

Subcontract Acknowledgment Guide

The Subcontract Acknowledgment is designed for use by Subcontractors to convert one-sided terms in General Contractors' subcontract forms into level playing field understandings. The Acknowledgment covers the vast majority of unfair terms typically found in Contractors' printed subcontract documents, but Subcontractors will still need to be alert for any less common inequitable terms and to address these as additional Acknowledgment provisions.

Subcontract Acknowledgment users should consider taking the following steps:

1. Consult with your legal advisor and modify the form, if necessary, to tailor it for any changes or additional provisions needed for the peculiarities of your trade. You may also wish to put the Acknowledgment language into your word processor so that its individual provisions can be used selectively when a more targeted approach seems appropriate.
2. Review each newly received subcontract (particularly the job specific information) to identify any unusual terms for possible inclusion as additional clarifications in Acknowledgment Section 13. If the scope of work, price or schedule shown in the subcontract differs from the basis on which you bid, the General Contractor should be contacted immediately and the difference resolved before proceeding further.
3. Enter wording such as "Acceptance conditioned on the terms as stated in the attached Subcontract Acknowledgment", by rubber stamp or otherwise, just above your signature on each subcontract to which the Acknowledgment is attached. This step helps protect against a Contractor later claiming not to have seen your changes to its printed subcontract terms. If the Contractor returns a signed subcontract copy with the Acknowledgment removed, you should immediately address any specific Contractor objections to its terms and assure that the Acknowledgment, perhaps amended, is attached to each copy of the subcontract.

Subcontractors should submit bids subject to use of equitable subcontract terms except where bid laws governing public work preclude any changes in terms. Some subcontractors condition their quoted prices on use of the latest editions of AIA A401, AGC 650 or comparable, even-handed model subcontract terms. Others use bid proposal letters developed with their attorneys consistent with the Acknowledgment terms. Where the bid documents require that Subcontractors sign the General Contractor's standard subcontract form, it is especially important that your agreement to use the Contractor's form be made subject to mutually agreed clarifications and changes to its terms. These actions clear the way for you to use the Acknowledgment, in whole or in part, to supersede unfair language in the Contractor's subcontract form. Otherwise, the Contractor's acceptance of a bid lacking such qualifications might obligate you legally to accept a set of onerous subcontract terms.

The best time for you to return a signed subcontract and Acknowledgment is shortly after being named as a Subcontractor of record with the Owner. By waiting until your competitors are gone and drawings and plans are being exchanged, you achieve increased negotiating leverage. However, sufficient time must be allowed to complete subcontract negotiations before beginning jobsite work. Otherwise, your negotiating leverage is lost, the Contractor's unfair terms may become effective and payment delays often occur until the subcontract form is signed.

Many General Contractors will predictably resist some or all of the Acknowledgment terms. Accordingly, you should be prepared with persuasive talking points for responding to typical Contractor objections and concerns – both to explain how the Acknowledgment approach is helpful to both parties and to justify the individual Acknowledgment items which generally track prevailing best industry practice as shown in the heavily used AIA and AGC model contract forms. Exhibit 1 provides practical talking points for you to use in answering common General Contractor objections to modifying *any* of the terms in their printed subcontract forms. Exhibit 2 contains similar talking points for you to consider when responding to General Contractor concerns about specific points of clarification relating to the 12 key topics addressed in the Acknowledgment. This exhibit also includes some potential fallback positions to be considered, if necessary, during the negotiating process. More detailed subcontract negotiating strategies and techniques may be found in chapter 6 of the American Subcontractors Association's *Mastering Subcontracts* publication.

Minor Acknowledgment changes can be made by pen and initialed by both parties. For more extensive modifications, it is generally best to make the changes using your word processor so that an easy-to-read modified Addendum is attached to the subcontract.

Remember that subcontract negotiations, when approached properly, usually lead to improved customer relations. Most General Contractors recognize that their own reputations depend on hiring responsible subcontractors who, in turn, deserve the benefit of equitable subcontract terms instead of language developed by the Contractors' lawyers to deal with marginal trade contractors.