

Best Practices Subcontracting

Part 1 - From Bidding to Subcontracts

A Presentation by Construction Analytix, LLC



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Providing over 40-years of diverse construction industry experience and expertise.

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Best Practices Subcontracting

Part 1: From Bidding to Subcontracts

WELCOME!

- ✓ “Best Practices Subcontracting” is intended to provide Subcontractors suggestions and guidance to help them avoid the damaging risks, costly impacts and missteps that can arise at any time on any project, and further, to protect their interests, finances and businesses in the process.
- ✓ The business-as-usual and expected “wash, rinse, repeat” subcontracting approach dominates the industry, and it has proven over and over again to be high-risk, insufficient and potentially costly. Change is needed! Smarter Subcontracting begins with Smarter Bidding, and builds from there.



Best Practices Subcontracting -- *Part 1: Bidding to Subcontracts*

WELCOME!

- ✓ Although Subcontractors perform about 85% of all construction work, they are also the least financially stable and least able to control their circumstances and project outcomes. Subcontracts ensure that remains the case, as GC's transfer as much risk to Subcontractors as they can. That is also why subcontractors are the most likely to suffer financial loss on projects, and why about 2 out of 3 go out of business within the first 5 years.
- ✓ It is evident that Subcontractors need to change the way they conceive and approach the contracting process if they want to limit their risk exposure and leverage better results. Let's get started!



Best Practices Subcontracting -- *Part 1: Bidding to Subcontracts*

What this presentation will cover:

- Similar to a General Contractor's prequalification of subcontractors, Subcontractors should pre-qualify Projects & GC's before bidding.
- Bid Proposal meets Subcontract! The Subcontract is a legal "counteroffer" to a Bid Proposal, but it is also a "bait & switch" gambit. Failing to negotiate at least some critical changes in the Subcontract is a plan-to-fail mistake.
- Following the industry-standard "wash, rinse, repeat" cycle to bidding is self-defeating and costly. Smarter bidding requires a better understanding of the game, better risk management, and a smarter approach to leverage better, longer-lasting results.



Best Practices Subcontracting

“Smart Bidding”

Smart bidding saves overhead costs, effort and ultimately, contracting businesses.

- ✓ It understands what work it does best and continuously improves it; it has historical cost data and a solid basis to know what it costs to do its work; it targets and pursues well-matched opportunities and avoids the rest; it pre-qualifies the GC & Project, “reads-between-the-lines” and understands how the “game” is played.
- ✓ Smart bidding requires more than the traditional bidding approach: the site visit, review of plans and specs, quantity take-offs, pricing and submission of bid proposals. Wash, rinse, repeat!
- ✓ Consider the following . . .



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“Smart Bidding”

- ✓ Before submitting your bid, pre-qualify the GC & Project. Request the GC provide:
 - Copy of the Subcontract Agreement form it will use for buy-out. Ask if the GC already has the Project, and if so, also request hard-copy of the Prime Contract.
 - Copy of the full Solicitation and the specific Scope of Work the GC wants you to bid. Ask the GC if it has a “Scope Sheet” for your work package.
 - If it is a private-sector job, request the name and contact information of the Owner (if not already given in the Solicitation docs).
 - Ask if the GC has confirmed Owner funding is allocated for the Project.
 - Ask if the GC is providing a Payment Bond for the Project.
 - Ask what the planned duration is, how many phases (and mobilizations) your work will entail, and request copy of the preliminary Project Schedule.



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“Smart Bidding”

- ✓ Why get advance copy of the Subcontract Agreement?
 - Because Subcontracts always include higher “risk-cost” terms and conditions than are covered in bid proposals. A Subcontract Agreement is a legal “counter-offer” to a bid proposal, and will replace that proposal.
 - Because Subcontract terms and conditions will remove or undermine the basis of bid you proposed. Subcontracts will separate your bid price from the proposed basis of that bid price, and replace with a new basis.
 - So you and your attorney can review the Subcontract in advance to understand the additional risks you will be accepting, so you can decide to tailor your bid and proposal in response, or not. You need the Subcontract so you can make a proper cost/benefit “business” decision.



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“Smart Bidding”

- ✓ Why get copy of the Prime Contract Agreement?
 - Because you should know if the GC already has the Project, and if it does, ask why is it contacting you. Does it already have sub bids for your trade work? Is it simply bid-shopping for an even lower price?
 - Because the Subcontract Agreement will require, in whole or in part, that you are responsible and obligated to the same terms and conditions the GC is obligated to under the Prime Contract.
 - Because you need to understand what those “flow-thru” terms, conditions and obligations are, how they may affect your bid, budget and performance on the Project, since no doubt, the GC will hold your feet-to-the-fire to the fullest extent.



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“Smart Bidding”

- ✓ Why request the full Solicitation and the GC’s Scope Sheet specific to your work?
 - Doing so shows the GC that you are a responsible, professional contractor, and want to support the GC by ensuring you bid exactly what the GC wants.
 - Because you want to bid only what is required, nothing more, nothing less, so the GC can make apples to apples comparisons for buy-out.
 - Because you need to assess the full Solicitation, not just your own work package, since you will be affected by it one way or another, and further, you want to validate that the GC’s Scope Sheet has captured the true Scope of your work, and if not, advise the GC accordingly.



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“Smart Bidding”

- ✓ Why ask the other questions listed?
 - On private projects you need to have the Owner’s name and contact info (e.g., to file a mechanics lien). You have every right to know who is funding the build.
 - You need to know if funding has been allocated, in part, to confirm the Project is a “GO”, and in part, as an indirect way to confirm the GC has done its due diligence in assessing the Owner’s financing.
 - On public projects over the “simplified acquisition threshold” (\$150K) payment bonds are required. On private projects, they may not be. You need to confirm whether a payment bond is in place. If not, you should consider moving on to another bid opportunity.
 - You must know the planned total duration for the Project and equally, the total duration of your own work package. How can you price and bid otherwise?



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“Smart Bidding”

- ✓ Other Smart Bidding Considerations:
 - Understand the GC “Buy-out Game” and how the game is played.
 - GC’s have favored subcontractors for various trades, and they may give them last-look (and the chance to meet or beat your low bid price). That is the game!
 - GC’s have dozens of trade work packages to cover and many more subcontractor bid proposals to assess. It is a major PITA for GC’s to ensure their buy-out leaves no work uncovered and no duplicate work coverage, while leveraging the lowest subcontractor pricing it can get.
 - Subcontractor bids are treated no different than commodities traded on the commodity exchange. Low price matters most to GC’s, but low price isn’t everything. Your superior past performance matters! Having a successful Project matters most to Owners and GC’s, and you need to convince the GC that you provide the best chance of that, and are “low-maintenance” in the process!



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“Smart Bidding”

- ✓ Some Smarter Bidding Considerations (*continued*):
 - Only Bid on work in your “wheelhouse”, that you have proven to do best. Avoid the rest. Bid to make a profit—Gamble in a Casino!
 - Know your Bid-Hit ratio, i.e., how many jobs you bid to win one (e.g., 6 to 1, 10 to 1?). To improve your bid-hit ratio and save time and money:
 1. Do not waste time and overhead money bidding on jobs you will not get (you know them when you see them).
 2. Build GC relationships that matter! Always meet the “decider”, the person who will decide who gets a Subcontract, and keep in touch.
 3. Only bid on opportunities you really want, to the Contractor’s who have them, and what you are experienced doing. Go after them with vigor. Sell your “best value” proposition, price and past performance!



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“Smart Bidding”

✓ Some Smarter Bidding Considerations (*continued*):

- Bid the Plans & Specs only, and also assess that which is patently obvious from the site visit! If something is not obvious or reasonably inferred to be included, do not include in your bid--but also, do not “exclude” or “qualify”.
- Show only your bid “inclusions”. Do not list your bid “qualifications” and “exclusions”. Why? Because you (1) want the GC to call you to discuss your bid (and it will if it is competitive); (2) you do not want the GC to send (“shop”) your comprehensive, deep-dive bid proposal to your competitors; (3) “Exclusions” are red flags to GC’s in an already overwhelming buy-out process.
- Instead of providing bid “exclusions”, consider including “alternates” (with associated unit pricing as needed) to cover whatever holes, variations or ambiguities you find in the Plans & Specs, and provide clarifications of your “inclusions” as need be.



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“Smart Bidding”

- ✓ Smarter Bidding Considerations (*continued*):
 - List the specific Plan Sheets & Specification sections you used as the basis of your bid [remember to include and cover (and price) your part of the “General Conditions” specification]. Include a statement that the Plan Sheets & Spec list constitutes the full basis of your bid.
 - Your Bid Proposal price will likely not be your “Final” price. When a GC wins the Contract, Round 2 begins. Your goal is to survive Round 1.
 - The Sub “Buy-out” game for GC’s is time-consuming and laborious. Any subcontractor who can make the GC’s job easier has a leg up on the competition. Communicate, educate, convince and follow-up!
 - The GC will review all sub proposals looking for overlaps and holes in scope coverage. It will contact the lowest bidders for each trade first.



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“Smart Bidding”

- ✓ Smarter Bidding Considerations (*continued*):
 - GC’s do all they can to leverage a lower price from their Subcontractors. This is however, dangerous to Subcontractors who play the GC’s “name-that-tune” pricing game, disconnected from any scope / cost / terms and conditions trade-off.
 - Lowering your bid price merely to get the job, without a trade-off, without anything of value in return, only increases your risk of failure and regret.
 - If the GC asks you to reduce your price to get the job, negotiate a trade-off. You need to request something of relative equal value in return. That may be a modification of the Subcontract they previously refused to make, such as removing or limiting a “No Damages for Delay” clause, narrowing the scope of the indemnification clause, and/or other “equitable” considerations.

NEXT, Subcontracts!



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“Subcontract Agreements”

- ✓ You survived the “buy-out” rounds and the GC presents you with its Subcontract for signature. Hopefully, this will not be the first time you see it, since you got copy for review before you bid. Right?
- ✓ But, before signing the Subcontract, request the GC provide copy of:
 - The Prime Contract (*the GC can redact proprietary info as it sees fit*).
 - The Payment Bond.
 - The Release-Waiver form to be used for progress payments. (*if attached to the Subcontract you must negotiate the release language and/or at least negotiate to insert an “exceptions” block. Otherwise, you will be stuck with giving up critical rights and right to Claim for the Project*). Always insist that Release-Waiver forms have a section allowing for “Exceptions”.



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“Subcontract Agreements”

- ✓ Why get copy of the Prime Contract & Payment Bond before you sign?
 - Because Subcontracts typically flow-thru many or all of the Prime Contractor’s responsibilities and obligations from the Prime Contract. You need to know the full scope of risks you are accepting (*or you can close your eyes, cross your fingers, hope and pray nothing bad happens*).
 - You need a copy of the Payment Bond with the Subcontract because it is your ultimate protection against non-payment, reduced payment and unfunded change impacts and Claim.
 - Waiting until disputes have arisen and you decide to Claim to request copy of the Payment Bond will only delay timely Claim submission.
 - You also have the right and need to know that there is a Payment Bond, who the underwriting Surety is and its mailing address.



Best Practices Subcontracting

“Subcontract Agreements”

- ✓ Why get copy of Release-Waiver forms and negotiate terms?
 - Release-Waivers are the second most dangerous Project document to Subcontractors after the Subcontract itself. These forms are hazardous materials and need to be treated as such.
 - Since you must sign release-waivers for payments, you should know the terms in advance and whether the form allows for “exceptions”. If not, you must negotiate inclusion of an “exceptions” block, or otherwise, insert your “exceptions” and reservation of rights to cover any outstanding disputes, unresolved changes, differing conditions, unforeseen conditions, cumulative impacts and Claim rights.
 - You do not want to wait until payment is due to discover (1) that you cannot reserve your rights and right to Claim, (2) that the GC won’t consider any alteration of its release terms, and (3) won’t release your payment until you sign the release as presented. Sound familiar?



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“Subcontract Agreements”

- ✓ Why get copy of Release-Waiver forms (*continued*)?
 - You need to know what flexibility you will have to take exceptions to the terms and conditions of the Release-Waivers form provided. Remember--Release-Waivers attempt to negate contract and legal rights.
 - You must reserve your rights and right to Claim for the entire Project duration until you have completed your work, have no issues of Claim, and are ready for Final Payment.



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“Subcontract Agreements”

Subcontracts are counter-offers to Bid Proposals. Subcontracts separate the bid price from the proposed basis of that bid price, and will always include far more risk-cost exposure than the actual bid covers.

- ✓ Once a Subcontract Agreement is executed, your bid proposal no longer applies. Subcontracts always disconnect the bid price from the proposed basis of that bid price to varying degrees.
- ✓ The basis of your bid as captured and submitted in your Bid Proposal will be replaced by the new basis of bid of the Subcontract Agreement.
- ✓ That new basis includes a new set of risks, responsibilities and obligations that you did not cover in your bid price. Guaranteed!



Best Practices Subcontracting

“Subcontract Agreements”

- ✓ Subcontracts are heavily skewed against subcontractors; replete with risk-transfer clauses, perfected from decades of lessons-learned by GC’s and attorneys, and over which subcontractors have little if any control.
- ✓ GC’s use a divide and conquer approach to Subcontractor buy-outs. This is not going to change until subcontractors learn to better play the game.
- ✓ The easiest way for Subcontractors to go out of business is to continue to sign Subcontracts without understanding the risks and consequences, and without competent legal counsel. Negotiation is a must, not an option!
- ✓ A Subcontract is a “counter-offer” to the bid proposal and adds far more risk exposure. Counter the counter-offer! Negotiate! Any GC refusing to negotiate at least some changes to its Subcontract will be one you later wish you avoided when you had the chance.



Best Practices Subcontracting

“Subcontract Agreements”

- ✓ Not all Subcontract Clauses are equal in value and risk. Know the major danger clauses and learn how to negotiate modifications.
- ✓ Pay an experienced construction attorney to triage your Subcontracts before you sign on the dotted line. Better to pay a little early on than far more later after you’ve already suffered financial loss and are compelled to Claim.
- ✓ Whether you agree and sign a Subcontract or walk away is ultimately a business decision—not a legal one. However, failing to understand the implications of the Subcontract you sign may become a legal one.
- ✓ Most GC’s will only allow few and minor negotiated modifications of their Subcontracts. Focus on the most dangerous clauses related to Payment, Release, Indemnification, Scheduling, No Damages for Delay, etc.



Best Practices Subcontracting

“Written Notifications”

- ✓ Subcontracts include notification provisions requiring timely, written notice to the GC for changes, delay, differing conditions, other issues and impacts arising. Comply with the notice provisions, or lose your rights.
- ✓ Know the notification requirements of the Subcontract: The time restrictions (e.g., submit within 48 hours of event or issue) and the means of notice delivery required (via Regular Mail, Certified Mail, Email).
- ✓ Describe the issue, event, action, or non-action underlying the cause for your Notification. Include an estimate of cost and/or time damages if known, or state that you are tracking allocable cost / time impacts.
- ✓ Include a “reservation of rights” to seek equitable adjustment and Claim as the situation merits and as additional information becomes available.



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“Project Schedules”

- ✓ Bidding Projects without first reviewing the baseline Schedule for your own work is reckless and risky. In fact, how can you price your work without it?
- ✓ Insert “clarification” in your bid proposal that (1) you condition acceptance of a Subcontract upon your review and acceptance of the “baseline” Schedule, (2) that the scheduling and sequencing of your work over the course of the Project must be within the reasonable parameters of the accepted baseline schedule, unless as may be extended or modified by formal Change Order.
- ✓ The “As-Planned” baseline schedule is a critical element of your basis of bid. Compare every schedule update from the GC for impactful variances to the baseline not due to formal changes and formal time extensions.



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“Project Schedules”

- ✓ The Subcontract will likely require you comply with whatever schedule updates and changes the GC makes. But that does not give the GC a “carte blanche” to make whatever changes it wants. “Reasonableness” matters, and unreasonable, egregious scheduling changes may support a claim for cost-time recovery.
- ✓ Whenever a GC alters the schedule not due progress updates or formal time extension Change Mods, you need to review for impacts to you, and if impacted, make written notice that you reserve your rights to claim for any impact costs and duration as may result, regardless of what the Subcontract may state otherwise.
- ✓ “Time is of the essence” is a requirement of your Subcontract, but it is not merely a flow-thru provision. It applies to the entire Project, to the GC and Owner as well. They cannot, through actions or inaction, interfere with your rights and efforts to timely performance.



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“Project Schedules”

- ✓ Get copy of the Schedule in its original software version from the GC (e.g., Primavera, MS Project) whether you have the software or not.
- ✓ You have a right to review and understand the network logic applied, since you will be bound to it: “Time is of the essence”!
- ✓ Pdf versions of schedules are snapshot representations only and otherwise, virtually useless. A software-version schedule allows for proper review and manipulation of the network logic, and will be necessary for any disruption / delay analysis for Claim as may later arise.
- ✓ Almost all Construction Schedules have flawed logic, and tend to be optimistic time-fiction. Schedules are rarely done well. Subcontractors would be wise to know how to interpret them.
- ✓ Disruption and delay analysis can be complex. Get expert assistance.



Best Practices Subcontracting

Part 1 – Conclusion

- ✓ Smarter Subcontracting begins with Smart Bidding. By following some simple, common-sense procedures, Subcontractors can:
 - Increase their bid ratio, win rate, and save time and OH cost in the process.
 - Increase their competitiveness and lower their risk of failure by focusing on the work they do best, and then communicating and selling that best-value performance to targeted GC's with conviction.
 - Reduce the significant amount of risk they will have under a Subcontract by negotiating the changes they can, and requesting the aforementioned documents from the GC before they bid, and before they sign a Subcontract.
 - Increase their knowledge and understanding of bidding, buy-outs & Subcontracts; know the pitfalls and work-arounds and play the game better than their competitors, and better than any GC would expect.

