



ASA Announces SAP 'Shell Game' Award

ASA announced a Subcontractors Are Prey (SAP) Award to a subcontract clause that requires a subcontractor to certify that it has a claim against a payment bond before it is able to obtain a copy of such bond. The SAP "Shell Game" Award goes to the following clause:

"The Contractor shall provide the Subcontractor with a copy of the Contractor's payment bond on the Project upon the Subcontractor's certification that it has a claim under such bond."

A subcontractor should get a copy of the payment bond from the prime contractor on a bonded job prior to signing the subcontract or as soon thereafter as possible. With a copy of the payment bond, a subcontractor can make sure that a financially-secure surety issued the bond and that the dollar amount of the bond is sufficient to cover possible claims. In addition a subcontractor can determine the notice and other procedures it will need to follow to assert a claim and possibly file suit, should the need arise. Too many subcontractors have been unable to perfect their claims against a surety bond because they did not have information on how, when and where to file notices. Under federal and most state laws, a potential claimant is entitled to obtain a copy of the prime contractor's payment bond upon request to the public contracting agency. Another federal law requires a government contracting officer and the prime contractor to provide prospective subcontractors and suppliers with a copy of the payment bond, upon request. If a subcontractor does not obtain a copy of the prime contractor's payment bond before signing the subcontract, it may want to consider adding to the subcontract language similar to that in the ConsensusDocs Form 750, *Standard Agreement Between Constructor and Subcontractor*. Paragraph 4.6 of that document states:

"Constructor shall provide to Subcontractor a copy of Constructor's payment bond on the Project upon the Subcontract Work commencing."

ASA's tongue-in-cheek SAP Awards recognize achievements in the use of predatory contract language in the construction industry. Nominations for SAP Awards can be submitted to ASA Chief Advocacy Officer E. Colette Nelson at cnelson@asa-hq.com.

OSHA Proposes Rule on Beryllium Exposure in Construction

On June 27, the Occupational Safety and Health Administration [proposed a rule](#) that would modify the agency's recent beryllium standards for the construction and shipyard sectors. ASA and other advocates for the construction industry had expressed concern that they had not had a meaningful opportunity to comment on the application of the rule to the construction industry when the rule was developed in 2015-16 and issued in final form on Jan. 9, 2017. The new proposal provides an opportunity to comment on the rule for construction industry advocates and the public. The proposal for construction would maintain the requirements for exposure limits (permissible exposure limit of 0.2 µg/m³ and short-term exposure limit of 2.0 µg/m³). However, the proposal would revise the application of ancillary provisions such as housekeeping and personal protective equipment. OSHA has evidence that exposure in construction is limited to a few operations and has information suggesting that requiring the ancillary provisions broadly may not improve worker protection and be redundant with overlapping protections in other standards. Accordingly, OSHA is seeking comment on, among other things, whether existing standards covering abrasive blasting in construction provide adequate protection for workers engaged in these operations. OSHA also announced it will not enforce the Jan. 9, 2017, construction and shipyard standards without further notice while determining whether to amend the Jan. 9, 2017 rule. Interested parties can submit comments at www.regulations.gov, the federal government's regulation portal, on or before **Aug. 28**.

ASA Task Force on Government Advocacy Fighting for Better Laws

"ASA members make the difference in helping public-policy makers at all levels of government understand the needs of construction subcontractors," said Daniel McLennon, a partner in the San Francisco office of Smith, Currie & Hancock, and the 2017-18 chair of the ASA Task Force on Government Advocacy. McLennon wants all subcontractors to know that they don't have to be lobbyists to make a difference in government policies at the local, state and federal levels. "It's critical that subcontractors get involved," he said. McLennon describes how one idea for pro-subcontractor legislation is spreading around the country. "At one ASA task force meeting, ASA Chief Advocacy Officer Colette Nelson reported that the City of San Antonio (Texas) posts its check registers online so that subcontractors and suppliers can see when their prime-contractor client has been paid. By the next task force meeting, the District of Columbia had enacted a similar requirement and Colette presented a draft federal bill. I went home and pitched the idea to the ASA chapters in California. Now both the California legislature and the U.S. House of Representatives are processing payment

transparency bills.” McLennon reports that other ASA chapter leaders are considering pursuing similar legislation in their own state legislatures. “This demonstrates the value of subcontractors banding together,” McLennon said. “Together we can identify, pursue, and gain new laws that will improve the construction industry.” The ASA Task Force on Government Advocacy will next meet from 9:00 a.m. to 12:00 p.m. on Friday, Oct. 20 at the Hyatt Regency Tamaya Resort and Spa in Santa Ana Pueblo, N.M., in conjunction with ASA’s other advocacy-related task forces. McLennon encourages all ASA members to attend. “It’s a great way to meet people and make a difference,” he said. For a meeting schedule and registration information, see the [ASA Web site](#).

Dateline: The States

With a majority of state legislatures in recess for the Independence Holiday, governors continued to sign into law bills that impact the operations of construction subcontractors and suppliers. The following are just some of the recently-enacted laws that impact ASA members:

California: Gov. Jerry Brown (D) signed [SB96](#), the state budget, which includes several provisions dealing with human resource management and public contractor registration. Specifically, the new law:

- Specifies that the statute of limitations on workers recovering unpaid wages and other penalties looks back from the date that an employer is notified of a Bureau of Field Enforcement investigation, to preserve the ability to recover unpaid wages and penalties that would have moved beyond the statute of limitations by the time a citation is issued.
- Extends the time the Retaliation Complaints Investigation unit at the Department of Industrial Relations has to investigate a retaliation complaint from 60 days to one year.
- Extends the time for employers to comply with the Division of Labor Standards Enforcement’s determination on a retaliation complaint investigation from 10 days to 30 days.
- Requires an employer to pay for DLSE’s legal costs when DLSE prevails in an action to enforce its determination on a retaliation complaint investigation.
- Clarifies that workers may not be retaliated against for reporting a work-rated fatality, injury, or illness, or other activities protected by the federal Occupational Safety and Health Act.
- Clarifies that workers who report an injury that does not relate to a specific OSHA complaint or worker’s compensation claim are still protected from retaliation.
- Requires that contractors and subcontractors engaged in the performance of a public work must be registered as a public works contractor for work on or after Jan. 1, 2018, regardless of a contract date. Raises the registration fee from \$300 to \$400. Registration is only required for projects over \$25,000 for new construction; over \$15,000 for maintenance.
- Allows the labor commissioner to charge a penalty of \$100 per day, up to \$8,000 total, for failing to register with the state.
- Allows the Labor Commission to issue and serve a stop order prohibiting the use of unregistered contractors or subcontractors on all public works until they are registered.

Connecticut: Gov. Dannel Malloy (D) signed [SB353](#), which establishes an apprentice, journeymen and contractor working group composed of industry representatives and charged with studying the hiring ratio and making recommendations to the legislature. The new law retains the requirement that one journeyman or contractor be onsite for one apprentice, and that two be onsite for two apprentices, but decreases the ratio when more than two apprentices are on site.

Missouri: Gov. Eric Greitens (R) signed [SB240](#), which establishes a statewide license for electrical contractors, which will be issued by the Division of Professional Registration. Any person who is operating as an electrical contractor in a political subdivision that does not require the contractor to hold a local license is not required to possess a statewide license. However, each entity or individual who engages in electrical contracting must have a least one statewide licensed electrical contractor employed at a supervisory level. Electrical contractors who hold a license that was issued by an authority in the state prior to Jan. 1, 2018, and that required the passing of a nationally-accredited written examination based upon the National Electrical Code and completion of 12,000 hours of practical experience will be issued a statewide license.

Political subdivisions may still establish their own local electrical contractor’s license, but must recognize a statewide license in lieu of such local license. If a political subdivision fails to recognize a statewide license, then the licensee may file a complaint with the DPR. An applicant for statewide licensure must be at least 21 years of age, provide proof of liability insurance in the amount of \$500,000, pass a standardized and nationally-accredited electrical assessment examination, and complete practical hours as specified in the act. Starting in 2020, statewide licenses shall be renewed once every three years.

Nevada: Gov. Brian Sandoval (R) signed SB246, which revises provisions governing advertising for and the submission of proposals relating to a contract for a public work involving a construction manager at risk. The new law also eliminates the monetary threshold at which public bodies are authorized to enter into a contract with a design-build team for the construction of a public work.

Oregon: Gov. Kate Brown (D) signed [SB416](#), which prohibits dividing public works projects into more than one contract in order to avoid prevailing wage rate laws. The new law makes clear that every public works contract and subcontract must specify that the contractor or subcontractor must file a bond with the Construction Contractors Board. In addition, the law requires disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses owned by a service-disabled veteran, and emerging small businesses to post a bond if they fail to pay workers the prevailing wage rate. The new law establishes that failure to pay the prevailing wage rate and failing to pay fringe benefits are separate violations of the law.

Texas: Gov. Greg Abbott signed [HB3021](#), which relates to indemnification and duties of engineers and architects under certain governmental contracts. Among other things, the new law prohibits the government from requiring an A/E to “defend” a government action in litigation.

In other activity:

The newly-created U.S. Climate Alliance, a coalition of states with the mission of upholding the tenets of the 2015 Paris Climate Agreement, now has 13 members representing 30.6 percent of the U.S. population and 35.9 percent of U.S. GDP. Members include California, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Virginia, Washington and the territory of Puerto Rico. An additional 10 states—Colorado, Illinois, Iowa, Maine Maryland, Montana, New Mexico, North Carolina, Ohio, and Pennsylvania—and the District of Columbia, representing 20.8 percent of the U.S. population, also have pledged support for the Paris Agreement. ASA Chief Advocacy Officer E. Colette Nelson said, “Subcontractors in these jurisdictions should be alert to new laws and regulations governing construction activities that impact the environment.”

Join ASA Chief Advocacy Officer for Briefing on ASA Priority Advocacy Issues

Join ASA Chief Advocacy Officer E. Colette Nelson for a free webinar on ASA priority advocacy issues, including change orders, payment transparency, OSHA rules and more. Nelson also will give a quick review of trends in the state legislatures and what you can be doing now to prepare for the 2018 legislative sessions. The webinar will take place from 11:00 a.m. to 12:00 p.m. Eastern time on Monday, July 24. Although the webinar, “ASA: Briefing on Federal Payment Legislation and Other Issues,” is free, you must [register](#) in advance.

Think the Unthinkable: Anticipate Unforeseen Environmental Hazards

It's every contractor's nightmare. Your employees are working on a job site when it becomes known that they've been exposed to asbestos, polychlorinated biphenyl (PCB) or another hazardous substance. No one—the owner, the prime contractor, or the other trade contractors—knew it was there until it was uncovered by accident, but it was there all along. Now there are health concerns, job disruptions and potential legal liabilities to be concerned about. One of the most important ways of handling nightmare scenarios like this is to anticipate that they'll happen. And while you obviously can't predict what scenarios may happen, you can gain an understanding of what legal and contract considerations and consequences you should be thinking about beforehand. The “Guideline on Unforeseen Environmental Problems in Construction,” developed by ASA, the Associated General Contractors of America, and the Associated Specialty Contractors, as part of the [Guidelines for a Successful Construction Project](#), is a starting-point for identifying these factors. Two points made in the guideline will be of immediate interest and value:

- “Environmental laws and regulations, such as the Resource Conservation and Recovery Act, have made owners responsible for all environmental wastes and byproducts of construction projects as the ‘generator.’”
- “Owner responsibility for remediation is embodied in the recognized industry standard form documents ...”

Certain portions of the construction owner's environmental responsibilities are legally governed and cannot be shifted by contract if a problem is discovered. And when the owner's responsibility can't be shifted to the prime contractor, it won't be shifted to a subcontractor. An attorney can advise you on how environmental laws apply in the jurisdiction of a project, if necessary. The owner-contractor contract provisions cited in the guideline provide support to subcontractors seeking the same or similar rights vis-à-vis prime contractors. A subcontractor might point to the guideline during negotiations and ask for the same type of consideration if environmental remediation disrupts a job. The same strategy might work for a subcontractor seeking contractual liability apportionment language in these scenarios.

Contract Changes and Claims: Concealed Conditions

Construction subcontracts generally contain exculpatory language acknowledging that the subcontractor has received copies of the bid documents, has examined those documents, understands them, and has viewed the project site. Subcontractors generally assume the risk of unknown concealed or subsurface conditions, if the contract does not provide payment for additional costs and time extensions for such conditions. Fortunately, most contract documents address this issue with clauses variously known as concealed condition, changed condition, or differing site condition clauses. Generally, these clauses relieve the prime contractor and the subcontractors from the risks for concealed conditions. For example, such a clause might allow a claim for additional costs and time if encountered conditions differ materially from those indicated in the contract documents or those ordinarily found to exist in the type of work involved. These clauses will not relieve the subcontractor of risk where a reasonable pre-bid site inspection or a review of available information would have disclosed the condition. In such a case, the risk would revert to the subcontractor notwithstanding the presence of a concealed conditions clause in the contract. 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.

ASA/FASA Publish 2017-18 Education Catalog of Resources for Subcontractors

ASA and the Foundation of ASA are providing construction subcontractors with the latest strategies and ideas to manage their businesses with videos-on-demand, webinars, and other resources on such topics as technology, retainage, mechanic's liens, negotiation strategies, and human resources. The 2017-18 edition of the [ASA/FASA Construction Subcontractor's Education Catalog](#) showcases the newest education programs (live and recorded), books, and downloadable manuals that ASA and FASA offer to help subcontractors meet the demands of working in today's construction industry. ASA and FASA have developed dozens of education programs and products for subcontractors, including these new videos-on-demand, available under "[Browse Products](#)" on the ASA Web site:

- **Technology & Transparency** (Item #8105) by Stephane McShane, Maxim Consulting Group (\$65/members; \$95/nonmembers)
- **Killer Contract Clauses** (Item #8104) by Russell O'Rourke, Meyers Roman Friedberg & Lewis (\$65/members; \$95/nonmembers)
- **Prompt Payment and How/When to Suspend Work** (Item #8103) by Jason Ebe, Esq., Snell & Wilmer, LLP (\$65/members; \$95/nonmembers)
- **Incentive Compensation Plan Best Practices** (Item #8102) by Mike Rose, Ph.D., FMI (\$65/members; \$95/nonmembers)
- **OSHA Silica Rule—Applications for Subcontractors** (Item #8101) by Gary Visscher, Esq., Law Office of Adele L. Abrams PC (Complimentary)
- **Cost Coding Made Simple** (Item #8100) by Anwar Hafeez, SDC & Associates Inc. (\$65/members; \$95/nonmembers)
- **OSHA Transgender Bathroom Requirements** (Item #8099) by Jamie Hasty, SESCO (Complimentary)
- **Most Popular Benefits Employees Are Purchasing Without Employer Contributions** (Item #8098) by Dan Cahn, Benefit Solutions Today (Complimentary)
- **Change Orders—The Bane of All Subcontractors** (Item #8096) by Joseph Sweeney, Sweeney, Mason, Wilson & Bosomworth, (\$65/members; \$95/nonmembers)
- **Is Your Cash Working for You? Understanding the Competitive Advantage of Cash Management** (Item #8095) by Kevin Jacobs and Aaron McFarland, Moss-Adams (\$65/members; \$95/nonmembers)
- **OSHA Illness/Injury Data Collection Requirements** (Item #8094) by Jamie Hasty, SESCO (Complimentary)
- **Using the ASA Subcontract Documents Suite** (Item #8093) by Eric Travers, Esq., Kegler, Brown, Hill & Ritter (\$65/members; \$95/nonmembers)
- **DOL Overtime Rule** (Item #8092) by Jamie Hasty, SESCO (Complimentary)
- **Sleeper Clauses—Contract Clauses That'll Make You Lose Sleep at Night** (Item #8091) by Daniel F. McLennon, Esq., Smith, Currie & Hancock, LLP (\$65/members; \$95/nonmembers)

The catalog also highlights the ASA/FASA education webinars series for 2017-18. Each webinar will take place from 12:00 p.m. to 1:30 p.m. Eastern time:

- **Aug. 8, 2017**—"The Devil's Triangle: Understanding the Overlap Between the FMLA, ADA and Workers' Compensation Laws" by Philip J. Siegel, Hendrick, Phillips, Salzman & Flatt (\$99 for ASA members; \$179 for Nonmembers)
- **Aug. 22, 2017**—"Self-Funded Healthcare for Subcontractors" by Andrea Aker, Redirect Health (Complimentary)
- **Sept. 12, 2017**—"Lean Construction" by Ashley Colburn, Hoar Construction (\$99 for ASA members; \$179 for Nonmembers)

- **Sept. 26, 2017**—“How to Have a Multi-Million Dollar Impact by Asking ‘One More Question’” by Eric Anderton, Professional Leadership Coach and Trainer (\$99 for ASA members; \$179 for Nonmembers)
- **Oct. 10, 2017**—“Technology and Transparency” by Stephane McShane, Maxim Consulting Group (\$99 for ASA members; \$179 for Nonmembers)
- **Oct. 24, 2017**—“Using Drones: What Subcontractors Need to Know” by Brian Esler, P.C., and Seth Row, Miller Nash Graham & Dunn LLP (\$99 for ASA members; \$179 for Nonmembers)
- **Nov. 14, 2017**—“Employment Law Mistakes Most Commonly Made by Subcontractors” by Philip J. Siegel, Hendrick, Phillips, Salzman & Flatt (\$99 for ASA members; \$179 for Nonmembers)
- **Dec. 12, 2017**—“Ownership Succession Planning” by Stephen Bonebrake, Maxim Consulting Group (\$99 for ASA members; \$179 for Nonmembers)
- **Jan. 9, 2018**—“Indemnity and Hold Harmless” by Lee B. Brumitt, Esq., Dysart Taylor Cotter McMonigle & Montemore, P.C. (\$99 for ASA members; \$179 for Nonmembers)
- **Jan. 23, 2018**—“How the Difference Between Extra Work and Additional Work Can Impact Claims for Payment” by Stephen Moore and James Morris, Galloway Johnson Tompkins Burr & Smith (\$99 for ASA members; \$179 for Nonmembers)
- **Feb. 13, 2018**—“Getting Better Subcontracts” by Eric Travers, Esq., Kegler, Brown, Hill and Ritter (\$99 for ASA members; \$179 for Nonmembers)
- **April 10, 2018**—“Lien & Bond Claims” by Timothy Woolford, Esq., Woolford Law, P.C. (\$99 for ASA members; \$179 for Nonmembers)
- **May 8, 2018**—“Change Orders” by Joe Katz, Esq., Huddles Jones Sorteberg & Dachille, P.C. (\$99 for ASA members; \$179 for Nonmembers)
- **June 12, 2018**—“Cash Management” by James L. Salmon, Esq., Benjamin, Yocum & Heather, LLC (\$99 for ASA members; \$179 for Nonmembers)

Register online for these webinars via the ASA Web site by clicking on [“Register for an Event.”](#)

Learn About Employment Practices Liability in Complimentary July 11 ASA Webinar

Construction subcontractors will learn about federal employment law, employment practices liability (EPL) exposures and the techniques employers may consider to help minimize the risk of a claim in a newly added, complimentary ASA webinar on July 11. In the webinar, “School of Risk Control Excellence: Employment Practices Liability,” presenter Laura Lapidus, Esq., CNA, will provide an overview of federal employment law and discuss current trends and statistics, claim scenarios and risk control practices. This live, 90-minute webinar will begin at 12:00 p.m. Eastern time/9:00 a.m. Pacific time. Registration is free for members and nonmembers. [Register online.](#)

Learn About Incentive Compensation Plan Best Practices with FASA Video-on-Demand

Subcontractors, specialty trade contractors and suppliers in the construction industry are learning about incentive compensation plan best practices with a video-on-demand available from the FASA. Incentive compensation is a huge investment. Engineering and construction companies spend an average 15 percent of net profit before taxes, on these programs. The U.S. construction industry has an enormous opportunity to improve the effectiveness of current incentive compensation programs, especially because few construction companies use industry market data to ensure adequate incentives. “It can be challenging to create an incentive plan that supports your strategic objectives, motivates attainment of stretch goals, provides desired returns and behaviors and yields results,” says Mike Rose, Ph.D., FMI, presenter of the video-on-demand, “Incentive Compensation Plan Best Practices.” FMI set out to answer some basic questions to find out what makes incentive compensation more effective in the eyes of top executives in the construction industry. In the on-demand video Rose shares results of this survey and discusses:

- The seven critical issues commonly practiced in the construction industry that need to be addressed in order to improve the effectiveness of your incentive program.
- How effective incentive compensation plans can attract and retain the best talent and increase your return on investment.
- How to effectively balance the incentives to minimize unintended consequences such as divisional silos and free riders.
- How to avoid the pitfall of paying out bonuses in lean years and ensure adequate time for proper transitions to new plans.

Play this on-demand video, available from the Foundation of ASA, with a free media player like [Windows Media Player](#), and use it for group training by projecting it onto a screen or wall in a conference room. “Incentive Compensation Plan Best Practices” (Item #8102) is \$65 for ASA members and \$95 for nonmembers. [Order online.](#)

ASA Platinum Sponsor CNA—Creating an Environment of Lowered Business Risk

Contractors' pollution exposures are more common than you might think. That's why ASA Platinum Sponsor CNA offers a broad array of limited pollution liability coverages for work sites and premises. Backed by CNA's best-in-class claims service and an "A" rating for financial strength, these supplements to commercial general liability policies deliver valuable coverage for basic exposures at nominal cost. For more than a century, in every business climate, CNA has helped companies identify and protect against risk. When you're looking for a carrier with unique programs, flexible coverages and a strong foundation to build on, CNA can show you more. Learn more by calling CNA at (312) 822-1776 or visiting www.cna.com.

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