



ASA Releases New FAQ on Retainage

Retainage, the holding of funds from a contractor until the completion of a contract, is a serious problem in the construction industry. Because of retainage, many contractors and subcontractors do not receive funds they already have earned for work properly performed. Contractors and subcontractors frequently are asked to act as bankers, financing in addition to building, the construction projects on which they work. ASA's new [Frequently Asked Questions](#) on retainage is designed to provide tips on dealing with retainage to both the most experienced in as well the newcomers to the construction industry. The FAQ reviews the types of retainage clauses a subcontractor is likely to encounter and provides guidelines on how to deal with them. The FAQ is available to ASA members as a downloadable PDF document under "[Contracts and Project Management](#)" in the Member Resources section of the ASA Web site.

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](#).

FMI Consultant to Help Subcontractors Prepare for Next Economic Downturn at SUBExcel 2018

How do you prepare for the next economic downturn? While FMI does not see a recession on the immediate horizon, the next recession is inevitable and the best time to prepare is when times are good, said Joel Stinson, FMI. Stinson will present an education workshop, "Recession Proofing Your Company," from 9:00 a.m. to 10:15 a.m. on Friday, March 2, 2018, during SUBExcel 2018 in Tempe, Ariz. 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**.



2018 SUBExcel
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As an FMI consultant, Stinson uses his construction and business strategy experience to provide a variety of management consulting services to construction and engineering firms of all sizes. Prior to joining FMI, Stinson was a senior analyst who

focused on revenue growth and innovation initiatives in the professional service industry. As the Friday keynote speaker, Stinson will discuss key economic indicators and the state of current markets. He will help participants understand how to assess their readiness and implement steps to prepare for the next economic downturn.

US Airways Flight 1549, or "The Miracle on the Hudson," survivor Dave Sanderson, an inspirational speaker and author, will be the Thursday keynote speaker. Both keynote speakers are provided by the generous support of ASA keynote speaker sponsor Commerce Bank. For more information about SUBExcel 2018, including the [schedule](#), visit [www.SUBExcel.com](#). Please note that the final reception, banquet and awards ceremony will take place on Friday, March 2, instead of on Saturday, as in past years. The Attorneys' Council meeting will be the only activity scheduled on Saturday, so most registrants can schedule their departure flights on Saturday—or stay the weekend to explore Tempe, the Grand Canyon, the Apache Trail, or Monument Valley! Or, if you wish to join the attorneys, the meeting is open.

Understanding Payment Terms Isn't Optional

Construction subcontractors are creditors: They provide labor, equipment and materials on credit, for a promise of future payment. As creditors, subcontractors should give careful consideration to the credit risks that they accept, and whether contract terms can ameliorate those risks by providing for interest on late payments, costs of collection, and appropriate security. Payment terms considered typical in the construction industry pose such extraordinary credit risks for subcontractors that it can be difficult for credit managers and other objective observers to understand how they have become so entrenched. Construction subcontracts quite often provide that the seller's payments are not due and owing to

the buyer until such time as the buyer actually receives payment from *its* customer (an upper-tier contractor or the project owner), i.e., that the seller will “pay when paid.” Pay-when-paid terms present extraordinary credit risks because the seller accepts the risk that a party over which it has no control, and with which it has no direct communication, will fail to make payments in a timely fashion. For example, the seller will ordinarily have imperfect information about the precise time when its buyer receives payment from its customer, and so the seller is left in the position of taking the buyer’s word to determine when the buyer’s payments are actually due or past due, an odd position for a creditor. Moreover, the buyer’s incentive to push for timely payments from its own customer is necessarily lessened when the buyer is entitled to extend the time when its own payments to the seller are due. Where the seller is a construction subcontractor, which must pay labor costs according to a strict payroll schedule, and which must pay suppliers as well, the seller’s costs for late payments will far exceed the cost exposure of payment intermediaries. A payment delay of even a single day has significant costs to a subcontractor that has to tap lines of credit, and pay interest on the borrowed funds, in order to keep current on its own accounts payable. Properly handling credit risks requires assessing numerous risk factors. To collect interest on a late payment, for example, the contract should provide not only for a reasonable rate of interest, but also for a way to determine when payment is “late.” Pay-when-paid terms, which require the buyer to make payment in a “reasonable” time, will almost never be considered late except in extreme circumstances, as when a monthly payment is several months overdue. As a practical matter, however, a monthly payment will have to be at least several months past due to be worth the cost of attempting to collect the accrued interest, and so that risk may be acceptable. Although pay-when-paid terms pose extraordinary credit risks, in “an overwhelming majority” of jurisdictions, payment pursuant to a pay-when-paid clause must still be made within a “reasonable” time, even where the buyer never receives payment from its own customer, unless the language clearly and unambiguously shifts the risk of owner nonpayment to the subcontractor. In other words, even if the ultimate customer (i.e., the project owner) never makes a payment, the construction subcontractors that perform the work and supply the materials will still be entitled to be paid by the contractors that are their direct customers, unless the payment terms clearly and unambiguously shift the risk of owner nonpayment to the subcontractor. Payment terms that do “clearly and unambiguously shift the risk of owner nonpayment” are often called “pay-if-paid” terms to distinguish them from other pay-when-paid terms. Pay-if-paid terms pose the risk that payment for services properly rendered will never, ever be due, and thus, never late. The effect can be similar concerning security for payment. Can a mechanic’s lien or a claim against a payment bond be used to secure a payment that is not, and may never, actually be due? Many jurisdictions recognize that a project owner should not be permitted to assert its own failure to pay for services it has received as a defense to the assertion of liens against the improved property, and others have recognized that payment bond sureties should not be permitted to assert the owner’s nonpayment as a defense. In many other jurisdictions, however, these questions are unsettled, or have been resolved against the interests of subcontractors. Subcontractors that inform themselves about local laws in order to fully understand the credit risks posed by the payment terms of any particular, proposed subcontract, will make much smarter decisions about which subcontracts to sign, and which not to sign.

Contract Changes and Claims: Keep the Written Record Accurate

A subcontractor should always respond promptly in writing to rebut any materially incorrect statements or unfavorable allegations found in correspondence by others. Otherwise, later there may be a factual inference or even a legal presumption that the allegations are correct. Furthermore, such allegations in written communications will be more difficult to effectively rebut months or years later. In addition, subcontractors should promptly respond with written corrections, additions or modifications to formal meeting minutes issued by others if they are deemed materially inaccurate or incomplete. Failure to do so may be deemed concurrence or acquiescence to the original content of the minutes, even if it proves detrimental to the subcontractor’s position later. Also, this type of clarifying or correcting response often provides an effective method of accomplishing notification in writing to many problems that may impact performance. 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.

Attorney Lee Brumitt to Examine ‘Indemnity and Hold Harmless’ in Jan. 9 ASA Webinar



The most important contract issue facing subcontractors is the extent to which risks inherent in the construction process—property damage, personal injury, liquidated damages, design or construction defects, etc.—are transferred from the upper tiers to subcontractors, said Lee B. Brumitt, Dysart Taylor Cotter McMonigle & Montemore, P.C., Kansas City, Mo. “Risk transfer” to lower tiers is accomplished in many ways. Contract provisions by which a subcontractor agrees to indemnify and hold a general contractor, owner, architect, or other third party harmless are the primary methods by which risks are transferred. In the Jan. 9, 2018, ASA webinar, “Indemnity and Hold Harmless,” Brumitt will discuss indemnification and hold harmless provisions, how subcontractors can limit exposure to such provisions, how state laws may impact such provisions, and the key issues involved in assuring that subcontractors have adequate insurance coverage to absorb risks they might agree to assume. 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.](#)

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ASA's newest LinkedIn discussion forums, ASA Connect, are a great way to connect with your peers across the country. To join these forums, first log-in to your LinkedIn account:



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10 Must-Haves on Construction Daily Reports



Daily reports are often a project requirement and may be needed in the event of a contractual dispute. Therefore, they must be accurate and, if possible, signed by the client or their representative.

The [daily report](#) should record:

1. The date.
2. Weather conditions such as the amount of rain, temperature, wind speed as well as the hours that couldn't be worked due to adverse weather.
3. The site physical conditions (such as encountering rock).
4. Resources available, including staff, personnel, equipment, subcontractor's resources and site visitors.
5. Work done.
6. Delays and disruptions.
7. Major items of material received.
8. Potential future delays.
9. Any safety, environmental or industrial relations incidents.
10. Any other relevant information.

The number of people recorded on site, in the diary, may be important when the client is adjudicating any claim for acceleration or delays. It's important when work is performed on a cost-recovery basis that the number of personnel recorded in the daily report ties-up with the cost recovery records. If they don't agree, the client may only reimburse the contractor for the lesser number.

Often a contractor experiences a delay, and records it on the daily report, but when the delay continues, they neglect to record its continuation, which can cause a problem later, because the delay has been recorded as if it only affected one day. It's important to note every delay on every day that it affects progress.

Learn more about daily reports and other construction project management best practices at www.esub.com/esubconstructionblog.

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