



Bulletin

Managing Killer Contract Clauses

INTRODUCTION

This bulletin will identify “Killer Clauses” commonly found in standard, preprinted contract forms of general contractors and construction managers. This is not a discussion of scope issues, but of the terms and conditions most typically found in boilerplate contract agreements.

The bulletin is divided into five sections, (1) The Work, (2) The Schedule, (3) Indemnity and Insurance, (4) Payments and (5) Miscellaneous. Within each of the sections mentioned above, there are examples of killer clauses. Each killer clause is followed by suggestions as to how to modify this language so as to eliminate unnecessary risk to the subcontractor without significantly altering the general contractor’s risk.

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Before commencing a discussion on specific contract clauses, two items must be reviewed: (1) bids, and (2) incorporation by reference of other documents. When bidding a project you should either have the intended subcontract form available and submit with your bid a list of exceptions to the form or, include with your bid a statement similar to the following: “If we are the successful bidder on this project, we reserve the right to negotiate the Subcontract so it more closely reflects the AIA documents [or ConsensusDocs] and our normal business practices.”

When you finally receive and read the GC’s proposed subcontract, carefully review the definition of the Contract Documents. It will likely include not only the subcontract, but other documents which are “incorporated by reference” into your subcontract. This language means that even though the referenced documents are not physically attached to your subcontract, you are nonetheless bound by their additional terms and conditions. Therefore, it is your obligation to acquire the incorporated documents from the GC and read them just as carefully as the subcontract itself before signing the subcontract. Most often the referenced documents include the contract between the Owner and the GC, as well as

certain GC forms. When reviewing the Contract Documents, be aware of the following killer clauses.

THE WORK

Scope of the Work

- KILLER

The Work of Subcontractor includes all work specifically set forth in the Subcontract, together with any and all work necessary to properly complete the Subcontract and which is necessary to have a properly functioning and totally acceptable project for the purpose intended.

- YOU CAN LIVE WITH...

The work of Subcontractor includes all work specifically set forth in the Subcontract, together with any and all work reasonably inferable from the Contract Documents as being necessary to properly complete the Subcontract ~~and which is necessary to have a properly functioning and totally acceptable project for the purpose intended.~~

- COMMENTS

Be sure not to become the Owner or GC's design professional by signing a killer clause like this. Your obligation should be limited to provide what is shown in the plans and specifications and anything reasonably inferable there from.

Owner, GC and Design Professional Decisions

- KILLER

The Work shall be performed to the satisfaction of the Owner, the Design Professional and the GC, and the decision of the Owner, Design Professional or the GC as to the construction and meaning of the Subcontract Documents shall be final.

- YOU CAN LIVE WITH...

~~The Work shall be performed to the satisfaction of the Owners, the Design Professional and the GC, and the decision of the Owner, Design Professional or the GC as to the construction and meaning of the Subcontract Documents shall be final in accordance with Contract Documents.~~

- COMMENTS

It is unreasonable for any of the parties to have unilateral decision authority either over approval of the project or interpretation as to the intent of the documents. Regardless of the type of project (design build or plan and spec), the mechanical contractor's responsibility is to build and install the project in accordance with the documents.

Code Compliance

- KILLER

Subcontractor will furnish all labor, materials, supervision and items required for the proper and complete performance of the work in compliance with all applicable local, state and federal laws, codes and ordinances.

- YOU CAN LIVE WITH...

Subcontractor will furnish all labor, materials supervision and items required for the proper and complete performance of the work and the performance of its work shall be in compliance with all applicable local, state and federal laws, codes and ordinances.

- COMMENTS

Unless you expressly agree to be a design-builder, you must be careful not to assume a design responsibility by agreeing to comply with building codes, especially if you do not carry errors and omissions insurance. The subcontractor should build the work in accordance with

the Contract Documents. It is fairly safe to agree that your “performance”, i.e. the method of installation will comply with applicable laws and codes like OSHA, etc. If you become aware that the design is not in compliance with code, you should notify the GC in writing and proceed with any corrective measures only under the change order clause. Arguably, under the killer clause, the Subcontractor has assumed the cost of the corrective action to meet code.

Coordination

- **KILLER**

Subcontractor shall be responsible for coordinating the Work included in this Agreement with all other trades.

- **YOU CAN LIVE WITH...** Subcontractor shall ~~be responsible for to~~ assist the GC in coordinating the Work included in this Agreement with all other trades.

- **COMMENTS**

The primary responsibility for coordinating the various trades should remain with the GC. However the Subcontractor can assist the GC's efforts. Note, refer to the joint position statement from MCAA, SMACNA and NECA on spatial coordination for further clarification.

Inspection of Site and Preceding Work

- **KILLER**

Subcontractor, prior to beginning the Work, shall notify Contractor of any claimed ambiguities or errors in the Subcontract Documents affecting its work. It shall be the obligation and responsibility of the Subcontractor to take such measurements as shall insure the proper matching and fitting of the Work with contiguous work. The Subcontractor shall carefully examine existing conditions and the work of others to determine whether it is fit, ready, and suitable condition for the proper and accurate performance of the

Work, use all means necessary to discover any defects in such other work, and before proceeding with the Work report promptly any such improper conditions and defects to the Contractor in writing, and allow the Contractor a reasonable time to have such improper conditions and defects remedied.

- **YOU CAN LIVE WITH...**

Subcontractor, prior to beginning the Work, shall notify Contractor of any claimed ambiguities or errors in the Subcontract Documents affecting its work of which Subcontractor is or should be aware. It shall be the obligation and responsibility of the Subcontractor to ~~take such~~ reasonably inspect and measure ~~measurements so~~ as shall insure to verify the proper matching and fitting of the Work with contiguous work. The Subcontractor shall carefully examine existing conditions and the work of others to determine whether it is fit, ready, and suitable condition for the proper and accurate performance of the Work, use all reasonable means ~~necessary~~ to discover any defects in such other work, and before proceeding with the Work report promptly any such improper conditions and defects to the Contractor in writing, and allow the Contractor a reasonable time to have such improper conditions and defects remedied.

- **COMMENTS**

The mechanical contractor should be held only to a reasonable and customary standard regarding ambiguities and errors in the contract documents, or site conditions and the proper work of others.

Trash\Debris

- **KILLER**

Subcontractor will clear its trash from the project site daily. If Subcontractor fails to do so, Contractor may clear Subcontractor's trash and charge

Subcontractor the cost of same.

- **YOU CAN LIVE WITH...**

Subcontractor will clear its trash from the project site daily to a dumpster on-site provided by Contractor. If Subcontractor fails to do so, Contractor may after 24 hours' written notice to Subcontractor, clear Subcontractor's trash and charge Subcontractor the reasonable cost of the same.

- **COMMENTS**

Adding the language indicated will ensure you need not provide site waste removal and can save you from those pesky clean-up back charges.

Warranties

- **KILLER**

The Subcontractor shall repair, or remove and replace, at the Subcontractor's own expense, workmanship or materials which prove to be faulty or defective at any time within one year from the date of final acceptance of the Contractor's work by the Owner. In the event of any such repair or removal, this warranty period will be extended one year from the date of completion of such repair or removal.

- **YOU CAN LIVE WITH..**

The Subcontractor shall repair, or remove and replace, at the Subcontractor's own expense, workmanship or materials which prove to be faulty or defective at any time within one year from the date of ~~final acceptance of the Contractor's work by the Owner~~ substantial completion of the Subcontractor's Work. ~~In the event of any such repair or removal, this warranty period will be extended one year from the date of completion of such repair or removal.~~

- **COMMENT**

Clauses such as this extend the potential warranty period unreasonably.

The mechanical contractor cannot be held to an extended warranty where Owner acceptance of the project may be delayed for reasons beyond the mechanical contractor's control or for general contractor caused issues. Likewise, extensions of warranty periods for corrective warranty actions may cause indefinite warranty periods. Beginning the warranty period at substantial completion of the mechanical contractor's work is a reasonable approach, especially since there is a strong likelihood that the equipment will be in use.

THE SCHEDULE

Accepting a Completion Schedule

- **KILLER**

Subcontractor shall perform the work in a prompt and diligent manner and in accordance with the schedules given from time-to-time to the Subcontractor.

- **YOU CAN LIVE WITH...**

The Contractor shall prepare the Construction Schedule with reasonable accommodation for Subcontractor's Work. Subcontractor shall perform the work in a prompt and diligent manner and in accordance with the reasonable schedules given from time-to-time to the Subcontractor, and as agreed to by Subcontractor.

- **COMMENTS**

Never agree to blindly accept GC/ Owner's schedule. The best schedules are mutually developed. The GC should be responsible to prepare a schedule establishing the sequence and duration of all activities and then refine it to include the Subcontractor's input.

No Damage for Delay

- **KILLER**

Should Subcontractor's performance of

this Agreement be delayed or disrupted by any acts of Contractor, other subcontractors, or Contractor's suppliers, or delayed or disrupted by any acts or causes which would entitle Contractor to an extension of time under the Contract Documents, Subcontractor shall receive an equitable extension of time for the performance of this Agreement but shall not be entitled to any increase in the Agreement Price or to damages or additional compensation as a consequence of such delays or disruptions.

- **YOU CAN LIVE WITH...**

(A) Should Subcontractor's performance of this Agreement be delayed or disrupted by any acts of Contractor, other subcontractors, or Contractor's suppliers, or delayed or disrupted by any acts or causes which would entitle Contractor to an extension of time under the Contract Documents, Subcontractor shall receive an equitable extension of time for the performance of this Agreement ~~but shall not~~ and shall be entitled to any increase in the Agreement Price or to damages or additional compensation as a consequence of such delays or disruptions. (B) Should Subcontractor's performance of this Agreement be delayed or disrupted by any ~~acts of Contractor, other Subcontractors, or~~ acts or causes which would entitle Contractor to an extension of time under the Contract Documents, Subcontractor shall receive an equitable extension of time for the performance of this Agreement but shall not be entitled to any increase in the Agreement Price or to damages or additional compensation as a consequence of such delays or disruptions, except the extent Owner or other third party is liable and pays GC for the cost of the delays or disruptions incurred by Subcontractor.

- **COMMENTS**

Do not give up your right to delay damages if at all possible. The direct and

indirect cost of a delay can be ruinous. Either get rid of the risk as shown in (A) above, or, as shown in (B) above, you can compromise by limiting your recovery for Owner caused delays to the amount recovered by the GC from Owner on your behalf.

Please note that these "no damage for delay" clauses are ~~widely~~ generally enforced by the courts, however, some states do have statutes voiding these clauses in public ~~contracts~~ or in some cases holding such clauses unenforceable as against public policy.

Subcontractor's Delay\Liquidated Damages

- **KILLER**

In the event of any failure of Subcontractor to complete his work within the required time and upon the dates established as provided herein, the Subcontractor hereby agrees to reimburse the Contractor for any and all liquidated damages, if any, that may be assessed against and collected from the Contractor by the Owner.

- **YOU CAN LIVE WITH...**

In the event of any failure of Subcontractor to complete his work within the required time and upon the dates established as provided herein, the Subcontractor hereby agrees to reimburse the Contractor for any and all liquidated damages, if any, that may be assessed against and collected from the Contractor by the Owner, but only to the extent the delay was due to the Subcontractor's wrongful failure to comply with the agreed upon schedule.

- **COMMENTS**

The GC should not be permitted to simply pass liquidated damage assessments down to the Subcontractor without first determining the extent to which the Subcontractor was responsible for the delay as

compared to other subcontractors as well as the GC.

Also, be aware that in many cases, it is better to have “liquidated” damages identified in the Contract Documents as opposed to having the uncertainty of “actual” damages in the event you cause a delay. At least when liquidated damages are identified, you know what delay will cost.

Acceleration

- **KILLER**

In the event Subcontractor fails to maintain the schedule, Subcontractor shall without compensation, work such overtime as GC may direct until Subcontractor is in compliance with such schedule.

- **YOU CAN LIVE WITH...**

In the event Subcontractor fails to maintain the schedule, Subcontractor shall without compensation, work such overtime as GC may direct until Subcontractor is in compliance with such schedule if said failure to maintain the schedule was Subcontractor's fault.

- **COMMENTS**

Be careful not to give up your claim for acceleration costs where the inability to maintain the schedule was due to causes beyond your fault or control.

INDEMNITY AND INSURANCE

Liability Indemnity

- **KILLER**

The Subcontractor agrees to indemnify and save the Contractor, Owner and the Architect harmless from any and all claims, suits, losses, damages or expense on account of injuries to or the death of any and all persons whomsoever, and any all property damages arising or growing out of or in any manner connected with the work

performed by or for the Subcontractor's account under this agreement or caused or occasioned in whole or in part by reason of the presence of the person or property of the Subcontractor, its employees, agents or suppliers, except when such claims or suits shall arise out of the sole negligence of the Contractor.

- **YOU CAN LIVE WITH...**

To the extent of its fault or negligence, the Subcontractor agrees to indemnify and save the Contractor, and Owner ~~and the Architect~~ harmless from any and all claims, suits, losses, damages or expense on account of injuries to or the death of any and all persons whomsoever, and all property damages arising or growing out of or in any manner connected with the work performed by or for the Subcontractor's account under this agreement or caused or occasioned in whole or in part by reason of the presence of the person or property of the Subcontractor, its employees, agents or suppliers, except when such claims or suits shall arise out of the sole negligence of the Contractor.

- **COMMENTS**

Many GC forms contain very broad indemnity provisions that might be considered deal breakers if not modified. As the majority of states have statutes that impact the Owner/GC's ability to shift risk to a Subcontractor via an indemnity clause, it is recommended that you have your attorney and/or insurance broker assist you with these clauses. The “comparative” negligence language demonstrated in the modification above is fair. Also, because of the design responsibilities and duties to inspect the work typically held by Architects, it is unwise to indemnify them.

The AIA subcontract form, as well as others, address this issue by including language similar to the following; “The Subcontractor's liability hereunder does

not extend to the liability of the Architect arising out of (1) the preparation of plans, specifications, designs, reports, surveys or Change Orders, or (2) the giving or failure to give instructions by the Architect, provided the such giving or failure to give is the primary cause of the injury of damages.”

Patent Indemnity

- **KILLER**

Subcontractor agrees to defend and save harmless the Contractor and Owner from and against liability or loss, cost or expense on account of an infringement or alleged infringement of any patent rights by reason of the Subcontractor’s Work or any materials, equipment or techniques used therein by Subcontractor.

- **YOU CAN LIVE WITH...**

Subcontractor agrees to defend and save harmless the Contractor and Owner from and against liability or loss, cost or expense on account of an infringement or alleged infringement of any patent rights by reason of the Subcontractor’s Work or any materials, equipment or techniques used therein by Subcontractor. However, this provision shall not apply to items specifically required by the Contract Documents.

- **COMMENTS**

If the Owner has mandated a particular item is to be incorporated into the construction, the Owner should retain the risk of a patent problem. On the other hand, if the Subcontractor is given the discretion to select the item, it is fair that the patent risk shift to the Subcontractor. In that event, however, be sure that your purchase order form passes that risk off to the manufacturer.

Waiver of Subrogation

- **KILLER**

The Subcontractor’s Workers Compensation and Employer’s Liability

Policies shall contain Waivers of Subrogation in favor of Contractor and Owner.

- **YOU CAN LIVE**

~~Compensation and Employer’s Liability Policies shall contain Waivers of Subrogation in favor of Contractor and Owner.~~ (B) The Subcontractor’s and General Contractor’s Worker’s Compensation and Employer’s Liability Policies shall Contain Waivers of Subrogation in favor of Contractor and Owner the other.

- **COMMENTS**

Most Subcontracts identify the minimum insurance coverage’s required by the GC and/or Owner. You should review this section with your insurance agent or broker on each job to insure compliance. The above killer clause will preclude your insurance company from getting reimbursed for payments it made to one of your injured workers, for example, if the injury resulted from the negligence of the Owner of GC. In fairness, each party should remain responsible for damages and injuries stemming from their own fault or negligence. If you can’t negotiate out this killer clause as in (A), at least make it mutual as shown in (B) so that you and your insurance company are off the hook for injuries to the employees of the GC

PAYMENT

Pay if Paid

- **KILLER**

Receipt of payment for Subcontractor’s work by GC shall be a condition precedent to the right of Subcontractor to receive payment from GC. Subcontractor acknowledges that it relies on the credit of Owner, not GC, for the payment of its work.

- **YOU CAN LIVE WITH...**

(A) Receipt of payment for Subcontractor's work by GC shall be a condition precedent occur prior to the right of Subcontractor to receive payment from GC. ~~Subcontractor acknowledges that it relies on the credit of Owner, not GC for the payment of its work.~~ (B) Receipt of payment for Subcontractor's work by GC shall be a condition precedent to the right of Subcontractor to receive payment from GC. Subcontractor acknowledges that it relies on the credit of Owner, not GC for the payment of its work. However, notwithstanding the above, Subcontractor's payment shall not be withheld if the Owner's nonpayment is due to disputes between the Owner and GC or GC's other subcontractors not in any way related to Subcontractor's performance hereunder.

- COMMENTS

The "condition precedent" language in this killer clause leaves the Subcontractor with no recourse against the GC in the event the Owner fails or refuses to pay the GC, regardless of the reason for the nonpayment. The modification as indicated in (A) above is fair in that it permits the GC to wait until it receives the payment from the Owner before being obligated to pay the Subcontractor. However, if more than a reasonable time passes for the Subcontractor's payment, the GC will then have to pay the Subcontractor, even if the Owner hasn't yet paid the GC. Most GC's are loath to delete the "condition precedent" language, and where the Owner is a solvent government or other risk free owner, you might choose to let it go. However, if the "condition precedent" language must remain, at least negotiate the change indicated in (B) above so that your money is not withheld due to the fault of others. In some states, such clauses are ineffective and cannot be used to relieve the GC from its obligation to pay subcontractors. In other states, the clause cannot be used to defeat a subcontractor's lien rights. Also, there have been several court

decisions where this clause was deemed invalid as a defense to the subcontractor's rights against the GC's bond.

A number of states also differentiate between "pay if paid" clauses (the Sub only gets paid if the GC gets paid), and "pay when paid" clauses (the Sub gets paid when the GC gets paid). Some pay when paid states provide for the Sub to be paid if a reasonable time for the GC to be paid has passed. These provisions are governed by state law, specific to each state, and the case law varies. Be sure to consult with legal counsel so you understand how the law applies in your state.

Finally, if you are under a strict pay if paid provision, be cautious of waiver of lien rights provisions in the contract. It is generally never a good idea to waive lien rights by contract. The combination of contract provisions that include a pay if paid clause and waiver of lien rights may result in no recourse against either the owner or the GC in the event of non-payment.

Retention

- KILLER

Notwithstanding any other provision of this Subcontract or the Prime Contract, it is agreed that Contractor shall retain 10% of the amount due Subcontractor as progress payments until final completion and acceptance of Subcontractor's Work by Owner.

- YOU CAN LIVE WITH...

Notwithstanding any other provision of this Subcontract or the Prime Contract, it is agreed that Contractor shall retain 10% of the amount due Subcontractor as progress payments until final completion and acceptance of Subcontractor's Work by Owner. However, in no event shall retainage exceed that which Owner is withholding

of behalf on Subcontractor's Work.

- **COMMENTS**

Don't let the Subcontract deprive you of the reduction in retention that the GC is enjoying. Also, remember that on federal and most state projects, the Prompt Pay Act in effect precludes the GC from withholding money received on behalf of the Subcontractor's work even if the subcontract terms permit the GC to do so. Finally, note several state statutes exist that limit the amount of retention an Owner may withhold.

Liability for Lower Tier Liens

- **KILLER**

Subcontractor shall defend indemnify and hold Contractor and Owner harmless against all liability for claims and liens of any laborers, materialmen or subcontractors of Subcontractor for labor performed or material used or furnished by, through or under Subcontractor for the Project.

- **YOU CAN LIVE WITH...**

Subcontractor shall defend indemnify and hold Contractor and Owner harmless against all liability for claims and liens of any laborers, materialmen or subcontractors of Subcontractor for labor performed or material used or furnished through or under Subcontractor for the Project unless the same arises due to the Owner's or Contractor's wrongful nonpayment.

- **COMMENTS**

Do not accept liability to keep the job free of liens or claims by your subcontractors and suppliers when the reason for their actions is as result of the wrongful failure of the Owner or GC to properly pay you for the work performed. When the GC has made timely payments to you, it is your responsibility to pay your lower tier subcontractors and to keep their claims and liens from affecting the GC, Owner or Owner's property.

Release of Liens

- **KILLER**

Subcontractor agrees that as a condition precedent to receiving partial payments from Contractor for Work performed pursuant to this Agreement, Subcontractor shall execute and deliver to Contractor with its request for partial payments as above provided, a full and complete release of all claims and causes of action Subcontractor may have or claim to have against Contractor or Owner through the date of the execution of said release.

- **YOU CAN LIVE WITH...**

Subcontractor agrees that as a condition precedent to receiving partial payment from Contractor for Work performed pursuant to this Agreement, Subcontractor shall execute and deliver to Contractor with its request for partial payments as above provided, a full and complete release of all claims and causes of action Subcontractor may have or claim to have against Contractor or Owner through the date of the execution of said release but only of the extent of amount requisitioned and paid through the date of the execution of said release.

- **COMMENTS**

Never waive your lien rights for claims, change orders or retention that you may not yet have requisitioned for or for work not yet performed.

NOTE: Increasingly, GCs are including severe release language on the monthly requisition form. Carefully review all language on the requisition form and make any adjustments necessary to protect your lien rights.

MISCELLANEOU

S Assignment

- KILLER

Subcontractor shall not assign this Subcontract without the written consent of the General Contractor.

- YOU CAN LIVE WITH...

Neither party shall ~~Subcontractor shall not~~ assign this Subcontract without the written consent of the other ~~General Contractor~~.

- COMMENTS

The GC does not want you to turn the Subcontract over to some unknown entity for completion. Similarly, you should protect yourself from having to perform for a future unknown GC. Sometimes, the Owner's Lender requires that the Owner and GC retain the right to transfer the subcontracts to the Lender. In that event, be sure that the GC is not released from liability to you for at least those events that took place prior to the date of the assignment to the Lender.

Bond Forms

- KILLER

Subcontractor shall pay for and furnish to Contractor 100% performance and 100% payment bonds on Contractor's standard bond forms attached hereto.

- YOU CAN LIVE WITH...

Subcontractor shall pay for and furnish to Contractor 100% performance and 100% payment bonds on Contractor's standard bond forms attached hereto as modified and agreed to by subcontractor.

- COMMENTS

Always review the bond forms supplied by the GC. Most often they will require some modification. Have your bonding agent review these forms as well to insure that (1) the payment bond form limits the definition of a proper claimant to one having a direct contract with you to supply labor or materials to the project, and (2) both bond forms limit the time frame within which to assert and pursue claims under

the bonds.

Notice of Claim

- KILLER

Subcontractor shall give Contractor written notice of all claims for any additional compensation or damages within three (3) working days of the beginning of the event for which such claim is made; otherwise, such claims shall be deemed waived.

- YOU CAN LIVE WITH...

Subcontractor shall give Contractor written notice of all claims for any additional compensation or damages within three (3) working days of the beginning of the event for which such claim is made; otherwise, such claims shall be deemed waived if Contractor is prejudiced by such late notice.

- COMMENTS

Notice provisions must be carefully adhered to or risk losing your rights to collect additional, deserved compensation. To provide some cushion, the additional language reflected in the modification to the killer notice clause will require that the GC show that your late notice somehow impaired the GC's position to either defend against the claim or to collect the damages from the Owner or other third party.

Attorney Fees

- KILLER

In the event it shall be necessary for Contractor to retain legal counsel to enforce any of its rights hereunder, Subcontractor agrees that it shall be responsible for payment of all reasonable attorney's fees, expenses and costs incurred therewith.

- YOU CAN LIVE WITH...

In the event it shall be necessary for either party Contractor to retain legal counsel to enforce any of its rights hereunder, the other party Subcontractor agrees that it shall be responsible for payment of all reasonable attorney's fees, expenses and costs incurred therewith.

COMMENTS

Sometimes it is easier just to delete this provision. In most cases, silence in the subcontract will result in each party bearing its own attorneys fees. However, the modification as shown above at least makes the ability to collect attorney fees mutual.

Venue and Choice of Law

- KILLER

The validity, interpretation and performance of this Subcontract shall be governed and construed in accordance with the laws of the state where the GC's home office is located and any litigation between the parties hereto shall be conducted in and by the appropriate courts having jurisdiction where the GC's home office is located and the parties consent to such jurisdiction.

- YOU CAN LIVE WITH...

The validity, interpretation and performance of this Subcontract shall be governed and construed in accordance with the laws of the state where the Project GC's home office is located and any litigation between the parties hereto shall be conducted in and by the appropriate courts having jurisdiction where the Project GC's home office is located and the parties consent to such jurisdiction.

- COMMENTS

Check these types of provisions to be sure they do not force you to travel to resolve a dispute and to confirm that the law governing the agreement is of a

neutral location. Note that increasingly, states are legislating these issues and in some instances, these killer clauses are voided by such legislation.

Labor Harmony

- KILLER

The Subcontractor shall procure its materials from such sources, and employ such labor subject to contract terms and conditions in order to ensure harmonious labor relations on the site and prevent strikes or disputes by its employees or other trade employees. The Subcontractor, in the event of a labor dispute including strikes, shall take whatever action is required in order to prevent the disruption of work on the project site.

- YOU CAN LIVE WITH...

The Subcontractor shall procure its materials from such sources, and employ such labor subject to contract terms and conditions in order to ensure reasonably: (a) provide for harmonious labor relations on the site and (b) prevent ~~reduce the potential for~~ strikes or disputes by its employees or other trade employees. The Subcontractor, in the event of a labor dispute including strikes, shall take ~~whatever action is required~~ all reasonable actions in order to ~~prevent~~ minimize the disruption of work on the project site.

- COMMENT

The MCAA contractor cannot be put in a position where contract requirements could be in conflict with either collective bargaining agreements or any labor laws. The changes noted above are a fair and reasonable approach to harmony clauses.

CONCLUSION

Hopefully, the above discussion will prove helpful to you in your future contract negotiations and will put you on

notice of some of the more common killer clauses. Remember, this is but a sampling of the killer clauses you may encounter. Each GC and Owner has other clauses that may be peculiar to their company or jurisdiction.

Be sure to read the contract documents and try to negotiate out any language that seems particularly unfair to you. If the GC will not budge, you may need to accept the terms on the current project, but try to resolve in advance a better agreement for the future work you will hopefully do together.

If you are only changing a few provisions in a subcontract, it is easiest to get a red pen, mark up the document and sign it. With a multitude of changes, it is better to take the time to prepare a separate amendment to the subcontract. When you attach a separate amendment, be sure to mark the subcontract signature line as follows so that your modifications become part of the subcontract itself:

BY: SUBCONTRACTOR Signature)*
*Subject to the attached Modifications

In any event, always give the GC a heads-up cover letter or courtesy call to let them know that you are modifying their subcontract (as you indicated in your bid).

In most cases, your proposed changes will not be accepted flat out and you will need to do some persuading. The GC's representatives often lack authority to change their forms so be sure you are negotiating with the right person. With each of the clauses identified above as well as any others you may find, your negotiating approach is simple. You are merely asking to modify some of the terms that are plainly unfair to the subcontractor, and modifying other terms so they are mutually applicable to both the subcontractor and GC. Though you may need to go a few rounds, your very basic

argument of fairness is hard to refute.

This bulletin was originally prepared by **Caryl Sandler Shuham of Shuham & Shuham, P.A. (Plantation, FL)** for the MCAA Management Methods Committee for use by MCAA members. Committee members revised and updated the bulletin to ensure its accuracy and relevance to current legal practice, standards and rules.

The information in this article should not be construed as legal advice from the author. MCAA contractors should contact their legal counsel for specific legal advice.