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Disclaimer: This publication does contain legal advice. The discussion and forms are intended to provide information and guidance to individual subcontractors for their use in establishing cash flow procedures. Specific circumstances vary widely, so subcontractors may need to consult their attorneys before acting on the premises described herein. Each subcontractor should decide for itself the contract terms and conditions which it believes will best protect its interests. Subcontractors should not agree among themselves as to the form of contract terms and conditions they will use. Such agreements may violate federal or state antitrust laws and could result in the imposition of civil and/or criminal penalties.


Improving Cash Flow:
A Guide for Construction Subcontractors

An Introduction
Many trade contractors focus their resources on bidding and winning contracts and even on dealing with challenges in the field, but no business can be successful without successfully collecting payment for work performed or goods delivered. Indeed, more subcontractors seem to fail because of poor cash flow management than a lack of work or technical expertise. Historically, this has been particularly true as the construction industry emerges from a recession, as subcontractors begin to extend more and more credit to their customers during the construction process. This publication is intended to be a practical “how to” guide for both veterans as well as newcomers in the construction industry. A successful collections program starts with a proper attitude. Thus, it is important that all parties involved in the collections process — those in your company as well as in your customers’ firms — are continually made aware that timely payment is of the utmost importance to your company. The following steps will improve your collections results:

- Set an example by treating collections as a vital part of your daily activities.
- Show your commitment to results through actions, not words. Demonstrate in tangible ways your need to get earned money into your hands on time. There is ample evidence that the squeaky wheel gets the grease. Contractors are more likely to pay those who show they really care rather than those who simply go through the motions.
- Accept the fact that some contractors have developed predatory practices designed to keep subcontractors off-balance and on the defensive as a way of paying less than due. One way to assure that you keep you and your staff on your toes is to assume that your customer has someone on its staff responsible for slowing down your payment by offering vague promises or delaying your checks.

Basic Principles of Cash Flow
Without a carefully developed and implemented program, all of the good intentions in the world will not improve your cash flow. Such a program should be built on the tenet that there is no substitute for actually getting money into your account. Only then can you cover the cost of project materials and the work that you have financed and attain a reasonable profit. The following are four basic principles to an effective cash flow program:

- **Establish a good foundation.** There are three building blocks for a sturdy foundation for your cash flow program: (1) equitable subcontract terms, (2) a billing schedule that provides adequate compensation during the progress of the job, and (3) a requisition form and system that helps your customer help you.
• **Heed the lessons of a general contractor’s track record.** Be prepared if, based on your past experience with the customer or the reputation of the customer, there is a history of predatory practices, such as improper back charges or excessive deductions from payments.

• **Use your time and employees to advantage.** Many customer collections contacts can be made during regular visits and telephone calls about other matters. Prioritize contacts, separating the unusual from the routine in assigning basic follow-up responsibilities. In most instances, administrative staff can carry out a systematic program of routine contacts so that senior staff can concentrate on exceptional conditions and major problems.

• **Do not hesitate to use leverage any time you can.** For example, you may be able to apply leverage when a customer is looking for a great price, a scope change, accelerated or out-of-sequence work, or whenever the customer needs your help to meet its own goals. The common element in each of these situations is that the customer needs special consideration from you. When these conditions arise, it is always best to make your agreement contingent on favorable payment terms and the removal of any obstacles to getting your money without delay.

**Pre-Contract Award Actions**
The groundwork for prompt payment and good cash flow must begin prior to the award of a contract. It is all too easy for an unscrupulous contractor to hide behind unfair payment terms and answer your pleas by telling you to “read your contract.” Unfortunately, stringent subcontract language may legally obligate you to continue to work for extensive periods without being paid. Worse still, contingent payment language can cause you to lose the right to sue, proceed against a surety company or even maintain a lien on the job. You should build into your company’s routine procedures specific steps to address recurring problem areas while negotiating fair payment terms. These steps should include those discussed below.

**Conditioning Your Bid on Your Own Payment Terms**
You should develop your own proposal form, not only to clarify the payment terms on which your bid is based, but also to confirm your understanding about the scope of work, related work by others, scheduled time for your performance and any unclear, contradictory or potentially troublesome items. See ASA’s *Subcontractor Bid Proposal* (2013) for a model that you can easily adapt to your use. An alternative way of handling your bid clarifications is to state that the bid is subject to the terms of the latest ConsensusDocs Form 750, Standard Agreement between Constructor and Subcontractor.

**Overcome Unfavorable Contract Payment Terms**
Address any language in the bid documents stating that the contractor’s or owner’s standard subcontract form will be used. By bidding without clarifications, you may be offered unsatisfactory payment terms and reminded that your bid price was to be based
on those terms. To avoid being precluded at the time of bid, you should, at the very least, state that your bid is subject to mutually-agreed upon clarifications.

One of the key factors in assuring your company's cash flow is to evaluate the credit of the general contractor or construction manager with which you are about to do business. In some instances, the process can start before you decide to bid. You may be surprised about how much information you can find about a prospective customer through an Internet search.

In addition, credit services such as Dun & Bradstreet may be helpful in identifying the size of the general contractor, the experience of its officers, and any current major problems. D&B reports, however, often have limited value in evaluating the contractor's true financial worth. Similarly, the contractor's financial statements often are difficult gauges because of progress payments and retainage, which may be inconsistent in reflecting monies owed in relation to monies collected.

The best initial source of credit information is the contractor's bank. Therefore, you should request the name of the bank or banks that the contractor uses. You also may want to consider requesting that your customer provide you with at least a partial copy of the prequalification form that it provided to its customer. See ConsensusDocs Form 221, Constructor's Statement of Qualifications for a Specific Project for a sample form.

Finally, do not overlook any previous experience you have had with the customer. Negotiate payment terms tailored to address any past abuses that you have encountered with that customer on earlier jobs. The exchange of information with other trade contractors also can be helpful in getting an idea of the customer's character and ethics, as well as paying habits. Many ASA chapters conduct a Business Practices Interchange. If the customer is a high credit risk, try to get a check for material before starting on-site labor. Also, be sure to establish a clear contractual right to stop work or hold up completion of your installation if your payments are not kept current. For major risks, consider some form of direct disbursement, joint checks, escrow or similar arrangements.

Clarify Payment Terms

Retainage
Unnecessary retainage can quickly erode a subcontractor's cash flow. Thus, a subcontractor will want to address the retainage terms during the pre-award process. The retainage rate should be no higher than that being retained by the owner from the general contractor, and, in any event, should be no higher than 10 percent. A subcontractor should seek entitlement to a retainage reduction when its work is 50 percent complete. It might seem only reasonable that a contractor would include any favorable project payment terms in its subcontract agreements, including retainage release. However, contractors may be tempted to negotiate more stringent payment terms with their subcontractors.
A subcontractor also should clarify when the retainage is to be released in full. The subcontractor should insist on terms making retainage payable upon satisfactory completion of its work. If punch list work remains, retainage on substantially completed work should not exceed one and one-half times the reasonable value of such unperformed work. This has become a general industry standard. Such terms offer a strong incentive for prompt completion of subcontract work and thus also benefit the contractor and the owner. For more information, see ASA’s Negotiating Tips on Copies of Contract Documents and Retainage for Sub is More Than for GC and ASA’s Retainage Laws in the 50 States.

**Entitlement to Payment**

One of the biggest challenges to subcontractor cash flow is a subcontract clause that makes its payment contingent on its customer receiving payment first. “Pay-when-paid” clauses are troublesome because these terms can be used by a contractor to justify long delays in progress and final payments. A typical “pay-when-paid” clause may read:

“The Subcontractor shall be paid within seven (7) days after the General Contractor receives payment from the Owner for the work of the Subcontractor.”

Such terms may result in slow payment due to disputes between others and inadequate project funding. However, many state court decisions allow subcontractors to get their money within a “reasonable” time following proper billing. Still, actually getting money owed may take an unrealistic time to overcome the hurdle that pay-when-paid language imposes. A few courts have not allowed subcontractors payment entitlement, concluding that a pay-when-paid contract clause means literally what it says.

“Pay-when-and-if-paid” clauses are far worse. A typical “pay-when-and-if-paid” clause may read:

“The General Contractor will pay the Subcontractor only if the General Contractor is paid by the Owner for the Subcontractor’s work. Receipt of payment from the Owner by the General Contractor for the Subcontractor’s work is an absolute condition precedent to the Subcontractor’s right to payment.”

These terms specify that payment by the owner to the contractor is absolutely necessary for a subcontractor to have any entitlement to payment. Courts usually find that such an explicit agreement means that a subcontractor has no right to even an eventual payment from the contractor should the owner fail to pay the contractor. There are a number of ways for subcontractors to avoid conditional payment terms. One way is to reach agreement on language limiting the general contractor’s right to withhold payment to a maximum of 30 days or 60 days, even if the owner does not pay the general contractor. A second way is to add a provision stating that payment by the contractor may be delayed only for monies withheld by the owner due to some deficiency on the subcontractor’s part. For example:
“Our acceptance of conditional payment language is conditioned on the understanding that these terms apply solely to monies withheld by the Owner due to some deficiency on our part.”

A third way to overcome conditional payment language is to include wording stating that, notwithstanding anything to the contrary, no provision of the subcontract shall restrict the subcontractor’s entitlement to prompt payment for work properly performed. Conditional payment language generally relates to both progress and final payments.

The “pay-when-and-if-paid” variety may cut off your ability to institute suit or assert a surety bond claim. Such terms could even permit a contractor to challenge a lien on the theory that all payments legally owed have been made. Long payment delays are predictable if the owner and contractor have a dispute — even if that dispute does not concern the subcontractor’s work. For more information, see ASA’s Negotiating Tip on Pay-if-Paid Clause and ASA’s Contingent Payment Clauses in the 50 States.

Schedule of Values
One of the ways that a subcontractor can preserve its cash flow is to clarify issues involving the schedule of values during the pre-subcontract award process. This may include mobilization, weighting of material and labor values, and payment for stored materials.

Mobilization
A subcontract should allow for early payment of mobilization costs, including engineering costs as well as insurance and surety bond premiums. Many contractors have no objection to this practice, particularly if their draws are based on the amounts they pay out.

Weighting of material and labor values
Generally, billing for material is rendered in advance of billing for labor. Thus, a subcontractor should assign adequate value to the material portion of its work. The subcontractor also should be sure that it assigns adequate labor amounts to on-site work that will be performed during the early stages of the job.

Stored materials
A subcontractor should be entitled to payment for fabricated material delivered to the jobsite prior to installation. This also should apply to material stored at an off-site location approved by the contractor or owner. The subcontractor should provide the contractor with a bill of sale, documents confirming delivery, and evidence of insurance in order to be paid. Typical language may state:

“Monthly progress payments to the Subcontractor shall include payment for materials and equipment not incorporated in the Subcontractor’s work, but delivered and suitably stored at the site or some other agreed upon location.”
For more information, see ASA’s *Negotiating Tip on No Payment for Stored Materials.*

**Payment Timing**

**Monthly Progress Payments**
A subcontractor should establish the firm date each month on which payments are due and payable. Otherwise, a contractor can conveniently contend later than it could hold the subcontractor’s money long after having been paid by the owner for the subcontractor’s work. For example, a progress payment clause should provide:

“The Subcontractor will be paid monthly progress payments on or before the 15th of each month for the value of work completed and the value of materials suitably stored on or off-site during the preceding month.”

For more information, see ASA’s *Subcontractor’s Negotiating Tip Sheet on Progress Payment Timing.*

**Final Payment**
To the extent practical, the subcontractor should be sure it has an understanding with the contractor that it will be paid within 30 days after completion of the subcontractor’s work. At that time, withholding should be reduced to no more than one and one-half times the value of any incomplete punch list work.

A subcontractor’s cash flow can be severely eroded throughout a construction project if it fails to assure that its payment rights are protected in the subcontract agreement. Among the terms the subcontractor should review, understand and negotiate further, if necessary, are those governing mechanic’s lien rights, payment for extras and back charges.

**Related Contract Terms**

**Lien Rights**
A subcontractor should not waive, in whole or part, any rights to assert liens, except for material and work for which it has been paid in full. A subcontractor that waives lien rights loses an important tool to obtain payment if the contractor is unable or unwilling to pay. Also, that subcontractor may have to remove at its own expense any liens which may have been placed as a result of the subcontractor’s work, in spite of a lack of payment by the contractor. For more information, see ASA’s *Subcontractor’s Negotiating Tip Sheet on Lien Waivers and ASA’s Lien Waiver Reservation of Rights Stickers.*

**Extras**
A subcontractor should obtain agreement that any extra work will be paid promptly. This agreement should include monthly progress payments for additional work performed pursuant to a contractor directive, even though a formal change order may not have
been issued. A clarification is vital if the contractor has a history of processing change orders slowly or when a large number of changes are expected. For more information, see ASA’s Subcontractor’s Negotiating Tip Sheets on Extra Work and on Payment Rate on Extra Work.

Back Charges
Deductions from subcontractor payments for unauthorized construction services should be limited to work agreed to in advance and billed promptly. Clarification of this point is most important if a contractor has a history of abusing the practice through spurious charges, often developed to offset legitimate subcontractor extras. For more information, see ASA’s Subcontractor’s Negotiating Tip Sheet on Contractor Back Charges.

Claims
A subcontractor should avoid subcontract restrictions on its ability to file valid claims for delay, acceleration, interference or similar unanticipated developments. While it is reasonable for a customer to require advance notice of such claims to mitigate potentially negative consequences, any waiver of rights for failure to provide notice within an arbitrarily determined time period is inappropriate. For more information, see ASA’s Subcontractor’s Negotiating Tip Sheet on Claims Notices.

Right to Stop Work
A subcontractor should be sure to clearly establish that its agreement to continue work is conditioned on prompt payment. A subcontractor can assure this right by including a clause such as:

“Should Subcontractor’s payment be delayed because (a) Customer fails to receive timely payment of amounts certified and approved, or (b) Customer fails to make timely payment after receiving payment for Subcontractor’s work, then Subcontractor may suspend work after giving at least seven (7) days written notice to Customer of the intent to suspend and the date of intended suspension. Should Subcontractor’s work be thereafter suspended for at least twenty-one (21) days, Subcontractor may terminate this subcontract upon written notice of termination to Customer.”

For more information, see ASA’s Subcontractor’s Negotiating Tip Sheet on the Inability to Stop Work for Nonpayment.

Controlling Cash Flow During the Job
Schedule of Values
The schedule of values consists of line item dollar amounts for each of the major activities throughout the project. An appropriate schedule of values can significantly help with a subcontractor’s cash flow by assuring that it is able to collect funds expeditiously after it has performed the service or provided the materials. For example, the schedule of values should include a reasonable amount for job mobilization costs,
such as surety bond and insurance premiums, engineering work and other costs incurred prior to the start of on-site work.

Similarly, the subcontractor should establish an appropriately small amount for running and testing equipment at the end of the job to protect against excess withholding at that point. For basic contract work, a subcontractor should establish adequate values for early finishing items. Otherwise, the subcontractor may find itself financing the project to a far larger extent than expected.

The subcontractor should obtain an approved copy of the schedule of values marked “for requisition purposes only.” This evidence can help if questions are raised later about billing amounts.

**Application for Payment**
The application for payment is an important function that is all too often treated as a routine clerical operation. Yet it is a critical component of a successful cash flow management program. Subcontractors and suppliers who succeed in getting their money promptly treat the billing function as a key element in a solid collections program.

Be sure that you know your customer’s prescribed billing format, pay cycle, turn-around time, any additional forms and copies required, and the name and billing address you are required to use. Identify any quirks or priorities of the customer necessary to assure your requisitions are acceptable for prompt processing. Also, make sure you have the telephone number, the email address and even the fax number of the person in your customer’s office that is responsible for your payment.

If your customer does not require you to use its own form, you should use an application for payment that recognizes your usual payment terms. One such form is the ConsensusDocs Form 710, *Subcontractor’s Application for Payment*. Alternatively, you may consider the *Subcontractor’s Application for Payment* developed by ASA, in conjunction with the Associated General Contractors of America and the Associated Specialty Contractors.

If you must use a contractor’s requisition form, watch carefully for any wording that would waive your right to future extras. Some contractor forms say that no other money is due for work performed to date. When in doubt, remove any such billing limitation. For more information, see ASA’s *Payment Application Reservation of Rights Stickers*.

**The Collections Phase**
Just as in sales work, your goal in the collections process is to get to know on a first-name basis each of the customer’s representatives who will be involved in the payment process. This includes everyone from the officials responsible for approvals and finances to the clerks who review requisition details and prepare the checks to the individual(s) who signs the checks, and who serves as back-up signatory, who may be contacted for assistance with problems, and their tips on how to speed up your payments. These contacts allow you to cut through the frequently impersonal customer
reactions that can range from insincere friendliness to unconcern or even belligerence. Through more personal approaches, you should be able to get some straight answers and plead your case for payment more effectively.

Again, as in sales, personal touches such as remembering birthdays, families and special interests of key customer representatives can pay big dividends. At the same time, you can dramatize the need for getting your money on time through specific, personal examples of what late payments do to your company and your ability to work effectively on the job.

You should find out who in your customer’s organization has the power to sign checks. This allows you to time your customer visits to coincide with that person or persons being available. Otherwise, your visit may not result in a check.

Adopt the attitude that you will not take “no” for an answer. By showing your concern in keeping the life blood of your business flowing, you should be able to avoid evasive responses that defer payment indefinitely. If the specific objective of a meeting with a customer is to pick up a check for the amount owed, then any other result is unsatisfactory. You also should be prepared to address any work-related complaints or disputed back charges immediately, including a joint tour of the jobsite, when necessary. If the owner or lending institution is clearly causing a payment delay, offer to join the contractor in meeting with them. If the contractor is not applying adequate pressure on your behalf, contact the owner directly.

**Telephone Calls: When and Who**
The core of a cash flow management program consists of well-developed and executed steps to assure the actual receipt of money is as fast as the job progress. One part of a program of collection techniques is a system of telephone calls.

Timeliness is the name of the collections game. Start quickly by calling within a few days after submitting a major invoice to be certain that everything is in order. Ask for a copy of the approved bill to complete your records. Three or four days before a major payment is due, call to remind your customer that you really need the money and are counting on the payment. This extra call lessens the chance of last-minute payment reductions.

If a check is not received on the date due, call the customer that day. Find out why you have not been paid. This prompt follow-up demonstrates in a very tangible way your concern about getting your money on time.

If you do not receive a check on the day the contractor promised to pay you, follow up with another telephone call that same day. The customer will recognize that you take its promises seriously if it gets a call on the specific date designated for payment. Valuable time and momentum are lost if you wait longer.
Such routine follow-up collections calls should be handled by members of your office staff who are familiar with your billing and payment records. By assigning routine calls to administrative staff, you can maintain an ongoing, daily system of contacts that does not involve managers and superintendents except for problem cases such as broken promises, performance questions and evasive answers by customers. All staff members making telephone contacts should have a professional, yet friendly tone in all contacts with customers. Nonetheless, they must be persistent.

**Telephone Techniques**
Routine follow-up collection calls are an important part of an effective cash flow management program. Successful telephone conversations consist of asking the right questions and being sure that the customer’s representative provides specific payment commitments in his or her own words.

- Do not put words in the customer’s mouth. For example, your caller should avoid asking questions such as, “May we expect your check at the end of the month?” Simply ask instead when payment will be made. Then wait for as long as it takes for the customer to give a clear promise in his or her own words.

- Repeat back the payment promise to the customer for emphasis and to preclude any possible misunderstandings.

- Record the customer’s promise on your collections follow-up records using the customer’s own words. Show the date, time and name and title of the customer representative for possible use later.

- If the check has not been received by the promised due date, call the customer back early that day. Talk directly to the person who made the promise. Quote that person’s words back to him or her. If that person is not available, talk with his or her supervisor. Again, the words of the promise should be used. Be sure to convey your concern by saying that the unmet promises are viewed very seriously by your organization. If the amount involved is significant or the customer does not convince you that payment will be sent immediately, arrange to have the check picked up.

- If your contact indicates that the decision about your payment has to be made by someone else, ask to speak to that person. Report to that new individual in an objective way, in an even tone each contact you have had with the company about payment. Follow the steps above.

- Keep a record of each follow-up call and repeat the above procedure until payment in full is actually received.

- If payment is received for an amount less than that requisitioned and approved, immediately place a call and get an answer in the customer’s words on two questions: (1) Who reduced the payment, the owner, architect or contractor? (2) On what basis was the reduction made?
Do not accept an evasive or vague reply, such as “the shortage amount will be included in the following month’s payment.” All too often, this is simply a dodge used for situations where more funds were received by a customer than were passed along to the subcontractor.

**Dealing with Problem Situations**

**Broken Customer Payment Promises**

No matter how strong the initial steps in your collections program, some of your customers are going to break their promises for payment. Thus, it is critically important that you supplement each telephone contact with a letter to get your position on the record, including:

- Your concern about not being able to rely on the customer’s word.
- A warning about possible consequences of continued payment delays.
- Conveying a sense of urgency about your need for payment covering the labor and material for which you’ve already paid.

To demonstrate your continuing concern about getting paid without delay, ask for funds to be electronically deposited directly to your bank account or arrange to pick up checks not sent when promised. This will avoid the “check is in the mail” excuse.

Alternatively, offer to have the check picked up by a courier service or an overnight delivery service. You can minimize the additional time that a customer may try to buy through your company’s ongoing, aggressive follow-up. Experience shows that people seldom renege on commitments to have checks available for pick-up at firmly agreed-upon times. Confirm the exact name of the contact person, his or her precise location and the appointed time the courier is to pick up the check.

In addition, apply your own leverage judiciously, to the extent that it is available, in order to create a sense of urgency and to emphasize the importance of getting paid promptly. Be cautious about warnings of specific actions you might take — limit such warnings to actions that you are willing and able to take. Premature or insincere warnings are counterproductive. The secret to using leverage successfully is to find out what is of vital concern to the customer at the particular time, and to offer your help in addressing that concern in exchange for immediate payment of money owed, as well as prompt progress payments in the future.

**Written Communications with Customers**

The core of a cash flow management program consists of well-developed and executed steps to assure the actual receipt of money as fast as the job progresses. Many of your written communications concerning payment will be in the form of letters, transmitted by email or the U.S. Postal Service, to the contractor. Such letters offer you a good opportunity to (1) demonstrate the importance you place on getting paid when due, (2) document for later actions or claims, and (3) put pressure on customer representatives to make good on their good assurances of timely payment.
As in the case of follow-up telephone calls, the subcontractor can achieve maximum impact by quoting the contractor’s exact words on promised payment. If you are sending a letter to a person down the line in the customer’s organization, a copy should go to one or more higher officials with a personal note urging their prompt assistance. You also would be wise to reinforce letters with telephone calls to increase the impact and to get a faster customer reaction than by waiting for a return letter.

State your case strongly in your letters. Bear in mind that you usually are competing with many other trades for what may be a limited amount of money. Too many collection letters are overly polite, or worded in a perfunctory way. To the extent possible, emphasize in specific terms just how late payment is hurting your company and its ability to perform the job. Also point out that the customer can hardly count on your continued cooperation in view of its lack of good faith in making payments promptly.

**Unexplained Payment Reductions**

A customer’s unexplained reductions in your expected payment represent a significant threat to your firm’s cash flow. Unfortunately, in the construction industry, it is not unusual to receive a check that is for less, sometimes significantly less, than the amount invoiced, with no explanation or substantiation of the difference.

Your first action should be to find out immediately how the customer justifies the short payment. Do not wait until the next check to see if the contractor includes the missing amount.

If the customer contends that the owner or architect reduced the approved amount of billing allowed for your work, insist on getting the details. Contact the architect to find out the percentage and amount approved for your work. Standard ConsensusDocs and AIA documents and construction industry practice permit subcontractors to contact architects directly to obtain this information.

If you discover that more money was approved by the owner than was passed along to you, confront the contractor. If necessary, lodge a complaint with the architect and the owner; generally, owners do not like to pay out their money only to have it misused.

On the other hand, if the architect or owner did reduce your requisition amount, take action as soon as possible to remedy what they consider to be deficiencies, or to demonstrate that the payment reductions are inappropriate.

**Unpaid Change Orders**

Frequently, subcontractors find that one of the biggest challenges to managing cash flow is collecting for extra work. Most contracts state that extra work is to be performed only pursuant to signed change orders. However, in the real world, subcontractors constantly are pressured to perform work beyond the scope of the contract, work overtime or accept changed conditions without the benefit of a prior written change order. By giving in to that pressure, you lose valuable leverage available to those who
insist on adhering to the contract. Remember that most contracts do not oblige you to perform extra work (1) in the absence of clear directives by authorized customer representatives and (2) unless you are paid promptly for that work.

List all of your extras on your monthly payment requisitions. If you have to use a customer billing form that provides no space for extras prior to issuance of a change order, attach a listing of extras and their amounts for inclusion in the total that you have tied up in the job. Particularly if the contractor tends to make short payments, listing all pending extras should reduce the chance of major cuts in payment amounts.

By delaying issuance of written orders, contractors often feel free to deny progress payments to subcontractors for the extra work. The contractor may also pressure you to accept reduced prices or other concessions in exchange for promises of early payment. In too many cases, these extra charges drag on throughout a project, at which time back charges are asserted after the fact to cover most or all of the extra amounts. The only effective way to deal with this practice is to insist on (1) a signed change order in advance of performing extra work; and (2) prompt payment for all change orders to date as a precondition for honoring all subsequent orders for extra work.

If the contractor responds with a directive to proceed subject to later determination of the amount, you may wish to perform the work under protest and subject to at least monthly payment for your cost, plus 10 percent pending final agreement on the amount. If you doubt the authority of the customer representative authorizing your extra work, be sure to confirm the work and customer payment in charge of the overall project.

**Back Charges**
Subcontractors sometimes face unexpected erosion of their cash flow when a customer unexpectedly reduces payments for charges purportedly incurred by the subcontractor in an earlier payment period. General contractors may sometimes seek to justify reductions in payments based on back charges for services that were not agreed to or authorized by a subcontractor. Back charges, like change orders, should represent work for which a specific agreement was made prior to the back charge work being performed, including the amount or rate to be charged. Otherwise, it is not appropriate to deduct the back charge from a payment. Instead, the charge should be billed to the subcontractor on the same basis that the subcontractor pays for other services. Payment reductions for unauthorized work should be considered the same as any other form of nonpayment in exercising your subcontract and other legal rights, as long as you are cautious enough not to accept contrary terms in your subcontract.

**Using Manpower Levels for Leverage**
As part of a successful cash management program, a subcontractor must evaluate the kind and amount of leverage it has with each customer and on each project. While it generally is not good practice to pull completely off of a job when a single payment is late, there are still some practical ways of using manpower levels for leverage.
One way is to announce and carry out a progressive reduction in the number of jobsite employees if payment continues to be delayed.

Another method is to have your foreman tell his counterpart in the customer’s organization that your office is seriously considering transferring all field workers to another job. The foreman can say that neither he nor the customer would like to see that happen and urge the customer’s representative to do whatever is necessary to get payment issued. In that way, your foreman can get the point across without seeming uncooperative for announcing an ultimatum. This “white hat” approach can be very effective, particularly if your trade’s confirmed progress at the jobsite is important to the customer.

Bear in mind that prior written notice is generally required if you intend to stop performing base contract or warranty work. Include in the notice your intention to assert a claim for any shut-down and start-up costs, such as allowed by ConsensusDocs and the American Institute of Architects model subcontracts. See the ASA Negotiating Tip Sheet on Suspension of Work.

It should be noted that many subcontracts do not permit work stoppage for nonpayment. Indeed, some expressly prohibit it and levy damages for slowed or suspended work. Thus, work slow-downs and stoppages for nonpayment should be considered judiciously and the terms of the subcontract followed carefully. The secret to using leverage successfully is to find out what is of vital concern to the customer at that particular time, and to offer your help in addressing that concern in exchange for immediate payment of money owed, as well as prompt progress payments in the future.

**Claims for Delays and Interference**
The increase in the number of design-build and fast-track jobs has resulted in more project work proceeding prior to completion of all coordinated drawings and schedules. In many instances, a clear definition of the scope of work may also be incomplete. As a result, there are more claims for unanticipated out-of-sequence work, stacking of trades and similar losses of productivity. One related factor involved in most such claims is the value of money represented by payments not received at the time contemplated in the contract.

Many contracts call for prompt notice of delays and other problems in order for claims to be considered. Otherwise, your customer can contend that it was unable to mitigate the impact of an adverse situation for lack of knowledge of the problem and sufficient time to respond. Accordingly, documentation in the form of timely delay notification letters is truly important.

Make every effort to get paid for extra cost items as the job progresses instead of waiting to file a claim at some later date. Obtaining change orders as a job proceeds allows you to receive your money earlier and also permits more effective use of leverage than after you have completed your jobsite work.
There often is a question about whether a subcontractor’s claim is really against the contractor or against the owner of the project. Naturally, subcontractor claims must be asserted against the contractor since the subcontractor has no contractual relationship with the owner. However, it is not unusual for the contractor, in turn, to approach the owner with the claims of various trades based on the actions of the owner and its design professionals and technical consultants. The contractor may ask you to sign a liquidating agreement in order to participate in the combined claim against the owner. Such agreements should be reviewed carefully and modified, if necessary, to reserve your rights to assert a claim against the contractor in case the amount obtained from the owner is not adequate. This reservation of rights is particularly important if the contractor is the apparent cause of a significant amount of your damages.

Formal claims can be prepared either by your own staff or by claims professionals. If large amounts of money or complex circumstances are involved, it usually is best to consult with professionals in order to maximize recovery.

**Mechanic’s Liens**

Lien laws vary from state to state, both in terms of the rights of the other parties and the procedures to be followed. Similarly, protections for sub-subcontractors and suppliers vary from state to state. Nonetheless, most lien laws have certain things in common. The basic principle behind these laws is that construction subcontractors have security interest in the real property being improved because it is generally not practical to reclaim one’s material or the product of one’s labor by repossession as one would do if, for instance, an automobile or home mortgage were not paid for as agreed.

At the same time, all lien laws impose specific notice and timing provisions that must be complied with in order to establish a lien that is legally valid. Thus, liens are not real substitutes for money in hand.

Liens afford maximum pressure when funds are flowing into a project from lenders who are insistent on no encumbrances to the property title prior to their releasing monies. Conversely, liens offer less help in those situations where an owner is providing its own financing and simply arranges to bond off any liens placed on its property. Subcontractors and suppliers should familiarize themselves with the provisions of the lien laws in the states in which they operate. Pay particular attention to the time limits for asserting liens in each of those states. Lien filings involve a precise legal description of the property being liened. You should make sure that you obtain this information as early in the job as possible. There are penalties for overstating the amount of a lien. Thus, it is advisable to be sure that all the legal requirements are met, and the amount is proper. For more information, see the Foundation of ASA’s *Lien and Bond Claims in the 50 States*.

**Payment Bonds**

General contractors and construction managers-at-risk are required to provide payment bonds on most public construction jobs and many private projects. These surety bonds are intended to assure that subcontractors will be paid if a contractor defaults in its
payment obligations. Thus, while surety bonds offer a measure of added assurance of eventual payment, payment bond rights are no substitute for obtaining progress payments as soon as due throughout a project.

In addition, the terms of these bonds vary greatly, and the security provided is only as good as the surety underwriting the bond. Thus, it is prudent that a subcontractor obtain a copy of the bond as soon as possible so that it can determine the name of the bonding company, the protection afforded, and the notice and claims provisions that must be observed. It is often hard to obtain such information once a crisis has developed and the contract is in default. Lower-tier subcontractors and suppliers also will need to determine if any bond benefits are available to them.

Notice requirements are particularly important to qualify for those benefits. As in the case of liens, a subcontractor’s documentation system should assure that it provides notices to all required parties within the time limitations set forth in the bond. Those time restrictions usually relate to the date the subcontractor’s last jobsite work was performed or material furnished for incorporation in the work. Bond rights generally are forfeited if required notices are not provided on a timely basis and in the manner prescribed.

Collecting from surety companies may be a long, drawn-out process. Surety firms hesitate to make payments if a contractor is solvent for fear or being accused of acting prematurely and thereby damaging the reputation of the contractor. Even after a contractor becomes insolvent, sureties may take a long time to evaluate claims, and they frequently insist on proof of all items. In addition, they may assert counterclaims and rely on any and all technical defenses available to them. For more information, see ASA’s Subcontractor’s Negotiating Tip Sheet on Copy of Contractor’s Surety Bond and the Foundation of ASA’s Lien and Bond Claims in the 50 States.

**Payment Arrangements**
A subcontractor may occasionally need to agree to a payment arrangement that prescribes the specific amounts of an existing debt payable on specific future dates. In arranging for payments, a subcontractor should emphasize that it is crucial that payments be made on or before the due date. The best way to reinforce this point is to specify in the payment arrangement agreement that the entire balance becomes due immediately if any periodic payment is not made when due. Be sure that the agreement preserves your rights to stop work, file liens, and reclaim materials and other similar rights in the event of default.

Notes generally offer only limited usefulness, particularly those calling for payment at some date far in the future. While a note can serve as an acknowledgement of a debt and the amount owed, it also acts as a satisfaction of the debts until the due date is reached. A subcontractor can thus become frustrated if a customer’s financial condition deteriorates prior to the date of payment for the note.
Similarly, personal guarantees often are not worth the effort unless backed up by collateral of demonstrated value that would be readily available in case of default. All too often, the only collateral a customer is willing to provide has little or no value, is not readily convertible to cash, and/or may have been pledged as security to other subcontractors as well. If a customer does not have demonstrated personal wealth, ask that a bank loan be arranged by the contractor and payment made to you. Do not put yourself into the banking business any more than you already may be.