



The ASA Report: The Policy Environment in the States

Background

Evaluating the public policy environment for construction subcontractors and suppliers requires making some arbitrary choices. After all, which public policies are being included in the evaluation, and which are being excluded? What are the deciding factors? And, what do the results of such an evaluation really signify? All of these questions are valid, and the practical objective of helping subcontractors and suppliers guided ASA's approach to this report.

ASA's evaluation of the public policy environment for construction subcontractors and suppliers began with some basic assumptions:

- The policy environment should be judged according to the issues that construction subcontractors and suppliers themselves consider important.
- Public policies include both statutory and case law.
- Public policies can be given meaningful numerical scores and grades.
- The grading scale of policies is not a distribution of grades based on an average. The standards for grading are based on how well public policies protect/support subcontractors, not on which policies predominate among states.

ASA conducted a needs assessment survey of 1,000 randomly selected ASA members in the fall of 2005. The results showed that payment assurance, onerous subcontracts, risk transfer issues and bid shopping are the most significant and problematic public policy issues for subcontractors and suppliers. Accordingly, ASA researched (1) Prompt payment protections; (2) Treatment of pay-if-paid clauses; (3) Mechanic's lien protections; (4) Payment bond protections; (5) Retainage limitations; (6) Anti-indemnity protections, including limits on "additional insured" endorsements; and (7) Anti-"bid shopping" measures. ASA limited the scope of the evaluation to state laws and court decisions in these policy areas.

Research showed great variation among the states in the level of protection and support that they offer to subcontractors and suppliers, and scoring was complex. For example, mechanic's lien laws vary in how many tiers of construction can claim liens, the construction owner's liability, whether lien rights can be contractually waived, and notice and filing requirements. ASA developed evaluative factors for each policy area and assigned a maximum number of points that could be accrued for each factor. The result was a numerical score and letter grade for each policy area for each state. Note that numerical scores within the "F" range vary from 0 to 60 points, meaning that two states with a failing letter grade in a policy area are not necessarily "equal" in "how much" they fail to provide adequate protection or support to subcontractors and suppliers.

The "course descriptions" in this kit encapsulate the standards by which ASA evaluated different policy areas and assigned scores and grades. ■