

Abide by the Subcontract to Preserve Claims and Don't Release Claims Through Release and Waiver Forms

by Timothy Woolford, Woolford Law, PC



Success on a construction project often hinges on obtaining additional compensation for increases to your scope of work or additional time for delays beyond your control. Demonstrating your entitlement to a time extension or additional compensation is harder than ever today because most owners are very budget and schedule conscious. They're often very resistant to requests for time or money and looking for any basis to deny relief. In light of this, subcontractors must not make it even more difficult by missing claims notice deadlines or failing to include required information in the notice. If you don't comply with the notice of claims provisions in the subcontract, you give the customer an easy way to deny relief to which you might otherwise be entitled.

In the past, use of the AIA subcontracts was more common than it is today. The AIA subcontract provided then (as it does today) that written notice of a claim must be provided to

the general contractor within 21 days of the date that you first became aware of the claim or the condition giving rise to the claim. Today, most general contractors have developed their own subcontract forms, which are usually intended to provide greater protection to them and less to subcontractors. They often contain traps specifically designed to cause subcontractors to inadvertently waive claims for time and money. These customized, or proprietary subcontracts, often shorten the time for giving notice to much less than 21 days. It is not unusual to see a requirement that written notice of claims be given within two or three days coupled with strong language that if notice is not given on time, the claim is waived.

In order to avoid waiving your claim, it is critical to know how much time you have under the subcontract to give notice of your claim and to comply with it. Short time periods are the norm now, so you've got to act very

quickly in many cases. Don't drag your feet and miss the deadline hoping it all work out in the end. Moreover, you must understand the information that your written notice is required to contain. Avoid the trap of doing "what you normally do," or have done on past projects. Don't wait until a project closeout meeting to put your claim on the table. Don't make the mistake of thinking that the claim was preserved because it was discussed at weekly or bi-weekly job meetings, or discussed verbally. Instead, carefully review the subcontract to understand the precise requirements for the timing and content of claims and follow them. If you miss the deadline or omit required information, your customer is likely to reject the claim on the ground that you did not comply with the subcontract and waived the claim as a result. Make sure any subcontracts that you enter into with lower-tiers also require the subcontractor to notify you of claims in time for you to timely notify your customer.

Some subcontractors don't strictly follow the notice provisions fearing they might alienate the customer or appear adversarial. They worry that the customer will retaliate against them by delaying progress payments, sitting on change order proposals, backcharging them or otherwise making life difficult for them. Don't let these fears preclude you from giving timely and proper notice. One way to fulfill your notice obligation while avoiding the appearance of adversity is to use language like this in your notice of claim:

Dear Customer:

Your subcontract requires subcontractors to place you on notice whenever our work is being delayed.

While we have no desire to become adversarial, we do recognize the need to adhere to the provisions in your subcontract regarding notice. As a result, we are required to tell you about the following which is impacting our work.

The benefit of language of this type is that you are giving notice while making it seem like you are simply being a good subcontractor who is following the customer's requirements. While

you must be sure to choose language that satisfies the requirements of the subcontract, there are often different ways of saying the same thing. The way you say it can make a big difference and reduce the chance that you will burn a bridge by giving notice of a claim.

Make sure all personnel involved with the project are aware of and well-versed in the notice requirements of the particular project. If project-level personnel are not aware of the requirements, it increases the chance that deadlines will be missed. Particularly on longer projects, it is not unusual to change project managers or superintendents in the middle of the project. Make sure the new people are aware of the requirements. It is easy for new PMs and superintendents to be so focused on getting acquainted with the project that they fail to comply with notice requirements.

Another critically important step to preserving claims for time and money is to avoid waiving claims through the submission of release and waiver forms as part of the payment process. Subcontractors are frequently required

to submit an executed waiver and release form as a condition of receiving progress payments. These are often called Waiver of Liens forms or some other similar name. Many subcontractors incorrectly assume that these forms are boilerplate and harmless documents that have no effect on pending change order proposals or other claims for which notice was previously given. That assumption is incorrect.

Subcontractors must understand that signing them can waive all claims that arose before the date of the release. Even pending change order proposals can be waived and released by signing these documents. This is because many release forms state that in exchange for the payment, the subcontractor waives and releases any and all claims or requests for payment that arose before a certain date. If the change order proposal arose before that date and is not carved out from the scope of the waiver or release, it will likely be considered waived and released. Courts enforce release and waiver forms and if you have not preserved your claim,

Use ASA Model 'Stickers' to Preserve Your Rights

by American Subcontractors Association

Include ASA's model "stickers" in your tactics to avoid potentially damaging language hidden in the "fine print" of routine project documents. Change orders, pay applications and other routine documents all too often contain language limiting subcontractors' rights. ASA members can download the model "stickers" from the ASA Web site and affix them to:

- Signed change orders submitted to customers. The *ASA Change Order Reservation of Rights* sticker reserves your company's rights to "additional claims for any delays, inefficiencies, disruption or suspension, extended overhead, acceleration, and the cumulative impact of this and other change orders issued to this date."
- Signed lien or bond waivers submitted to customers. The *ASA Lien Waiver Reservation of Rights* sticker specifies that your company does not waive "any lien or bond rights securing payment of retainage, unbilled changes, and claims which have not been asserted in writing or which have not yet become known to Subcontractor."

- Signed payment applications submitted to customers. The *ASA Payment Application Reservation of Rights* sticker makes releases or waivers "effective only to the extent of payments actually received and ... inapplicable to work performed and/or materials furnished for which payment has not been received."
- Signed schedule approvals submitted to customers. The *ASA Schedule Approval Reservation of Rights* sticker reserves your company's right to claims for "additional costs with respect to unresolved issues" and claims resulting from work that does not proceed in accordance with the schedule because of the actions of others.

Print the ASA stickers on Avery 5163 (or equivalent) labels and keep them handy in your office. Download the stickers from the ASA Web site under "[Contracts and Project Management](#)" by clicking on "Log In/Access Member Resources."

recovery will probably be denied. Therefore, do not assume that a routine change order request (which has not yet been approved) is not covered by the release language.

When reviewing the subcontract during the bidding and negotiation phase, determine if it requires you to submit a release or waiver form in exchange for payment. If it does, request a copy of release or waiver form and determine if it contains language providing that you waive or release claims that arose before a certain date. See if the form allows you to specifically identify claims that you do not intend to waive or release. If it does not, ask that the form be revised to include a place where you can identify claims that you do not intend to waive release. This is called reserving claims or exempting them from the scope of the release or waiver. You must clearly identify claims that you do not intend to release or waive. For example, if there are pending change order proposals or time extension requests, identify them by name and number.

If the form does not have a place to reserve or exempt claims and the customer refuses to revise the form, you should still attempt to reserve or exempt the claims by identifying the claims that you do not intend to waive. A handwritten or typed description of the claim either in the margin or at the bottom of the page with a statement identifying the claim(s) not intended to be released, will likely be sufficient. If the customer refuses to allow you to reserve or exempt claims on the form and tells you that it will not pay you unless you sign the form without modification, we recommend you comply with the customer's demand in order to obtain the payment. However, write a contemporaneous letter or email making it very clear that you are signing the release without reserving the claims under protest because the customer refuses to make payment otherwise. We cannot guarantee that a court or arbitrator in your jurisdiction will rule that the claims were not waived or released, but this strategy at least gives you an argument that you clearly informed the customer of the claims you did not intend to release.

By far, the best approach is to address the language of the form at the negotiation stage and to insist that the form have a space for you to reserve or exempt claims from the scope of the release or waiver. Once the language of the release or waiver is agreed upon, make sure it is attached to the subcontract as an exhibit and that the subcontract is clear that the form attached as the exhibit is the one you will be required to sign in order to receive the progress payment.

Failing to provide timely and proper notice of claims can be devastating. This article is designed to provide very general guidance on a complex subject. Each subcontract and each project are unique. You should consult with an experienced construction attorney regarding your individual circumstances.

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