



Advertisement



## State Legislative Action: Looking Ahead to 2018

With 46 state legislatures scheduled to meet in 2018, subcontractors can expect action on many issues that will impact their businesses. Thirty-six gubernatorial seats and 87 of the 99 state legislative chambers are up for election, so legislators are likely to be distracted by campaign activities. In addition, with many states facing fiscal challenges, subcontractor issues like prompt payment and surety bonds that some legislators view as a drain on their budgets may be tabled. Further, other construction issues, such as infrastructure funding and project delivery methods, may receive short shrift. Nonetheless, ASA chapters are reporting that they are not deterred by the difficult legislative environment. For example, ASA of Arizona is pursuing indemnity reform legislation; ASA of California is pursuing legislation that would require construction owners and prime contractors to disclose the terms of controlled insurance programs (i.e., wrap-up insurance); and ASA of Colorado is seeking legislation to assure subcontractor payment protections on public-private partnerships. Check with your local ASA chapter for information on its legislative priorities for 2018.

## Nelson Provides Tips on How to Gain Political Clout

As the 2018 state legislatures ready to convene, ASA Chief Advocacy Officer E. Colette Nelson reminds chapters and members about tools available to help with their advocacy programs. For example, the ASA manual [Establishing and Maintaining a Government Advocacy Program in Your ASA Chapter](#) addresses a myriad of topics, including working with advocacy volunteers, preparing the sales tools for a government advocacy issue, developing a grassroots program, identifying and joining coalitions, building relationships with policymakers and taking political action. The manual also outlines 10 tips to gain political clout, including:

1. **Never tell legislators you're smarter than they are.** This is perhaps the prime sin of businessmen and women who get involved in the legislative process. No legislator can be an expert on every issue. If the legislator has a day job as an estate attorney, an accountant, a pharmacist or a dry cleaner, don't expect him or her to know about retainage or risk allocation in the construction industry.
2. **Develop a program in advance.** A legislative initiative is a major project for which planning can and must be done.
3. **Don't get divided.** In the political environment, unity is strength.
4. **Lobby at home.** You don't have to go to the state capital every time you want to speak with a legislator.
5. **Get other people involved.** Explain the issue to your family, your friends and colleagues. Identify, join or establish a coalition.
6. **Trust your lobbyist.** You have to be in charge. But in the push and pull of the legislative process, your lobbyist has to have flexibility to negotiate on bills. If your lobbyist's hands are tied, you've essentially said, "Here's our moral premise: no negotiation, no compromise."
7. **Don't lobby on your own.** This means checking in with your lobbyist before you speak to your legislator, unless you're personally involved in the legislative process on a daily basis. Otherwise, there may have been amendments, refinements or agreements about which you're not yet aware.
8. **Wait for the magic moment.** In every legislature there exists a magic moment when everything comes together. Usually, that's the closing days of the legislative session.
9. **Stroke your legislators.** Everyone likes to be recognized and revered. Thank your legislators for their service, even if you don't agree with them on every issue.
10. **Do the work yourself.** You can't leave the work to your lobbyist. Constituents are the greatest immobilized army who can capture the legislative process for your subcontractor issue.

## Maxim's Stephane McShane to Present 'Lean Transformations' in SUBExcel 2018 Workshop

2018 **SUBExcel**  
ASA - We Build Excellence

Stephane McShane, Maxim Consulting Group, will present an education workshop on "Lean Transformations" from 1:15 p.m. to 2:30 p.m. on Thursday, March 1 during SUBExcel 2018 in Tempe, Ariz.

“With the future bringing more of the same accelerated challenges of schedule compression, pricing pressure, and manpower shortages, the industry will be forced to innovate at a heightened clip,” McShane said. “Most contractors are trying to solve these massive industry issues with tactical solutions and everyone is basically trying the same approach they have used for years. The reality is a new business model that is evolving to address these challenges with strategic, long-term solutions.”



McShane notes that best-in-class contractors are utilizing value-stream mapping to visualize work systems (prefabrication, IT, financial systems, etc.) and identify the gaps, overlaps and roadblocks in how customer requests/orders are completed. In this workshop, McShane will use case studies of U.S.-based contractors including pictures and detailed descriptions of what they have done, why, and the substantial bottom line results they are enjoying.

ASA is also pleased to announce that Arizona Secretary of State Michele Reagan will join us during breakfast on Thursday. Secretary Reagan will discuss construction trade workforce development and what her leadership council is working on.

SUBExcel 2018 will take place Feb. 28-March 3, 2018, in Tempe, Ariz. [Register online](#) and [make your hotel reservations](#) in the ASA room block at Tempe Mission Palms. The early-bird registration deadline and hotel room block cut-off date is **Jan. 31, 2018**. Read the full [schedule](#) online via [www.SUBExcel.com](http://www.SUBExcel.com).

### **Agencies Announce Future Rulemakings Affecting Federal Contractors and Subs**

Construction contractors and subcontractors doing business with the federal government will need to be alert to new regulations impacting their contracts, according to the regulatory agendas released by the Federal Acquisition Regulatory Council and other federal purchasing agencies on Dec. 14. Many of the new regulations are required by provisions enacted by Congress in recent versions of the annual National Defense Authorization Act. Other new rules are being driven by the Trump Administration’s regulatory review process.

Among the final FAR amendments scheduled for publication in 2018 are:

- January: Revision of Limitations on Subcontracting (interim)
- January: Rate Adjustment of Liquidated Damages (interim)
- February: Sick and Safe (i.e., paid sick leave)
- February: Audit of Settlement Proposals
- February: System for Award Management Registration
- February: Non-Retaliation for Disclosure of Compensation Information
- February: Combating Trafficking in Persons—Definition of “Recruitment Fees”
- February: Task- and Delivery-Order Protests
- March: Clarification of Requirement to Justifications for 8(a) Sole Source Contracts
- March: Set-Asides under Multiple Award Contracts
- April: Sustainable Acquisition
- April: Effective Communication between Government and Industry
- June: Reporting of Nonconforming Items to the Government-Industry Data Exchange Program

The FAR Council also announced its intent to publish proposed rules that if/when finalized will impact construction subcontractors that do business with the federal government. These include:

- February: Reverse Action Guidance
- February: Ombudsman for Indefinite-Delivery Contracts
- February: March: Incremental Funding of Fixed-Price Contracting Actions
- March: Whistleblower Protection for Contractor Employees
- March: Breaches of Personally-Identifiable Information
- March: Requirements for DD Form 254, Contract Security Classification Specification
- April: Alternatives in Lieu of Corporate or Individual Sureties
- April: Performance-Based Payments
- April: Acquisition 360 (e.g., contractor review of contracting agency)
- April: Credit for Lower-Tier Business Subcontracting

- April: Exception From Certified Cost or Pricing Data Requirements-Adequate Price Competition
- April: Evaluation Factors for Multiple-Award Contracts
- April: Duties of Office of Small and Disadvantaged Business Utilization
- June: Policy on Joint Ventures

In addition, the Defense Department announced that it intends to take action on at least 25 regulations that potentially could impact construction contractors and subcontractors, including rules on change orders and payment instructions. The General Services Administration also announced that it intends to publish a series of proposed rules amending its construction practices.

ASA will continue to aggressively represent the interests of subcontractors before the federal acquisition agencies and the Congressional committees with oversight responsibilities.

### **OSHA Issues New and Revised Fact Sheets on Silica**

OSHA has released [more than a dozen fact sheets](#) that provide guidance on the [respirable crystalline silica standard](#) for construction. One fact sheet is an overview of the [silica standard](#). The other fact sheets provide employers with information on how to fully and properly implement controls, work practices, and if needed, respiratory protection for each of the 18 tasks listed in Table 1—Specified Exposure Control Methods under the standard.

The new fact sheets include:

- Crushing machines
- Dowel drilling rigs for concrete
- Drivable saws
- Heavy equipment and utility vehicles used during demolition activities
- Heavy equipment and utility vehicles used for grading and excavating tasks
- Large drivable milling machines (half lane and larger)
- Rig-mounted core saws or drills
- Small drivable milling machines (less than half lane)
- Vehicle-mounted drilling rigs for rock and concrete
- Walk-behind milling machines and floor grinders
- Walk-behind saws

The revised fact sheets include:

- Overview of standard
- Handheld and stand-mounted drills
- Handheld grinders for mortar removal (tuckpointing)
- Handheld grinders for tasks other than mortar removal
- Handheld power saws
- Jackhammers or handheld powered chipping tools
- Stationary masonry saws

### **Controlling Your Legal Costs**

The demand for and cost of legal services for businesses, particularly those in the construction industry, continue to increase. Almost every company has sought to help review and prepare contracts to deal with more complex employee regulations and to comply with federal and state laws governing business. There are a number of steps that a subcontractor can take to cut down on the cost of legal services. First, make sure the attorney you consult is experienced in construction law. The attorney who handled your divorce or your mother's estate may not be familiar with the intricacies of lien or surety bond claims. You do not want to spend money for his or her education in construction. How do you find an attorney who specializes in construction? Easy. Ask other construction subcontractors for referrals to good construction lawyers. You also will want to match your needs to the size of the law firm. In almost all cases, you will be able to use a local construction attorney familiar with the laws and practices in your state. Rarely will you need to pay the fees of a high-priced national construction attorney. Once you select an attorney, make sure that the appropriate person in the firm is doing your work. You do not want to pay for a junior attorney's education in construction either. At the same time, you do not want to pay top legal rates to do work that could be assigned to junior lawyers or paralegals. Make sure your attorney knows you are working with a budget on legal fees. Get a time estimate of how long each job should take, then keep a close tab on your attorneys' time records. You may even want to consider negotiating a fixed

fee for your project. Many law firms will be receptive to such a suggestion if it's necessary to keep your business. Work with your attorney to establish documentation systems that will help you avoid claims and litigation. A little advance time and effort can save you countless dollars in legal costs later. In addition, have your attorney train your own staff to prepare routine correspondence and documentation for the attorney's review. Many attorneys will conduct such training in your office at no charge to you. As your firm grows, you may want to consider adding an attorney to your own staff. This individual could be responsible for filing government forms, doing certifications, filing tax documents, etc. Using an in-house attorney can cut your legal costs considerably. Even then, however, you probably will want your outside attorney to prepare or review certain documents. If you are faced with litigation, make sure you understand its true cost. Calculate the cost of the time of your staff in assisting to prepare for the case. You also may want to take into consideration the wear-and-tear on your own mental well-being and productivity. All litigation should be pursued with settlement in mind and the cost benefit trade-off should be discussed at every stage of litigation. Never forget that your attorney is one of your company's key advisors. In the litigious construction industry, your attorney can be the difference between your company's success and failure.

### **Help ASA Fund Precedent-Setting Briefs with Tax-Deductible Contribution**

As 2017 draws to a close and you consider how you'll direct your year-end charitable giving, consider *how much more you can do* to help construction subcontractors by sending a tax-deductible year-end gift to the Subcontractors Legal Research Fund of the Foundation of ASA. ASA finances its "friend-of-the-court" briefs entirely by [voluntary contributions](#) to its Subcontractors Legal Defense Fund and FASA's SLRF. So, as you consider the size of your year-end gift, please think about the magnitude and the importance of the challenges that subcontractors face every day—issues like slow or no final payment, pay-if-paid clauses, retainage, a requirement to keep working even in the face of nonpayment, broad-form indemnity, misleading insurance coverages, and more. As it looks ahead to the many precedent-setting court cases that impact construction subcontractors, ASA has to calculate how much funding is available to fund "friend of the court" briefs on each critical issue. It will help so very much if you can [send your year-end gift](#) by **Dec. 31**. FASA is a 501(c)(3) education foundation; contributions to FASA are tax deductible as a charitable contribution. You can make your contribution through the [ASA online store](#). For more information, visit the ASA SLDF Web site at [www.sldf.net](http://www.sldf.net).

### **Contract Changes and Claims: Daily Reporting, Part 2**

Daily project reports, if properly prepared, provide a wealth of information about the project and should be reviewed routinely by project management as a project control method. To the extent that problems and conditions identified are within the subcontractor's control, this method of documentation will promote the early warning and internal response necessary for proper project management. To the extent that problems or conditions result from the conduct of others, proper documentation will lay the historical foundation for identifying the problem and assessing the impact on the subcontractor's scope of work. In addition, if the reports are submitted to the prime contractor, this gives written notice of problems that may arise and form the basis of later requests for subcontract adjustment. Conversely, the failure to describe such problems likely will be used to resist any later contentions of extra work or delay. ASA's [Contract Changes and Claims](#) is a series of articles providing tips for the management of changes and changed conditions and how to realize full adjustment to the contract price or contract time.

### **Learn How to Get Better Subcontracts in Feb. 13 ASA Webinar by Eric Travers, Esq.**



Eric Travers, Esq., Kegler, Brown, Hill and Ritter, ASA's general counsel, will explain how to negotiate fairer, and better, subcontracts in the Feb. 13 ASA webinar, "Getting Better Subcontracts." "It is a reality for subcontractors that on most jobs they will be asked to sign, often on short notice and with little time to consider the full implications of all the terms, a contract form prepared by their customer and containing numerous clauses that shift risk in a way that does not reflect what the subcontractor considered when putting its bid price together," Travers said. In the webinar, Travers will focus on the most common subcontracting issues of concern that arise and will provide practical information on the unique considerations and legal risks of subcontracting. This webinar will take place from noon to 1:30 p.m. Eastern time. Registration is \$99 for ASA members and \$179 for nonmembers. [Register online](#).

Advertisement

### **Foundation Software Helps Trade Contractors Improve Accounting and Business Processes**



ASA Silver Sponsor Foundation Software has helped contractors improve their accounting, collaboration, reporting, and business processes since 1985. Author and developer of FOUNDATION® job cost accounting, project management and mobile software, Foundation Software products and services are focused on streamlining a contractor's back office operations. Foundation Software serves contractors of various trades and sizes. See how FOUNDATION® can

help your construction business by visiting [www.foundationsoft.com](http://www.foundationsoft.com) to watch a free online demo, or call Foundation Software at (800) 246-0800.

**Disclaimer of Endorsement and Liability**

The American Subcontractors Association (ASA) does not endorse or recommend any commercial products, processes, or services. Therefore, mention of commercial products, processes, or services should not be construed as an endorsement or recommendation.