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SAM

Subcontractors Association of the Metroplex

PUNCH LIST

The voice of the Subcontractor's Industry

Subbie Sam Says.

Don't get mad, get your money by protecting your lien rights!

SAM is your best source of Subcontracting related information.

Inside this issue:

BEWARE OF THE HIDDEN SCOPE

When bidding a job, subcontractors routinely review the plans to see the design and layout of the work, review the detailed drawings on the plans to see particular means and methods, and review the specifications for particular required materials. Based upon this review, and a carefully-made survey of the quantities of materials required. the estimator comes up with a price which hopefully will be low enough to get the job, but high enough to make money.

Unfortunately, more and more often, the labor and materials necessary to construct a subcontractor's portion of the project are far from being the only requirements of the construction subcontracts. These days, all subcontractors have to be extra-vigilant to watch out for unintended scope, and unintended consequences.

Engineering and Inspections

One item which is often written into subcontract agreements is "Engineering and Inspections." The specification book will assign the responsibility for ongoing inspections and testing (engineering) to the general contractor, and the general contractor in turn refers this responsibility down to the sub. As a practical matter, many projects are built without any special testing or inspections at all, and most of these end just fine. If, however, a dispute later arises over the work, and it is the kind of dispute that testing or inspections might have caught, you can bet the subcontractor will be in the line of fire, based on the inspections and engineering language.

As a practical matter, it is rarely appropriate for the subcontractor to take on the responsibility of arranging for and performing testing and inspections anyway, because the testing and inspection requirements apply to the job as a whole, not to any single scope of work, and the general contractor is the only entity on the jobsite with the authority and ability to coordinate such activities among all the trades. You can avoid this problem in the first place, by ensuring that (1) testing and engineering are specifically excluded from the scope of work which you are bidding to perform (unless uniquely appropriate to your trade, of coursed), and (2) making sure the subcontract document is carefully reviewed and that these requirements are not written back in.

Warranties – A "Black Hole"?

Most subcontractors regard warranties as a practical promise that your work will be built without defects, and if defects in your work appear within the warranty period, you will fix them – a common-sense description of what a warranty should be. Unfortunately, as Mark Twain once said, "The problem with common sense is sometimes, it ain't so common."

Many subcontracts now have "warranties" that go way beyond promising quality work; they have subcontractors warranting that work is "fit for its intended purpose," "acceptable" to the owner, that the work will "function as intended," or that the work will comply with governmental codes and rules.

Because projects are built in accordance with well-defined drawings and specifications, subs lack discretion over Project design, how it goes together as a whole. Warrant that a project is "fit," "adequate," or "acceptable," and you have made easily-breached promises of performance, even on projects built in compliance with all the plans and specifications – an impossible standard.

Of perhaps greater risk, if you warrant that your work will meet all applicable Governmental Codes and Rules, you have unwittingly accepted that a raft of liability that rightfully belongs with the design architects and engineers. Subcontractors building the plans and specifications do not typically review or even consider building codes (whether they be local or national), or other design-related rules and regulations (including in particular) the Americans With Disabilities Act (ADA). Unless you intend to conduct a comprehensive review of applicable codes and standards, including a comprehensive ADA review, you should never agree to provide a warranty that can be breached with work that is built in full compliance with the design documents.

Other damages can be problematic; many subcontracts now make subs responsible for protecting their work from damage until the project has been fully-accepted by the owner. Under this construct, a stranger or another sub could back a truck into a wall, bust a hole in it, and you would still be responsible for repairing the damage. You should make sure that your obligation to repair damage or penetrations is limited to repairing damage that you caused, and repairing penetration specifically disclosed as necessary in the plans and specifications, before your bid was prepared.

"Trojan Horse" provisions

As a final caution, beware of added contract burdens in documents other than the subcontract. In particular, watch out for new and different obligations in documents like "pay applications" or "partial waivers of lien." Many such documents include not only an affirmation that the work is performed, or that you are releasing your rights to claim a lien in exchange for payment, but also include new and different contract obligations, including steeper obligations for indemnification, warranties in excess of the base contract warranties, and others.

In this day of electronically-prepared and distributed plans and specifications, by which obsolete specifications, poorly-detailed drawings and mis-matched dimensions can all be reproduced, time and again, with digital precision, it is especially important to make sure that you don't take on yet another layer of risk, by agreeing to burdens and obligations you didn't even know you had.

Spike Cutler is SAM's legal Counsel

THE OFFICIAL WORD ON UNEMPLOYMENT INSURANCE

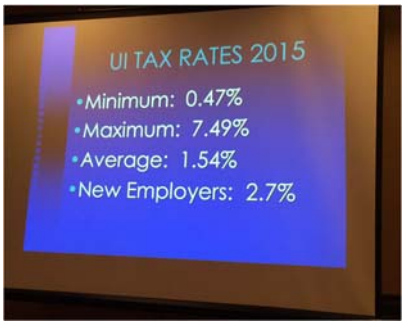
Elsa G. Ramos of the Texas Workforce Commission

We learned more than we thought we needed to know about hiring and firing and how to protect your extremely valuable experience modifier at our October meeting.

Elsa G. Ramos is the Authority on the subject in Texas, and is the Counsel for Commissioner Hope Andrade representing Employers.

We all can do a better job of hiring, managing with the intent of firing, and the actual act of firing a bad employee. Our companies and it's good employees don't need to be penalized by the act of firing a bad employee, and we won't be if we do it right.

Thanks to Selena Zarate of Groves Electric for obtaining this great program for us.



Unemployment Rates in Texas

PSYCOLOGICAL WORK INJURIES -- THE NEW NORMAL

Are you as an employer addressing psychological work injuries? Psychiatric stress cases can be expensive and difficult to prove or disprove. Psychiatric stress can cost employers a lot of money such as providing treatment, evaluation, compensation and lost productivity. Employers should comply with OSHA by providing a safe and healthy work environment which includes preventing work-related injury and disease. Companies should check their state laws regarding what type of mental injuries are covered by their state laws.

Here are the typical worker's compensation cases:

1: Physical/Mental – is a psychological injury claim that results from a physical injury or occupational disease. Example: Post Traumatic Stress Disorder as a result of severe workplace accident injury.

2: Mental/Physical – is a psychological injury resulting in a disabling physical work condition.

3: Mental/Mental – is a psychological occurrence while working, leading to a psychological injury or condition. Example: An employee witnesses a workplace accident and later develops a fear of operating the equipment where the workplace accident happened.

What Can Employers Do to Prevent Psychiatric Claims?

What can employers do to prevent claims?

4: Responding to trauma at work. Many employers are ill prepared to handle traumatic events and yet these events do occur in our workplaces. For victims of traumatic, violent or frightening events, it is important to provide support to all of the affected staff as soon as possible after the incident. Employers may also want to explore enlisting the services of their Employee Assistance Program (EAP) or another professional.

5: Handling stressful work environments. Employers can reduce workplace stress by making employees feel valued. Organizations should have an effective internal complaint procedures and some sort of informal dispute resolution system to address employee issues in the workplace.

6: Avoiding psychiatric harm after physical injuries. Employers can also attempt to avoid mental harm that arises from job-related physical injuries. Companies learn how to legally manage employees who have pre-existing mental problems or stress issues that may be exacerbated by any physical injury.

Train supervisors and managers. Supervisors/Manager should be trained how to constructively address trouble situations at work. This includes identifying behavior that may indicate problems that require professional assistance. Employers should further understand that harassment and bullying are great risks to an employee's psychological well-being and have a plan in place to deal with these risks.

Encouraging positive mental health generally. Employers should invest in their employees' psychiatric well-being. The returns for this type of investment increase morale and worker productivity. Companies should ensure that they implement EAPs that acknowledge the interrelationship of work and family problems and should encourage stressed

First time visitor, Benny Burse of Perma Pier

A studious James Mayhew, Business Practices Chair, presents our BPI

Who's having more fun?
Billy Neu of Neuco or
MaryEllen Evans of Trade Management

Do You Audit Your Independent Contractor Classifications? Don't let the IRS or DOL do it!

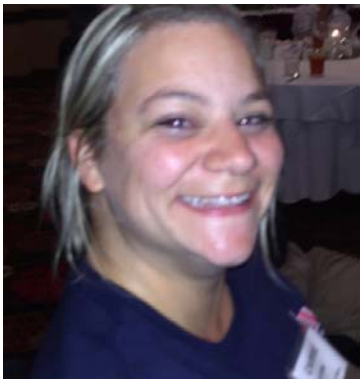
The U.S. Department of Labor's Wage and Hour Division (WHD) issued an Administrator's Interpretation (AI) that seeks to restrict companies from the use of independent contractors. Furthermore it requires employers to reclassify those workers as employees which would be subject to the Fair Labor Standards Act. The Department of Labor (DOL) and the Internal Revenue Service are working together and sharing information that identifies potential misclassification in businesses.

The DOL continues to use the six factory analysis test:

1: The extent to which the work performed is integral to the employer's business –
is the work integral to a business, "even if the work is just one component of the business and is performed by hundreds of other workers".
2: Whether the worker's managerial skills affect his/her opportunity for profit and loss –
An independent contractor's opportunity for loss appears to now be a requirement under the test: "it is important not to overlook whether there is an opportunity for loss, as a worker truly in business for him or herself faces the possibility of a loss."
3: The relative investments in facilities/ equipment by worker and the employer
"the worker's investment must be significant in nature and magnitude relevant to the employer's investment…to indicate that the worker is an independent businessperson."
4: The worker's skill and initiative –
The DOL's guidance emphasizes a worker's "business skill, judgment, and initiative" and not his or her technical skills under this factor.
5: **The permanency of the worker's relationship with the employer –**
The DOL states that "the key is whether the lack of permanence…is due to the operational characteristics intrinsic to the industry." As an example, staffing agency workers were viewed as employees given the nature of the industry and the permanency in the working relationship.
6: **The nature and degree of control exercised by the employer –**
A company's exercise of control due to the nature of their business, regulatory requirements, or their desire to maintain high customer satisfaction are not permissible reasons to exert control over independent contractors and still indicate an employee relationship.

References: (Alfred, R., Passantino, A.J., Bannon, P.J. & Smiley, A.J., 7/15/2015) DOL Issues Guidance On Independent Contractor Classification Interpreting FLSA Broadly to Cover Most Workers as Employees; Idalski, A. A (SHRM.org 4/1/2015). Defending Your Independent Contractor Classifications.

A good audience for our October speaker



Always Happy!
Carrie Edomm of Astro Sheet Metal.

A VERY GOOD YEAR

SAM's mission is to give the most needed information to Subcontractors at the best possible price, to provide a forum for exchange of information among it's members, and to be an advocate for the Subcontracting industry.

SAM raised the bar even higher this year. We maintained our membership in the National Subcontractors Alliance which is now the largest Subcontractors association in the USA. We also became members of the Texas Construction Association, and have a strong voice at the Texas Legislature.

Every program this year has presented valuable tools to aid in a Subcontractor's profitability.

Being a Legislative year, we had two programs on the legislative issues as presented by Mike White, Vice President of Legislation at he TCA. Mike presented in January on our Legislative agenda, and reported back to us in June with the results and our resolve for the future.

We had programs on jobsite and construction technology presented by Blake Potts of Rogers-Obrien Construction. We presented our first "Lunch and Learn seminar with Garrin Fant of Cutler-Smith showing us how to combat Construction Defect Claims. We had Donna Nuernberg and Lance Trammell of Lane Gorman Trubitt show us the perils of employee theft and betrayal, and give us tools to prevent it. Our own Jim Brewer presented a program to show what's needed to get your business to its "sweet spot" and bring it to a position of achieving maximum profits. We had our popular presenter, Elias Vela, of OSHA speak to us about developing our company's Injury Protection Plan. Brad Curtis of Dodge Analytics provided us with a comprehensive Construction Forecast. Elsa Ramos of the Texas Workforce Commission gave us a detailed look at how to keep our experience modifier low. SAM set a record attendance at this years Lien and Bond Claim Seminar.

SAM will Continue to provide the best education and advocacy at the best price in Texas.

Subcontractors Association of the Metroplex

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The Subcontractors Association of the Metroplex was founded with the purpose of creating an affordable forum for Subcontractors to exchange information and learn from each other how to be better business men or women.

Sam is a member of the National Subcontractors Alliance, the largest Subcontractors association in the USA, and also a member of the Association of Specialty Contractors where we have a voice in National Legislation. SAM is also a member of the Texas Construction Association, the unifying voice of the trades in the Texas Legislature and as such all SAM members have access to all the benefits of the TCA.

Sam is also allied with the National Federation of Independent Business who has a voice in the Texas Legislature on small business issues.

Your Source for Subcontractor's information.

Visit us at:
http://www.sam-dfw.org

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SUBCONTRACTORS– THE ONES WHO REALLY BUILD THE BUILDING