors with which it wishes to do business, it is absolutely necessary.

The Golden Rule of contracting is well known: “He who has the gold rules.” A corollary of that Golden Rule is that a subcontractor must “know well the party with which it contracts (especially if that party holds or controls the gold).”

Unfair, one-sided subcontract forms are a substantial risk to subcontractors. Nevertheless, on many projects, subcontract language often is forgotten or overlooked by both parties during the course of project performance. However, in virtually every subcontract relationship, the success or failure of the subcontractor, and indeed the project, depends substantially upon the manner in which the contracting parties conduct themselves.

Viewed in this light, careful selection of a partner is the most essential and important determination a subcontractor can make. To aid in this process, each subcontractor should develop and implement its own program to assist in evaluating and selecting contracting partners that will treat it reasonably, fairly and honestly in a subcontract relationship. A subcontractor that disregards this approach proceeds at its own risk.

### Characteristics of Quality Prime Contractors

The characteristics that define quality in the operation of a prime contractor’s business can be distilled generally into the following categories:

#### **Reasonableness**

Does the contractor consistently strive to reach reasonable resolution of questions or issues? Or does it merely impose its unilateral will on subcontractors?

#### **Honesty and Trustworthiness**

Does the contractor honor its agreements and commitments?

#### **Fairness**

Does the contractor seek to treat all parties fairly and equitably or rather exercise its superior leverage without regard to the impact on the subcontractor?

#### **Pertinent Experience**

Has the contractor successfully performed the kind of construction work involved in the project?

**Technical Competence**

Does the contractor have the technical experience and expertise to successfully manage the project and integrate the subcontractors' work?

**Financial Capability**

Does the contractor have the financial capability to fulfill its obligations to its subcontractors?

**Capable Central and Project Management**

Does the contractor have the necessary people skills and management experience in both its home office and at the jobsite?

**Sufficiency of Available Resources**

Can the contractor coordinate and marshal the equipment and facilities required by the project?

**Team Spirit**

Does the contractor approach project management as a team effort involving all team members including subcontractors and suppliers?

**Professionalism**

Does the contractor have a reputation for approaching each project as a professional?

A prime contractor that exhibits these characteristics will tremendously enhance the quality of the subcontract relationship and significantly reduce a subcontractor's risks.

**Potential Risks**

On the other hand, a prime contractor that lacks these characteristic signs of quality increases a subcontractor's risks by:

- Increasing the overall direct cost of performance due to ineffectual project management and inefficiency in scheduling and coordination.
- Slowing or impeding payment, resulting either from deficient management by the contractor or from disputes with the owner that threaten payment flow.
- Unnecessary use of valuable and limited project management and supervisory time and resources.
- Disruptions resulting from adversarial and dispute-oriented relationships.
- Necessary assumption of a defensive posture regarding performance of subcontract responsibilities rather than a cooperative, team-spirited approach.
- Impairment of bonding and financial capacity.
- Damaged reputation by "guilt by association" with a problem project.
- The inevitability of litigation with its attendant costs and delays in order to enforce subcontract rights.

The consequences of failing to implement a program for selecting contracting partners can be swift and substantial. These problems and their direct and indirect impact on a subcontractor will directly impact its bottom line and may even threaten the firm's survival.

Therefore, it is imperative that each subcontractor develop its own system to evaluate and determine the relative quality of potential prime contractor customers. This determination will then assist a subcontractor in making decisions at each critical step, even before the deal is struck, including:

- Whether to submit a bid at all.
- Whether to adjust the bid higher or lower for particular risk factors or contingencies.
- Whether and how hard to bargain for adjustments in subcontract price and/or terms and conditions which will reduce or mitigate risk factors.
- Whether and when to “fold ‘em” and walk away from a bad subcontract deal.

Each potential subcontract relationship must be addressed on its own merit starting with the relative quality of the prime contractor. A subcontractor must assess the risk and determine if suitable price or other terms can be established that reasonably reflect the measure of risks undertaken. Failure to fully assess the prime contractor's quality in making this determination, and therefore not knowing the risk to subcontractor performance and payment, is simply a less noisy and messy form of Russian Roulette.

## Development of Criteria

Hundreds of factors can be identified which bear upon the prime contractor-subcontractor relationship. As a practical matter, the more detailed, cumbersome and complicated the listing of factors, the less likely it will be used effectively, or at all, in assessing relative prime contractor quality. In addition, each subcontractor has different values and perspectives regarding the relative significance of desirable or undesirable prime contractor characteristics. Therefore, each subcontractor must carefully select the factors it will use to evaluate prime contractors.

A subcontractor can consider the following factors as a starting point since they bear most directly on the quality and risk assessments by subcontractors. From this list, a subcontractor can develop its own guidelines for bid and contracting determinations that will meet its own unique needs.

### Owner- and Project-Related Risk Factors

Many of a subcontractor's rights and risks derive legally or practically from the prime contractor relationship with the owner. Thus, a subcontractor's assessment of the quality of a particular potential subcontract relationship must start at the top. A subcontractor should consider the following owner and project characteristics:

- 1) Who is the owner?
- 2) Is the owner experienced in the construction process?
- 3) Is the owner capable of funding the project to completion with committed funds?
- 4) What forms of assurances of payment are available (i.e. payment bond, mechanics lien, trust funds)? What steps must be taken to secure these assurances?
- 5) Does the owner have prior contracting experience with the contractor? If so, what is the nature of this experience? What is the current status of those projects?
- 6) Does the owner have a positive or negative reputation in dealing with contractors?
- 7) Does the owner have a reputation for releasing retainage within a reasonable time?
- 8) Are there any signs that the owner has financial problems?
- 9) If multiple primes or separate contractors are to be used, what is the owner's ability, by itself or through a construction manager or other representative, to successfully coordinate multiple contractors?
- 10) Who are the design professionals?
- 11) Is the architect/engineering team experienced in the construction process?
- 12) Does the A/E team have prior contracting experience with the contractor or owner? If so, what is the nature of this experience? What is the current status of those projects?
- 13) Does the A/E team have a positive or negative reputation in dealing with contractors?
- 14) Is there any inflation or cost escalation anticipated?
- 15) Will labor availability – quantity, quality, cost and potential for disruption – meet project needs?

- 16) Are any unusual or difficult weather or physical conditions anticipated?
- 17) Will there be reasonable access to accomplish the work?
- 18) Is performance going to depend on owner-furnished equipment, materials or services?
- 19) Is the owner known for reasonableness or litigiousness?

### **Prime Contractor-Related Risk Factors – General**

A subcontractor's evaluation of a prime contractor's quality should start at the corporate level and include the following considerations:

- 1) How long has the contractor been in the construction business?
- 2) Where is the contractor's principal office or major branch office that will administer the project?
- 3) What are the contractor's prior experiences in comparable projects (i.e., size and complexity)?
- 4) What is the contractor's experience in the immediate geographic market?
- 5) What is the contractor's experience in the immediate labor market?
- 6) Does the contractor have sufficient financial capability to complete the project?
- 7) Does the contractor have an ongoing or prior relationship with the subcontractor? If so, what is the nature of these relationships?
- 8) Does the contractor have ongoing or prior relationships with other similar trade contractors? If so, what is the nature of this relationship?
- 9) Is the contractor generally familiar with local suppliers, the labor market, building inspectors and potential political and bureaucratic complications?
- 10) What is the current and near-term backlog of the contractor's project volume? What impact will this have on resources, bonding and management?
- 11) Is the contractor experiencing a rapid growth or decline in volume of business?
- 12) Are there any signs of financial problems?
- 13) Is the company a broker rather than a contractor? What is the likely extent of the contractor's financial interest in the project for work that it is performing itself?
- 14) Does the contractor use reputable corporate sureties for its bid, performance and payment bonds?
- 15) Does the contractor hold a pre-bid or kick-off conference?
- 16) Does the contractor support its subcontractors in their disputes regarding owner or architect actions?
- 17) What is the contractor's reputation for litigation and dispute resolution?
- 18) Does the contractor have any particular business or political connections which may be helpful?
- 19) What is the contractor's general reputation for:
  - Working cooperatively with subcontractors to address and resolve problems?
  - Administering jobs as if it were a "friend of the project" and not everyone's adversary?
  - Inducing or requiring subcontractors to make unreasonable commitments?
  - Employing coercive actions by withholding money owed to achieve concessions?
  - Making timely and appropriate payment per subcontract terms?



- Dealing with subcontractors forthrightly, honestly and fairly?
- Employing an effective project planning, scheduling and coordination method that allows input and influence from subcontractors?
- Reducing retainage in immediate response to a reduction by the owner?
- Finishing comparable projects on time and on budget?

### **Prime Contractor Home Office Management Factors**

A subcontractor also must gauge the home-office support capability of each contractor by assessing factors such as:

- 1) Are the project management personnel experienced in comparable projects (i.e., site, type, size)?
- 2) Are the project management personnel competent and capable of performing on the project?
- 3) Are change requests and claims promptly processed as they arise?
- 4) Are back charges or other withholdings administered fairly and reasonably? For example, is proper advance notice offered and opportunity to cure given?
- 5) Are pay applications timely reviewed and adjusted only upon prior notice and explanation?
- 6) Is paper flow promptly processed? Consider changes, proposals, notices, submittals, etc.

### **Prime Contractor Field Office and Project Management Factors**

A subcontractor should carefully assess the prime contractor's ability and capacity to manage the particular project. Indeed, a contractor's performance generally is only as good as its project personnel. Thus, a subcontractor should consider the following factors:

- 1) Is the field-supervision staff, including field engineers, experienced in comparable projects (i.e., size and complexity)?
- 2) Is the field-supervision staff competent and capable of performing on the project?
- 3) Does the field-supervision staff view the project as a whole and as a team effort in which they are to quarterback the team to a successful and profitable resolution for all?
- 4) Are there periodic progress or schedule meetings to inform all team members of the project status?
- 5) Does the field-supervision staff solicit and consider subcontractor suggestions and input for resolving problems?
- 6) Does the field-supervision staff encourage a candid and positive environment for the flow of information?
- 7) Is the field-supervision staff afforded sufficient time to deal effectively and directly with all subcontractors to help coordinate efforts and head off problems?
- 8) Are subcontractors afforded reasonable advance notice of when and where to begin work?
- 9) Is the schedule process used reasonably and effectively on a regular basis to provide realistic measures of progress and to identify problem areas?
- 10) Are subcontractors given copies of periodic schedules (i.e. near term, project completion, etc.) in a clear format?

- 11) Are specialty trades properly sequenced and coordinated?
- 12) Does the environment encourage adversarial, confrontational and self-serving exchanges or direct, accurate and concise exchanges?
- 13) Is site cleanup regularly performed?
- 14) Are formal minutes maintained of all regular job, schedule and progress meetings?
- 15) Are safe job conditions maintained?
- 16) Are temporary facilities routinely provided without cost?
- 17) Is the field-supervision staff knowledgeable about your particular tasks and needs?

### **Prime Contractor Bid Process Factors**

A subcontractor must carefully weigh the risks that arise out of the contractor's administration of the bidding and subcontract negotiation process. These factors include:

- 1) Does the contractor take the lowest responsible bid? Or does it bid shop or bid cut after award?
- 2) Will the contractor succumb to bid peddling by competing subcontractors?
- 3) How many potential competing bidders are expected? What is the quality of these bidders?
- 4) Is any anticipated bidder believed to have an inside track? Why?
- 5) Is the anticipated bid competition reasonable, tight or unreasonable?

### **Subcontract Factors**

A subcontractor can gain significant insight into a contractor's overall philosophy and attitude toward subcontractors by reviewing its standard subcontract form. One-sided, poorly-drafted subcontract agreements significantly complicate effective and efficient contract performance.

Indeed, poor subcontracting practices lead to difficult contract administration, confusion, controversy, dispute and ultimately greater costs to all involved, especially subcontractors. A subcontractor should carefully assess the proposed terms and conditions of the subcontract form proposed by the prime contractor before preparing and submitting its bid. That is, the subcontractor should gauge how fair and functional a prime contractor's subcontract form is into the initial decision of whether or not to submit a bid or proposal at all. These considerations also affect the subsequent decision of what modifications the subcontractor should propose to the subcontract form to make the ultimate subcontract acceptable.

Among the subcontract risk factors a subcontractor should consider are:

- 1) Contingent payment clauses that condition the subcontractor's right to payment upon receipt of payment by the contractor.
- 2) Prospective mechanics lien and payment bond waiver language that requires the subcontractor to relinquish future lien and bond rights.
- 3) Unreasonable retainage procedures permitting the contractor to retain a greater percentage of retainage than the owner is retaining from the contractor.

- 4) Unreasonable schedule provisions that do not allow the subcontractor to provide meaningful input into the scheduling process and allow the prime contractor to unilaterally impose and alter the subcontractor's schedule without recourse.
- 5) Omission of differing site conditions or changed condition type language in the prime contract or subcontract documents leaving the entire risk on subcontractors.
- 6) Inclusion of no-damage-for-delay language in the prime contract or subcontract form that leaves the subcontractor without remedy or recourse in the event of increased cost resulting from delays caused by the owner, the contractor or other subcontractors.
- 7) Conditional entitlement clauses that restrict the subcontractor's rights against the contractor to only what the contractor can in turn recover from the owner, even if the contractor cannot recover because of its own performance.
- 8) No express right to suspend work if payment is not timely made.
- 9) No right to interest recovery on late payment.
- 10) Unreasonable or unspecified time in which payment is to be made by the contractor to the subcontractor.
- 11) Unreasonable back charge provisions that do not require advance written notice or opportunity for the subcontractor to cure any alleged deficiencies or omissions in its work.
- 12) Unreasonable default and termination clauses that do not provide for reasonable advance notice or opportunity to cure alleged deficiencies, and are based solely upon subjective, rather than objective criteria exercised in the sole opinion of the contractor.
- 13) Unreasonable limitations on mark up for overhead and profit on changes and extras.
- 14) Unreasonable or unworkable change order procedures that unfairly burden the subcontractor with extra work without fair compensation.
- 15) Unreasonable or unworkable claims and disputes procedures requiring unreasonable notice of claims and imposing overly complicated dispute resolution procedures or unilateral dispute resolution by the contractor.
- 16) Broad form indemnity requirements that impose indemnity obligations without negligence or fault by the subcontractor which will likely exceed the subcontractor's ability to insure against the risk under available comprehensive general liability insurance coverage.
- 17) Requiring the subcontractor to name the prime contractor, and often the owner and architect as additional insureds under the subcontractor's insurance policy.
- 18) Provisions indicating that work is to be performed to the satisfaction of the other party.
- 19) Contract and subcontract requirements that have conflicting performance and specification criteria (e.g., "Do it as shown" but also "Make sure it works").
- 20) Unclear and unwarranted allocation of ultimate design responsibility to the contractor or its subcontractors.
- 21) Unreasonable language that seeks to absolve the owner or the prime contractor for the consequences of their own acts, omissions or negligence.
- 22) One-way conduit clauses that seek to pass only the burdens and not any of the benefits arising out of the prime contract documents to the subcontractor.

These issues and questions are dealt with comprehensively in other ASA publications, including the *ASA Subcontract Documents Suite*, subcontract negotiating tips, white papers and frequently asked questions. These materials are available on the ASA Web site at [www.ASAonline.com](http://www.ASAonline.com).

A subcontractor should consider conditioning its bid upon either specific modifications to address the unacceptable portions of the contractor's subcontract form if obtained in advance of the bid or the use of neutral alternatives such as the ConsensusDocs Form 750, Agreement Between Constructor and Subcontractor, available at [www.ConsensusDocs.org](http://www.ConsensusDocs.org). The ASA "Subcontract Bid Conditions," a part of the *ASA Subcontract Documents Suite*, provides sample language to condition your bid. The *ASA Subcontractor Documents Suite* is a no-cost benefit available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

## Sources of Information

A subcontractor must continually develop and update its database concerning particular owners and contractors with which it wishes to do business. A subcontractor also should seek every opportunity to expand its network of sources and resources about particular projects, owners and contractors.

### Third-Party Sources

A subcontractor can explore avenues of obtaining objective information from third parties. For example, a wealth of information can be obtained from the following third-party sources:

- 1) Trade association “business practices” programs such as those administered by many ASA chapters.
- 2) Professional references regarding comparable project experiences from owners, architects or other subcontractors that previously have dealt with a particular prime contractor.
- 3) Federal, state and local government listings of debarments or disqualifications of contractors.
- 4) Trade association membership indicating prime contractor responsibility by active affiliation with such groups as the Associated General Contractors of America, the Construction Management Association of America and the Design-Build Institute of America.
- 5) Court records of bankruptcies, lien filings, judgments and executions, and lawsuits commenced by or against a particular contractor.
- 6) State and local registration, qualification and licensing bodies that may have information regarding the experience and qualification of particular prime contractors.
- 7) Financial reporting services such as Dun & Bradstreet and other national or local counterparts that provide information regarding the financial capacity and experience of particular contractors.

### First-Party Sources

In addition, a subcontractor can compile its own database regarding prime contractors based upon its own experience and investigation. These sources may include:

- 1) A subcontractor’s own experience with a contractor.
- 2) A subcontractor’s resource files for each prime contractor in which it is interested in doing work. Such a file could include:

- News articles.
  - Announcements.
  - Financial information.
  - Brochures and promotional material, including a link to the firm's Web site.
  - Notes on street talk about the contractor.
- 3) Information obtained by direct solicitation or questionnaire to a particular prime contractor. Indeed, this may be the first step in a subcontractor's preferred customer program, as discussed further below.
- 4) A personal meeting and interview with key contractor personnel. Such a meeting can provide the best and most direct information concerning the contractor's philosophy toward subcontracting. Obviously, such a meeting or interview must be with a person with authority and preferably a decision maker such as the project manager or lead estimator involved in a particular project.

## Develop Your Own Rating System

Based upon the factors and criteria discussed above, an individual subcontractor can develop its own set of criteria applicable to its unique needs and objectives. Once a subcontractor has developed a rating system, it can be used on a day-to-day basis to assess each prospective prime contracting partner.

A subcontractor can assign a range of numerical values for each identified factor ranging from “0” (indicating no concern) to “10” (indicating great concern). The range may be altered by decreasing or increasing the positive number to reflect the perceived importance of the seriousness of a particular risk factor.

More important risk factors have higher numbers (such as “50”) while lower risk factors have lower numbers. For example, a subcontractor may rank a pay-if-paid clause as riskier than a failure to provide temporary services.

Then for each contracting situation, a subcontractor can analyze each risk factor and rank it numerically on the range specified for such factor according to the perceived risk in that contracting situation.

For example, if the factor of previous similar experience is deemed very important, then the overall risk factor range may be as follows:

Lowest	0
Lower	12
Moderate	25
Higher	28
Highest	50

A contractor with substantial comparative experience would then rank near the “0” or lowest risk on the scale, while an inexperienced contractor would rank at the highest risk end of the scale. See Example 1.

<b>Example 1</b>					
Prime Contractor’s Action	Always	Almost Always	Often	Seldom	Never
Does the prime contractor offer the ConsensusDocs Form 750, AIA A401 or other neutral subcontract?	0	10	20	30	40
Does the prime contractor refrain from bid shopping?	0	5	10	15	20
Does the prime contractor provide expected temporary services?	0	2	4	6	8
Is the project manager competent?	0	5	10	15	20
Does the prime contractor maintain safe job site conditions?	0	5	10	15	20
Does the prime contractor process change orders in a timely manner?	0	5	15	25	30

When all factors have been assessed with the best possible information, all assigned risk factors should be added and compared to the total possible score. See Example 2.

Example 2				
Excellent	Good	Fair	Poor	Dangerous
0-99	100-199	200-299	300-399	400-500+

The closer to the maximum the assigned risk analysis comes, the higher risk in the potential transaction. The subcontractor should further consider setting thresholds and adjust bids for contingency factors.

For example, a subcontractor could decide:

- Don't bid if the assigned risk is analyzed to exceed 80 percent of the total potential risk.
- Adjust the bid upward if the assigned risk is 50 to 80 percent of the total potential risk.
- Leave the bid unadjusted if the assigned risk is 20 to 50 percent of the total potential risk.
- Adjust the bid downward if the assigned risk is 20 percent or less than the total potential.

Of course, this type of analysis is necessarily subjective and, therefore, the results must be applied with a view to reasonableness and discretion.



## Preferred Prime Contractor Program

A subcontractor should consider initiating its own preferred contractor program. Under such a program, a subcontractor would directly approach selected prime contractors with the proposition that the subcontractor's proposed prices and terms will be influenced by the relative quality of the prospective contractor partner. Reputable and responsible prime contractors often strive to achieve a well-deserved reputation for professionalism and responsibility. In recognition of the overall efficiency and cost savings that result from a well-managed project, a subcontractor can and should adjust its bid and subcontract terms to reflect the relative quality of the particular prime contractor involved.

In introducing and implementing such a preferred prime contractor program, a subcontractor should seek to initiate an introductory meeting with targeted contractors. This initially should be presented as an introduction and an opportunity to present the subcontractor's firm in its most favorable light to the prospective prime contractor. The subcontractor should emphasize that a cooperative and reasonable subcontract relationship promotes efficiency and reduces risks and costs – and leads to more competitive pricing proposals. During the course of this introductory meeting, a subcontractor can seek out additional information from the contractor about its history, experience and practices from such source as:

- Questionnaire responses.
- Resumes.
- References from prior projects.
- An evaluation of the work environment for signs, good and bad.

## Appendix A

### Do's and Don'ts's of Exchanging Business Information

Subcontractors should be aware and cautious of the legal dangers inherent in the exchange of business information. Exchanging too much information or inappropriate information can violate federal and sometimes state antitrust or trade laws, or subject the parties involved in the exchange, to legal liability to an injured party.

Modern antitrust statutes and regulations seek to promote unfettered competition. Usually, the proscribed activities involve some form of concerted or organized activities – a conspiracy – to fix prices or terms of dealing, to limit or exclude competition, or to engage in boycott activities.

Penalties for violation of antitrust laws can be substantial. Penalties may include civil fines, stiff criminal fines and incarceration, as well as cease and desist orders and injunctions barring the offensive action. In addition, under certain circumstances, enforcement actions can be brought by affected private parties seeking civil damages which are tripled under the statute.

Trade associations and their members are particularly vulnerable to antitrust exposure. In essence, a trade association is a gathering or coalition of competitors. No matter how lofty the motives and intentions, this has the potential of a natural conspiracy, especially if the trade association focuses its activities and efforts on the marketplace and their common commercial interests. Consequently, even activities as innocuous as member education, information exchange, standardization of business practices, certification or licensing of an exclusionary nature can quickly get a trade association into trouble.

While national trade organizations are the most conspicuous targets for such investigations, local trade groups often are most vulnerable to potential violations of antitrust laws. Local groups tend to be more homogeneous, more inclined to act in concert even without explicit understandings or agreements, abler to actually impact competition in a particular marketplace, and less sophisticated in their approach to avoiding antitrust exposure.

From an antitrust or unfair trade practice exposure, a subcontractor must be very careful in exchanging information to avoid any tendency toward concerted action, or even the appearance of acting in concert, regarding such issues as:

- Terms and conditions of dealing with particular contractors or owners.
- Whether or not to deal with a particular contractor or owner.
- Bid or pricing decisions or practices.
- Credit policies or practices.

In such an information exchange, each party must ultimately evaluate the information provided and make independent decisions. No recommendations or agreements should be exchanged regarding a course of conduct.

Regarding defamation concerns, the parties to an information exchange must be very careful not to give false information which could adversely reflect on the business practices or financial standing of a third party. Verbal defamation (slander) or written defamation (libel) can be very difficult to contain once it has been released and the liability for actual or punitive damages can be extreme.

Finally, regarding tortious interferences with business or contractual relationships, parties exchanging information about a third party should be very careful about interfering with an existing or prospective contractual relationship. In many states, such interference is illegal and can result in being liable for actual and punitive damages.

Many of these concerns relate to business practice programs similar to those conducted by many ASA chapters. ASA has provided its chapters with very carefully prepared rules, guidelines and procedures for the business practice programs.

Generally, the following guidelines should be followed in any exchange of business-related information, whether they are an informal, one-on-one situation, or a more formal business practice type of exchange:

- Know the party with whom you share information and its particular interest or concerns.
- Relate firsthand experience only. Do not relate hearsay or rumor.
- Share facts, not opinions or conclusions.
- Be accurate, precise and specific.
- Be objective, fair and reasonable. Do not interject personal feelings for individuals or companies.
- Provide only pertinent information regarding payment and business practices.
- Do not recommend a course of action regarding business dealings with others.
- Do not disclose your plans regarding future business dealings with others.
- Always ultimately think and act independently.