



This month's Ask an Attorney column was written by Timothy J. Woolford, Esq., of Woolford Law, P.C., Lancaster.

Q: How can I gain more leverage to negotiate a better contract?

A: In the current construction market, owners and general contractors are more sophisticated than ever. Gone are the days when standard AIA contracts are adequate. Many owners and general contractors now have their own contract forms which heavily favor them. Many clients often ask: "What can I do to get a fair contract?" The best way to increase your bargaining power is to condition your bid at the earliest stage of the process.

General contractors and subcontractors alike should condition their bids upon acceptance of all of the terms and conditions in the bid. The bid should contain more than price and scope, and should contain very specific binding conditions addressing important issues affecting your right to payment. For example, you might condition the bid on the inclusion of a provision requiring a change order for materials price increases. Or, a subcontractor might condition its bid upon being paid regardless of whether the owner has paid the general contractor. If your bid contains conditions and you are asked to begin work before the contract is sent to you, the terms and conditions in your bid are deemed accepted. If your customer later sends you a one-sided contract, you now have greatly enhanced bargaining power to either reject the one-sided contract or to insist on changes that will make it fair. If the customer demands that you sign the unfair contract, you have the right to walk away without liability. When the customer realizes you can walk away without liability, it will be much more willing to accept some or all of your conditions.

If you do not feel comfortable submitting bids with numerous conditions, you should consider including at least the following condition in your subcontractor bids: *"This bid is subject to a mutually agreeable contract and if none can be reached, the parties agree to use the Standard Form AIA A401-1997 Subcontract Agreement."* General contractors can use the same language, but should refer to the AIA A101/A201

Contract. If your bid is conditioned in this manner and you are asked to start work before the contract is sent, the contract would consist of the AIA contract and the terms contained in your proposal. If a one-sided contract is sent later, you have the right to reject it and to take the position that the AIA contract governs.

Due to customer relations, you might not want to take this hard stance, but you now have much greater leverage to negotiate a fair contract. Faced with the prospect that you could legally walk away, your customer may be willing to include your provisions. Getting just one key provision into the contract may make all the difference. For example, the inclusion of a price escalation provision can make or break some projects.

If you start work under a bid that was not conditioned on your company's standard terms and conditions, your bargaining position will be much weaker. If you are already on site when the one-sided contract arrives, you will have little choice, but to sign it. The other side will have all the bargaining power and will likely reject any modifications. Also, you probably cannot walk away without liability. Regardless of which agreement you eventually reach, make sure that the final agreement contains all of the terms you negotiated.

The preceding article was written to inform and not to advise. Individual facts in a given case may alter the advice that would be given by an experienced construction attorney. Accordingly, before taking any legal action related to the issues covered herein, we urge you to consult with competent legal counsel.