Outline

• **Aligning Prime Contract and Subcontract Provisions**
  – Avoiding Gaps
  – Applicable to Prime Contractors and Architect/Engineers

• **Key Provisions and Associated Pitfalls**
  – Indemnity
  – Payment Releases
  – Change Orders – Release Language
  – No Damages for Delay

• **Dispute Resolution**

• **Claim Management Pitfalls**
Contract Documents

Project Specific Terms
- Agreement
- General and/or Special Conditions
- Plans and Specifications

FAR Clauses

Other Documents Incorporated by Reference
- E.g., Bids, Bonds, Inclusions/Exclusions, etc.
Contract Documents – Avoiding Subcontractor “Gaps”

Common Gaps Resulting From Lack Of Coordination

- Scope of Work
  - Look out for exclusions
- FAR Flow-Downs
- Indemnity
- Termination
  - Contractors (e.g., for convenience - fixed price) FAR 52.249-2
  - Architect-Engineers (fixed price) FAR 52.249-7
- Notice Requirements
Key Provisions - Pitfalls

• Indemnity Provisions (Prime/Sub)
  • Claims arising from Prime K’s active negligence, sole negligence and/or willful misconduct?
    – Enforceability under California law
  • Architect-Engineer Contracts –
    – Design within funding limitation (FAR 36.609.1; 52.236-22)
    – Redesign responsibility (FAR 36.609-2; 52.236-23)
  • Who are you indemnifying? (owner, architect, etc.)
  • What claims trigger the indemnity obligation?
    – Delays
    – Fines/Assessments
    – False Claims Act Violations
    – Should not be limited to negligence and associated property damage/personal injury
Key Provisions - Pitfalls

• Progress/Final Payment Releases
• Change Order Releases
• No Damages For Delay
  – Enforceable?
• Severin Doctrine
Severin Doctrine

- Subcontractors cannot directly sue the government because they do not contract with the government.

- A pass-through claim is a subcontractor claim against the government that a prime contractor brings on behalf of a subcontractor.

- The Severin doctrine: a prime contractor presenting a pass-through claim can recover damages only if the prime contractor remains liable to the subcontractor for those damages.
Severin Doctrine – No Damages For Delay

• No Damages For Delay – Limits recovery resulting from delays to additional time (no recovery for extended general conditions/overhead).
• A prime contractor may not be able to pass-through a subcontractor delay claim as the result of a no-damages-for-delay provision.
Severin Doctrine – Payment Application Releases

• Turner Construction Co. v. Smithsonian Institution
  
  Subcontractor “represents and warrants that there are no outstanding claims by the [subcontractor]... through the date of Application for Payment No. __ except for any retention, pending modifications and changes, or disputed claims for extra work as stated herein[;]” and “does hereby forever release, waive, and discharge ... any and all ... claims and demands ... by reason of delivery or material and/or performance of work relating to the project through Application for Payment No. __, except for those items listed under No. 1 above.”

• Holding by U.S. Civilian Board of Contract Appeals - even though the progress payment releases did not carve out the pass-through claims, the Severin Doctrine did not bar them mainly because the releases were “clearly tied” to each progress payment.
Severin Doctrine – Payment Application Releases

• MW Builders, Inc. v. United States
  • Subcontractor “irrevocably and unconditionally releases and waives ... any other claims whatsoever in connection with this Contract ... through the end of the period covered by this Application ....” No carve-out for delays.

• Holding by U.S. Court of Federal Claims - based on the broad language in the releases and the fact that the releases did not expressly reserve the subcontractor’s delay claim, the court determined that the releases barred all claims by the subcontractor and Severing Doctrine prevented the prime contractor from passing through the claim.
Severin Doctrine – Change Order Releases

Typical Change Order Release Language:

“Any price increase associated with each individual change listed in this Change Order or any time extension granted under this Change Order constitute full and final payment to the subcontractor for all of its additional costs and time associated with the change, both known and unknown, including without limitation all of the subcontractor’s direct costs, indirect costs, delay costs, overhead costs, general and administrative expenses, profit, home office expenses and all of the subcontractors cost’s (direct, indirect and consequential, including but not limited to, impacts, changes/impacts to unchanged work, and ripple effect) and time on all other subcontract purchase order work, whether or not such subcontract purchase order work was changed by the change in this Change Order.”
Severin Doctrine – Change Order Releases

Typical Change Order Release Language:

“Any price increase associated with each individual change listed in this Change Order or any time extension granted under this Change Order constitute full and final payment to the subcontractor for all of its known additional costs and time associated with the change, both known and unknown, including without limitation all of the subcontractor’s known direct costs, indirect costs, delay costs, overhead costs, general and administrative expenses, profit, home office expenses and all of the subcontractors known cost’s (direct, indirect and consequential, including but not limited to, impacts, changes/impacts for this change to unchanged work, and ripple effect) and time on all other subcontract purchase order work, whether or not such subcontract purchase order work was changed by the change in this Change Order.”
Dispute Resolution - Pitfalls

- Dispute Resolution – Is the Owner Involved?
  - If yes, Contract Disputes Act applies (FAR 52.233-1)
    - Certification and associated False Claims Act exposure
  - Pass-through obligations – Severin Doctrine
    - Devil in the details re: attorney fee responsibility, mark-up by prime K, etc.
  - Miller Act - Pay attention to Miller Act Timing Requirements
  - Mediation?
  - Arbitration?

- Attorneys’ Fees?
  - Per Contract
  - Per Statute – No right under Miller Act
Claim Pitfalls

1. Poor Documentation
2. Failure to Maintain Accurate and Updated Schedules
3. Inconsistent Communications with Owner/Subcontractor/Suppliers
4. Damaging Internal Communications, i.e., E-mails/Texts
Email Usage

- DISCOVERABLE
- Trial exhibit
- Not a chat room
- Fertile source of damaging and/or useful evidence
- Treated as a party admission
- Establishes bias and prejudice
- Embarrassing
- Damaging to relationships
- ALL EMAIL ACCOUNTS
Damaging Internal Communication

General Contractor’s email to pass-through subcontractor

Message

From: 
Sent: 3/27/2012 3:15:43 PM
To: 
CC: 
Subject: FW: Non-Compliance 0003
Attachments: GTC_003_Non_Compliance_0003_26March2012_wth_attachment.pdf

I guess I can start by asking everyone involved: HOW THE FUCK DID WE GET ANOTHER NON-COMPLIANCE???? Do you know how this reflects on the end of this job, not to mention the submitted REA and time extension? Where the hell is the QC, Safety and Supt? I am really fucking tired of fighting an uphill battle here. This is bullshit!
Damaging Internal Communications

Internal email from structural engineer regarding design problems

You, [Redacted], have been well aware of this collector design defect and related issues on the [Redacted] for months.

I am sure it is very embarrassing for you and Eric specifically, as the mistake was caused by staff working directly under your supervision, but blame serves no purpose here.

As you are the main point of contact with the [Redacted] client(s), I am very surprised that you have not informed them of design error.

To my knowledge no one on the [Redacted] staff is capable of practicing structural engineering in Nevada, therefore review of the fix and/or suggestions from your staff are irrelevant.
Damaging Internal Communication

Internal email from structural engineer regarding design problems

From: [Redacted]
To: [Redacted]
Subject: [Redacted]
Date: Wednesday, December 31, 2008 10:54:21 AM

Please take a look at this and give me your thoughts/opinion.

I am still under the opinion that if we are pushed to defend our design it will have a lot of holes big enough to fall through.

I have upload the TO provided calcs for your amusement to: S:\transfer girder\harmon calcs transfer

Thanks

[Redacted]
Internal email from structural engineer regarding design problems

Hi,

Unfortunately the lateral system does not work the way its detailed and designed, and all the bubble gum in China can’t hold it together.

I am having someone look at changing the system to ordinary braced frames (R=5), which gives us another 33% reduction in base shear in addition to the 27% from the reduced seismic mass, and still the system does not appear to work (but its pretty close).

I suggest if you don’t have an alternative that we (vegas) should take this piece of the building over assuming we can stall the submittal dates a few days.

Please ask someone to send the relevant Ramsteel and Sap? Models when you have a chance.

Thanks,
Before Clicking the Send Button

- Refrain from disparaging comments about individuals, questionable humor, or intimate personal details of your life.
- Use proper grammar and punctuation.
- Treat each email as a stand-alone document that is demonstrative of professionalism and intellect.
- Refrain from using profanity.
- Playing “devil’s advocate.”
- Is it in connection with seeking legal advice?
Questions?