

A close-up photograph of a person's hand pointing at architectural blueprints on a desk. Another hand is holding a pen over the blueprints. A laptop is visible in the background, and the scene is lit with warm, golden light. A semi-transparent green box is overlaid on the left side of the image, containing the title and subtitle.

Form Contract Modifications

A Subcontractor's Perspective

In this presentation



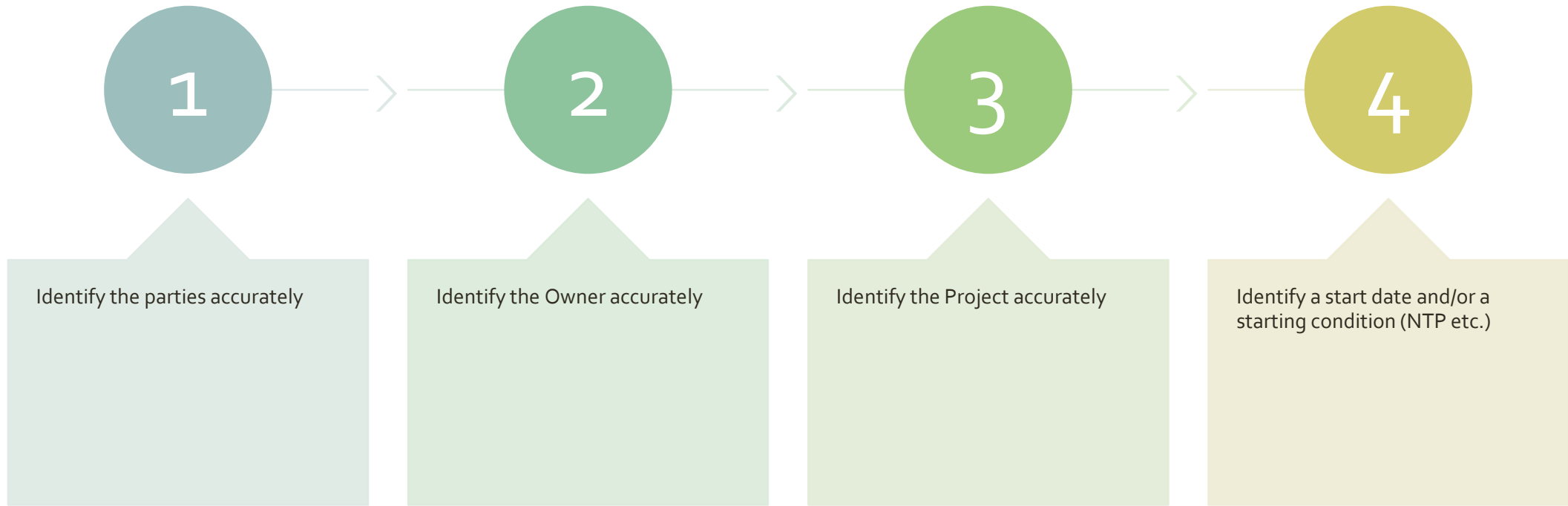
WHAT YOU SHOULD BE
LOOKING FOR WHEN READING
A PROPOSED SUBCONTRACT



WHAT YOU SHOULD BE
CONSIDERING WHEN READING
KEY PROVISIONS



HOW YOU SHOULD PROTECT
YOURSELF IN A SUBCONTRACT



Subcontracts Generally

Form Contracts

AIA A401 - 2017

- Published by the American Institute of Architects with input and endorsement from several trade organizations and industry stakeholders
- Because they are drafted by architects, the architect plays a large role in construction project administration
- Each document is updated every 10 years

ConsensusDOCS 750 (2017)

- Developed by a collection of trade organizations and construction industry stakeholders, including the ASA, ABC, AGC,
- First created in response to the 2007 update to the AIA contracts updated that year
- Each document is updated on an as-needed basis

Subcontract Documents

AIA A401 - 2017

- Addressed in Articles 1 and 15
- Does not include the Subcontractor's Proposal
- Prime contract incorporated
- Requires Contractor to provide copy of all Subcontract Documents prior to execution

ConsensusDOCS 750 (2017)

- Addressed in Articles 2.4, 2.6.1, and 13
- Does not include the Subcontractor's Proposal
- Prime contract incorporated
- Requires Contractor to provide copy of all Subcontract Documents prior to execution
- Contains an express Order of Precedence

Subcontract Documents Considerations

- Ensure your proposal is included and/or that your scope of work is clearly set forth
- Ensure that the only incorporated documents are ones that you have been provided
- Ensure you review the most important provisions of the prime contract
- Ensure you know the order of precedence

Contractor's Responsibilities

AIA A401 - 2017

- Addressed in Article 3

ConsensusDOCS 750 (2017)

- Addressed in Article 4

Contractor's Responsibilities Considerations

- Identify the Contractor's representative and their scope of authority for the Project
- Ensure the Contractor's communication obligations are set forth, especially concerning Subcontractor's lien rights
- Clearly outline the requirement for the Contractor to provide storage areas on the Project
- Clearly outline Contractor's responsibility for scheduling

Payments to Subcontractor

AIA A401 - 2017

- Addressed in Article 11

ConsensusDOCS 750 (2017)

- Addressed in Article 8

Payment Defaults

AIA A401 - 2017

- Schedule of Values to be submitted prior to first application for payment
- Does not contain “pay-if-paid” language per §11.1.3 last sentence
- Provides for retainage and late payment interest

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- Schedule of Values is a condition precedent to payment (must be provided within 15 days of execution)
- Does not contain “pay-if-paid” language per 8.2.5
- Provides for retainage and late payment interest

Payment Considerations

- Be aware of attempts to add “pay-if-paid” language
- Confirm retainage
- Under both form contracts, payment is triggered by Application for Payments

Indemnity

AIA A401 - 2017

- Addressed in Article 4.7

ConsensusDOCS 750 (2017)

- Addressed in Article 9.1

Indemnity Defaults

AIA A401 - 2017

- Subcontractor shall indemnify and hold harmless
- Indemnified parties: Owner, Contractor, Architect, Architect's consultants, and agents and employees
- Bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself),
- To the extent caused by the negligent acts or omissions of the Subcontractor, Sub-subcontractors, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable
- Regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified by Subcontractor.

ConsensusDOCS 750 (2017)

- Subcontractor shall indemnify and hold harmless
- Indemnified parties: Constructor, Design Professional, Owner, and their agents, consultants, and employees
- Bodily injury and property damage other than the Work itself
- To the extent caused by the negligent or intentionally wrongful acts or omissions of Subcontractor, sub- subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable

Indemnity Considerations

- Be aware of the breadth of indemnity including the nature of the claims and the parties indemnified
- Be sure to only indemnify for your own negligence
- Be aware that some indemnity provisions are unenforceable in certain jurisdictions

Delay/Force Majeure

AIA A401 - 2017

- No express provision regarding delays or force majeure
- Subcontractor may make claims for extensions of time and damages for delay (Article 5.3)

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- Delays addressed in Article 5.3
- Subcontractor agrees to initiate all claims for which Owner is or may be liable in the manner and within the time limits provided in the Subcontract Documents for like claims by Constructor upon Owner
- Subcontractor may recover for delay damages caused by Contractor
- No express force majeure provision

Delay/Force Majeure Considerations

- Be aware of notice requirements, including those contained in the Prime Contract
- Document delays and their causes carefully

Unknown Site Conditions

AIA A401 - 2017

- Not addressed

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- Addressed in Article 7.3
- Subcontractor to stop affected Work after the condition is first observed and give prompt written notice of the condition to Constructor.
- Subcontractor shall not be required to perform any Work relating to the condition without the written mutual agreement of the Parties

Unknown Site Conditions Considerations

- Ensure this is addressed in the Subcontract
- You should try to avoid being responsible for unknown site conditions

Termination of Subcontract

AIA A401 - 2017

- Addressed in Article 7

ConsensusDOCS 750 (2017)

- Addressed in Article 10

Termination of Subcontract Defaults

AIA A401 - 2017

- Subcontractor may terminate for the same reasons as the Contractor may terminate with Owner under the Prime Contract, or for non-payment ≥ 60 days
- Contractor may terminate for cause and finish Subcontractor's scope
- No Contractor right to terminate for convenience
- In the event the Owner terminates Prime Contract for convenience, Subcontractor entitled to payment on work performed and overhead and profit on work not performed
- Contractor may suspend, Subcontractor receives equitable adjustment in time and sum

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- Subcontractor may terminate after stopping work for 30 days due to non-payment or "unreasonable" suspension
- Subcontractor type of recovery dependent on payment status of Owner to Contractor
- Contractor may terminate for cause and finish Subcontractor's scope utilizing Subcontractor's material and supplies; Subcontractor may not unreasonably withhold consent for Contractor to utilize Subcontractor's tools and equipment onsite
- If Owner terminates Prime Contract, Subcontractor recovery limited
- Wrongful termination by Contractor results in Subcontractor recovering reasonable overhead and profit on the Subcontract Work not executed

Termination of Subcontract Considerations

- Be aware of attempts to add termination for convenience language
- Be aware of attempts to increase Contractor's rights to suspend
- Be aware of attempts to limit Subcontractor's remedies
- Be aware of attempts to increase Contractor's remedies
- Be aware of all notice requirements

Dispute Resolution

AIA A401 - 2017

- “Contractor’s Claims” addressed in Article 3.4 and 3.5
- Claims and Disputes addressed in Article 6

ConsensusDOCS 750 (2017)

- Addressed in Article 11

Dispute Resolution Defaults

AIA A401 - 2017

- AAA Mediation is a condition precedent to binding dispute resolution
- Binding dispute resolution is to be selected (Litigation is default)
- Expressly provides for consolidation and joinder
- Silent as to attorney's fees

ConsensusDOCS 750 (2017)

- Direct Discussion are required before mediation
- Mediation is the second step (Default is AAA but other options provided)
- Binding dispute resolution is to be selected (Litigation is default)
- Prevailing party awarded costs and attorney's fees

Dispute Resolution Considerations

- Be aware of notice and appeal requirements, especially timeframes
- Be aware of attempts to permit the contractor to determine dispute resolution path
- Be aware of attempts to change venue of dispute resolution
- Be aware of attempts to shift costs of dispute resolution

Liquidated Damages

AIA A401 - 2017

- Addressed in Article 3.4.1
- Liquidated damages are only applied if “assessed” against the Contractor

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- Addressed in Article 5.5
- Liquidated damages are only applied if “assessed” against the Contractor

Liquidated Damages Considerations

- Be aware of any liquidated damages provision in the Prime Contract
- Be sure to limit liquidated damages to those actually “assessed” against the Contractor
- Ensure subcontracts limit liquidated damages against the subcontractor to the Subcontractor’s share of the responsibility for the damages

Waiver of Consequential Damages

AIA A401 - 2017

- Addressed in Article 6.4
- Exception for liquidated damages

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- Addressed in Article 5.4
- Exception for any liquidated, consequential, or other damages that Owner is entitled to recover against Constructor under the prime agreement and for losses covered by insurance as required by the subcontract
- Requires similar waivers in all sub-subcontracts

Waiver of Consequential Considerations

- Major difference between ConsensusDOCS and AIA
- Be aware of major exception to waiver contained in the ConsensusDOCS
- Owner is the most likely party to suffer significant consequential damages

Final Thoughts

- Always be aware of Subcontract timing and notice requirements
- Paper, paper, paper
- “An ounce of prevention is worth a pound of cure”

A group of people are gathered around a table in a meeting room, engaged in a discussion. The scene is partially obscured by a semi-transparent olive green overlay on the left side, which contains the text 'Thank you' and the email address 'mfelezzola@babstcalland.com'. The background shows a modern office environment with large windows and a brick building exterior.

Thank you

mfelezzola@babstcalland.com