



Prequalification from the Subcontractor's Point of View

It is with great pleasure that we present the inaugural issue of "Talking Trades," the newsletter specifically tailored for our members who are Specialty Trade Contractors.

Specialty Trade Contractors comprise more than 40% of CFMA's membership and this publication is intended to focus on areas of interest to you, and to provide you with information, solutions, and ideas to help you and your company run more efficiently and more profitably.

We hope that you find this publication to be a useful and informative resource tool, and welcome your feedback.

Please let me or anyone on the Sub-Specialty Committee know your thoughts on the publication or if you have any ideas for future articles.

This is your publication. Enjoy!

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The current state of the construction economy has created a conundrum for subcontractors. While it is important to find work, it is also critical to get paid for that work.

When times are lean, the natural tendency is to take work – any work – and hope for the best regarding payment.

An unfortunate side effect of this tendency is that such work often results in not having any control over getting paid in a timely manner. With razor-thin margins, any delay in receiving payment or failure to collect for all work performed can be disastrous for a subcontractor.

This article will discuss the most important areas subcontractors should evaluate to help ensure payment at all stages of a construction project.

Learn About Project Details

The first step in a reasonable due diligence effort for new work is to investigate all aspects of a project, starting with how it will be funded.

Source of Funding

Construction projects can be funded in a variety of ways and from a variety of sources. This information can help determine whether or not a project is worth bidding.

Is the project publicly or privately funded? If the answer is public, then subcontractors must find out if the money has already been approved or if it is still contingent.

If the project is privately funded, subcontractors should investigate the lender of the funds. Knowing the legal description of the project property or the owner's correct legal

name will enable a subcontractor to determine the lender on a particular project by reviewing the applicable county records. This information will allow the subcontractor to develop a clearer picture of the owner/developer's financial outlook and potential payment concerns. For example, any mortgage filed on the property typically appears in the land records and is searchable by party name.

Once a subcontractor determines whether the work is public or private, it will know which set of rules will govern its right to be paid. However, a complication can arise when a public project (such as a library) is funded by revenue bonds or another source of non-taxpayer money. It's critical that subcontractors do not take someone's word about such funding, unless that person can bind the entity. *(Continued on Page 2)*

About This Newsletter and the Sub-Specialty Committee

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Welcome to the inaugural issue of "Talking Trades," the biannual publication specifically for the sub specialty trades.

The purpose of this newsletter is to inform you of what's happening at CFMA and within your trade specialties.

If your CFMA SIC is 1711-1799 (approximately 2,800 members), this newsletter is your source for breaking news and hot topics

produced by fellow members in the specialty contractor field.

Among the initiatives the Sub-Specialty Committee is developing are a Sub-Specialty Blog on CFMA's Connection Café, a specialty-specific Webinar as part of CFMA's KnowledgeNOW Series, and aligning the Committee's goals and objectives with CFMA's strategic plan.

The Sub-Specialty Committee

meets once a month via teleconference for an hour.

More information about this Committee can be found on Page 4, but we are always looking for new members who want to make a difference in their profession.

If you would like to join CFMA's Sub-Specialty Committee, please contact Mike Molaro (609-945-2412; mmolaro@cfma.org) for opportunities to get involved.

Another complication can occur when a private project's owner/developer (such as a large corporation) donates land for a public facility, which might be a mixed-use facility (used for both public and private functions).

A subcontractor can better shape its strategy for negotiating payment terms and remedies in the event of nonpayment if this type of information is known up front.

Schedule

It's helpful to find out during the pre-bid phase if the project's proposed schedule is realistic. Often, a project may include a compressed time frame for the subcontractor's trade, or other specialty trades that immediately precede or follow the subcontractor. In such cases, problems are likely to arise, which would of course impact payment.

It is also important to research how potential delays can affect billing and payment. For example, if a subcontractor misses a pay application deadline, must it wait for the next month's billing cycle to bill for that portion of the work?

Remedies

Subcontractors should also know what remedies are available in the event of payment delays. Typically, subcontractors' best friends are the mechanics' and material-men's lien and payment bonds.

It's helpful to have the legal description of the property where the project is located in the project file so that a lien can be quickly filed if needed. There is nothing worse than approaching a filing deadline and having to run to the county courthouse to look up a property description. Similarly, having the pertinent and detailed information on any relevant bonds in the project file can save hours of stress later.

Extra Work

Payment issues often arise out of change orders, scope of work questions, and differing site conditions. It is critical that subcontractors become familiar with the decision-making and approval processes to know

what happens in the event of a problem.

For example, if a pad constructor is contracted to excavate a certain quantity and type of material, but encounters a different quantity and type of material that requires more work, is there a process in place by which it can be assured of being paid timely and fairly for the extra work? Job superintendents and PMs should know about any such process beforehand.

Research the Project Partners

Although a construction project is not legally or technically a partnership, in a sense, it's a partnership among a subcontractor, owner/developer, GC, and their financing sources.

Given this kind of quasi-partnership, it's important for subcontractors to find out as much as they can about the reputation, business status, and financial condition of all parties in their contractual chain.

GC's Reputation

A subcontractor should start by researching the GC's reputation through its own industry network. The Internet can also be a useful source of information, especially if a subcontractor is working in a new state or region and/or if the GC is from out of state.

A GC's Website may provide references or highlight other projects in which the GC has been involved. It is well worth the time to research these projects and learn about their outcomes.

Even if a subcontractor has previously worked with a GC, it is still important to conduct this research, since things can change. For example, PMs with whom a subcontractor has a trusted relationship may no longer work for the GC.

GC's Legal History

A subcontractor should also research whether the GC has been involved in any project litigation or arbitration, which can usually be done online through court filings. Remember, litigation often has nothing to do with project performance or payment history. But since knowledge is power, subcon-

tractors will be well served to learn all they can.

Further, even though arbitration takes place outside of the courthouse, these awards are approved by the court (and thus public record) and can provide valuable information and/or other leads.

GC's Project Liens

A subcontractor should also check the county clerk's records in which the GC is located or where it knows the GC has performed work to determine if any liens have been filed against any of the GC's projects.

Although liens are filed against the real property, the GC will often be included as a party that has received notice of the lien. If a search reveals there are many liens that involve the GC, then this should raise a red flag regarding either the project or the GC's ability to pay its vendors and subcontractors.

GC's Liquidity

Subcontractors can also check the UCC filings against the GC in the county where it is located. This will provide some understanding of the personal property collateral that the GC has pledged. If a subcontractor is going to be in the position of trying to collect money from the GC, then it would be useful to know how liquid the GC is and whether there appear to be many financing arrangements.

If a subcontractor has a mechanic's lien or a judgment lien, then these liens will normally be secondary to the financing institution. However, it depends on the order of filing. Since each state has different lien laws, it's always best to know the specific laws for each state involved. Determining the number of liens will give the subcontractor a more realistic idea of whether or not payment is likely.

To learn more on this topic, read Lee A. Weintraub's "Lien Laws & Out-of-State Projects: A Little Research Goes a Long Way" in the May/June 2011 issue.

Other Project Partners

It is not sufficient for a subcontractor to confine its due diligence to the project's GC. It should also carefully investigate the owner/developer of the project in a similar manner, as well as the financial trends and influences for the type of industry the owner/developer comes from (e.g., is the owner/developer an oil and gas company or a real estate developer?). Services such as Dun & Bradstreet can be useful in this type of research.

A subcontractor should also determine if the project involves an architect. If so, what role does the architect play in project administration? Often, an architect will ap-

prove change orders and make other important decisions, which can determine whether and when a subcontractor is paid. It would also be helpful to know if the architect has been involved in any litigation or payment disputes.

In addition, involvement with such local or national trade organizations as CFMA, The Associated General Contractors of America (AGC), or the American Subcontractors Association (ASA) can help subcontractors stay informed about other construction businesses.

Understand All Project Document Language

Finally, subcontractors must become familiar with the bid documents and the contract – specifically, the provisions regarding liens,

bonds, scope of work, payment terms (i.e. “pay-if-paid” and “pay-when-paid” clauses), retainage, notice, termination for convenience, and opportunity to cure.

The contract will incorporate the prime contract and its terms. If this is the case, then the subcontractor or its legal counsel must review the prime contract prior to executing the subcontract. If there are unfavorable terms regarding the subcontractor in the prime contract, then the subcontractor should make efforts to remove the incorporation by reference language in the subcontract.

At a minimum, subcontractors should be aware of the prime contract and any

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CFMA’s 2012 Annual Conference & Exhibition Specialty Contractor Sessions

These Specialty Contractor sessions at CFMA’s 2012 Annual Conference & Exhibition have been created with you in mind.

Government Contracting & Prevailing Wage Requirements (1.5 CPE credits)

Focusing on the *Davis-Bacon and related Acts* set forth by the Department of Labor Wage & Hourly Division, this session will cover government compliance, specifically:

- Why there was a chance in enforcement
- Common failures to avoid
- Practitioners’ approach to compliance
- Margin improvement considerations

E. Heidi Cottle, Senior VP, Team Lead, - National Government Contracting CBIZ & Mayer Hoffman McCann P.C.

The “Gotchas” of Subcontractor Expansion (1.5 CPE credits)

A panel of subcontractors and a GC discuss the pitfalls and “gotchas” involved in expanding to new territories. Topics include:

- The risk of expanding vs. the risk of not

- Deciding to take the plunge and what to do first
- The reliability of the Internet to answer all of your questions
- Labor: Yours vs. Theirs
- Getting your CPA, banker, and bonding agent on board
- How to manage a remote location

Kevin Burnett, CCIFP, Senior VP Sundt Construction, Inc.

Marjorie Weber, CCIFP, CFO Irontree Construction, Inc.

Lisa Autino, CCIFP, Treasurer & CEO Corbins Electric

Contracts: A Specialty Contractor’s Perspective (2 CPE credits)

Topics in this session will include:

- Ten contract risks to avoid and how to do so
- New developments in standard form agreement and their impact on specialty contractors

- Indemnity, Insurance, and bonding developments of which to be aware

Frank Riggs, Chair, Construction Practice Group Troutman Sanders LLP

Tim Burrow, Partner Burrow & Cravens, PC

For more information or to register, please visit www.cfma.org/annual_conference.

Take advantage of early bird registration by April 20 to save \$100 off the full conference fee.



terms that affect their rights with respect to the owner/developer, GC, or project. For example, subcontractors should be aware of “pay-if-paid” and “pay-when-paid” provisions, which in essence make receipt of payment by the GC a condition precedent to its obligation to pay the subcontractor.

These types of contract provisions have different meanings in different jurisdictions; a thorough knowledge of their impact on payment is critical. Although it's not always possible to negotiate the best contract terms, especially in the current economic environment, a subcontractor must know what is required by the contract documents to accurately evaluate its risk.

A thorough review of the subcontract should significantly aid the subcontractor's understanding of the work to be performed and its potential exposure with respect to the project and the parties involved.

Conclusion

While it's impossible to predict the future, if a subcontractor does its homework regarding the relevant parties and financial and legal issues for a proposed project, it can greatly reduce its risk of nonpayment and related legal problems.

This ongoing due diligence, from pre-bid to final payment, is vital to subcontractor success. The proactive approach presented in this article will help subcontractors receive and keep payment for the work they performed.

The author wishes to acknowledge the assistance of attorneys Michelle Campney and Andrew Mildren.

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Call for Articles!

Do you have an idea for a future “Talking Trades” article? Let us know.

Suggestions can be sent to Mike Molaro at mmolaro@cfma.org.

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