



# Preparing for and Dealing with Subcontractor Defaults

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# Today's Speaker

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# General “default” categories

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Performance

Damages

Coverage/Insurance

Deliverables/Licensing

# First, which agreement is right for you?

## A401-2017 Standard agreement between Contractor/Subcontractor

- Scope: Prime contract defines scope of work; passed to subcontractor
- General Conditions: use A201-2017
- Compensation: stipulated sum
- Claims and dispute resolution: initial decider tbd; mediation and then checked method
- Insurance: fillable form
- Termination: Subs' rights mirror GC's in prime contract; non-payment after 60 days; GC may terminate for cause or Owner's convenience; GC may suspend

## A421-2018: Master Agreement with work under multiple work orders

- Scope: Work orders define scope of work; use A422-2018 work order form
- General conditions: stated in agreement
- Compensation: stipulated sum through work orders
- Claims and dispute resolution: architect is initial decider; dispute method defined by prime contract;
- Insurance: provides set terms
- Termination: Sub's rights mirror GC in prime contract (terminate/suspend); non-payment after 60 days; GC terminates for cause or suspend for convenience

## AA441-2014: Agreement for design-build projects

- Scope: design-builder is party
- General conditions: in agreement and A142, Standard form agreement between design-builder and contractor
- Compensation: stipulated or cost of work plus fee with/without GMP
- Dispute resolution: neutral initial; then mediation or checked method
- Claims: owner is initial as to design-builder
- Insurance: includes insurance and bond requirements
- Termination: Owner/design-builder terminate for cause; owner terminates or suspends for convenience

We will use the A401 reference, but **create your own or conform** whichever AIA version (present or prior) to your particular project.

# Failure to Perform

Subcontractor claims work not within scope; demands change order

- Subcontractor reviews/approves shop drawings, specifications; verifies understanding; adopt to subcontract work (§4.2.3)
- Contract identifies alternates (§10.2)

## Practical Tips:

- Specify and include specifications and drawings in subcontract agreement
- Review full scope with Subcontractor
  - Mindful of unsophisticated or rushed Subs
- Refer to prime contract schedule
- Define scope of work broadly
- Use architect/owner's design team
- Serve cure notice immediately
- Consider retainage flexibility (increasing, rewarding)

# Failure to Perform (con't)

## Subcontractor delays performance

- Work commences on date of agreement, GC's notice or other agreed date (§9.1)
- Substantial completion either specified or within number of days (§9.2.2.)
- Liquidated damages for delay in substantial completion (§9.2.4)
- GC not to instruct/order Subs' employees or sub-subcontractor unless authorized (§3.3.2)
- GC/architect may reject work non-conforming to Prime (§ 4.2.5.)
- Subcontractor may stop work on 7 days notice after 7 days non-payment from GC (§4.8)

## Practical Tips:

- confirm owner/architect reviews schedule
- Make completion dates earlier than prime contract requires
- Permit GC to instruct Sub's employees or sub-subcontractor as needed
- Have targeted progress completion dates
- Consider targeted liquidated damages
- Have replacement subcontractor ready if possible
- Don't wait till problem enlarges

# Failure to Perform (con't)

## Subcontractor's quality of work defective

- GC promptly notifies Subcontractor of faulty, defective or nonconforming work (§3.3.5)
- GC provides 7 day notice for costs/services to expended for failure, and provide charges within 15 days after (§3.4.2)
- GC may withhold costs/payment if Sub does not cure within 5 days notice (§3.5)

## Practical Tips:

- Shorten cure period
- Make more restrictive than under prime contract
  - E.g., if prime gives Owner 7 day notice, make 5 days
  - E.g., if prime requires GC to make claim for contract adjustment within 15 days, provide to sub within 10 days
- Document and photograph work not performed
- Require same employees of subcontractor
  - Consistency breeds familiarity
- Adjust/utilize other subcontractors
- Keep owner/design team informed
  - Did owner refer subcontractor?

# Failure to Perform (con't)

Subcontractor abandons project, disappears or files for bankruptcy

- GC may terminate if subcontractor fails or neglects to do work, or fails after 10 day notice to correct default/neglect; unpaid balance to be paid after applying damages (§ 7.2)
- Termination for convenience if Owner terminates GC as such (§7.2.2.)

## Practical Tips:

- Provide immediate right of termination on bankruptcy filing
- Provide recourse where Subcontractor has “emergency” affecting presence at project
  - adjust contract price accordingly
- Increase retainage and/or withhold payment
- Advise owner/design team
- Have authority/assignment of right to contract and to closed out permits



# Safety/Damage Failures

Subcontractor causes damage to persons, property of owner, GC or other subs' work

- Subcontractor to take reasonable safety precautions, follow all laws, etc., notify GC within 3 days of injury to Subs employee (§4.4.1)
- Subcontractor indemnifies owner, GC, architect, etc. from claims, damages (§4.7.1)

Subcontractor does not follow Covid related safety requirements

Practical tips:

- Include broad indemnification provisions in rider
- Notice to subcontractor to cure or repair and deduct
- Make sure subcontractor's carrier policy conforms; Notify carrier
- Report to owner/design team
  - Document/photograph
- Notify carriers (GC's and subcontractor's)
  - Coverage for tort, not contract damages
  - Don't settle without carrier's input
- Review Owner/building rules on accessibility
- Make sure subcontractor provides mandated safety protocols

# Coverage/Insurance defaults

## Subcontractor's insurance lapses or is insufficient

- Subcontractor required to maintain specified insurance types and limitations; kept from inception through final payment or termination; or expiration of correction period for any completed operations coverage (§ 12.1)
- Subcontractor to provide certificates of insurance before beginning, on renewal and on GC's request (§12.1.4)
- Additional insured may be required (§12.1.6)
- Contractor may suspend work on insurance lapse until cured (§12.1.7)

## Practical tips:

- Keep declarations and policies on file
- Incorporate prime contract insurance requirements into subcontract
  - Copy Insurance exhibit
- Confirm additional insured obligations
  - Owner may require additional parties
- Provide in subcontract 30 day notice to renew
- Include right to terminate (not just suspend) on lapse of insurance

# Deliverables/Licensing defaults

## Subcontractor does not provide warranties

- Warranties must be written to Owner's name, transferable to owner; warranty period begins per subcontract (§4.6.2)

## Practical tips:

- Verify provider at inception
- Maintain communication with provider
- Have assignment of rights warranties effective upon notice

## Subcontractor not licensed

- Subcontractor required to be licensed if the jurisdiction requires (§4.1)

## Practical tips:

- Verify!
- Do not allow use of licensed companies as proxies
  - Sub working on project must be licensed

# Questions?

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