

SAN FRANCISCO BAY AREA NARI SEPTEMBER 2008 NEWSLETTER

SUBCONTRACTS

Subcontracts are presently a hot topic among my clients – both general contractor and subcontractors - because of several recent court cases. Commercial liability insurance carriers are also paying more attention and requiring you to have your ducks lined up.

Contrary to popular opinion, subcontracts are complex legal documents – in many ways more so than home improvement contracts. Unlike home improvement contracts between contractors and owners, there are no general statutory Contractors State License Board or Business and Professions Code requirements. And of course it is further complicated by the real world issue of leverage.

Subcontract Key Terms

There are several key terms that should be addressed in any subcontract. And inclusion of these sections puts you in compliance with what is now typically being required by your insurance carrier.

- Insurance. This should specifically spell out coverages, and discuss certificates of insurance and additional insured issues.
- Indemnity. This is now often a requirement by your CGL insurance carrier. Be sure it is included. And read it. And show it to your broker for comment and approval.
- Subcontractors as Independent Contractors. In addition to being a discrete provision in the contract, general contractors should check that subcontractors are in fact licensed and insured.

Prompt Pay Statutes

Business and Professions Code § 7108.5 provides that upon receipt of a progress payment, the general contractor **must** pay his subcontractor within 10 days the amount allowed the contractor for the work performed by the subcontractor. Where a good faith dispute exists, the contractor may withhold from a progress payment up to 150 percent of the amount in dispute.

Three **sanctions** are provided if the contractor fails to pay the subcontractor as required: (1) a possible disciplinary proceeding before the Contractors State License Board; (2) a penalty of 2 percent a month on the balance payable to the subcontractor; and (3) attorney's fees. Courts have held that the 2 percent penalty against the contractor could also be recovered in a civil suit by the subcontractor, in addition to prejudgment interest.

If you are a general contractor, and have a dispute with a subcontractor and are not paying him, document that there is a dispute.

If you are the subcontractor, be mindful of these rights and when it is appropriate to assert them.

Bryant H. Byrnes, Esq. practices construction law in the San Francisco Bay Area and is counsel to the SFBA NARI Board of Directors. Questions? Please feel free to contact him by email at bhbatty@pacbell.net.