SUBCONTRACTOR AGREEMENTS

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Before committing to any job, a subcontractor should consider what type of agreement will best protect him or her in the transaction. Many times, a subcontractor is handed a form agreement which is heavily slanted in favor of the other party. Usually, the job is well underway and the sub has little time to worry about whether the contract protects his interests. This can lead to disaster if a dispute arises because a sub may be bound to a contract provision that will cost him or her time or money. As such, these agreements and some specific provisions warrant discussion.

I. Form Agreements

Many of you are familiar with the AIA Document A401, or AGC subcontract, the standard agreements between a contractor and a subcontractor. The A401 is the most commonly encountered form agreement and has been successfully marketed in the construction industry. Like most preprinted form contracts, it has its advantages and disadvantages.

First, the good points. All parties in the construction industry feel comfortable with it. Once you've dealt with a standard contract a few times, you know what to expect and what is expected of you. There is no chance of a "hidden" provision; all handwritten or typewritten provisions inserted will stick out like a sore thumb. Because many special interest groups, like subcontractors, lobby the AIA when the forms are being revised, subcontractors feel their concerns have been protected. Lawyers

also love them. The AIA standard provisions and wording have been interpreted by the courts and this interpretation resulted in a body of case law which makes easy reference for lawyers.

On the other hand, there are some disadvantages to a form agreement such as the AIA A401. Primarily, the contract will not fit every situation. For instance, the A401 is too burdensome for a small residential project. It really was designed for large, commercial construction projects with multiple parties whose roles are well-defined. Furthermore, there is a tendency not to read the small print on form contracts, particularly when a subcontractor has dealt with the A401 before and may not look to see if any additional provisions were inserted. Finally, and most importantly, the A401 may contain clauses a subcontractor does not want to be bound by and may result in damages unforeseen by the subcontractor. It is important that a subcontractor know the meaning of these clauses and to beware of them. Remember, a form contract can always be revised to extract or modify these harmful clauses.

II. Making your own Subcontract - Personalize it to make it work for you.

As previously mentioned, any written agreement can be changed to suit your interests. Many of the provisions discussed in this article should set off an alarm when subcontractors encounter them. At the very least, subcontractors must be aware of the implications of these clauses.

A. Bidding Provisions - Although this is not a standard

clause, subcontractors should attempt to protect themselves even before an agreement is signed. Generally speaking, a subcontractor cannot make the prime contractor contract with him if the contractor uses his bid unless the parties have an agreement to that effect.[1] On the other hand, the contractor can hold the subcontractor to its bid.[2] There is no mutuality of obligation. The conflicting case law interpreting this bidding scenario dispute has resulted in a recent theoretical battle amongst construction lawyers.[3] Thus, it is wise to include a provision or an addendum in a subcontractor bid obligating the contractor to contract with him or her if the contractor includes the subcontractor's bid in its bid to the owner. Furthermore, the subcontractor's contract should contain the following language to prevent him or her from onerous terms of standard contracts:

> Notwithstanding anything to the contrary contained in the agreement between the general contractor and the subcontractor, the terms contained herein at the time of the bid shall prevail over any such agreement and

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[1]Home Electric v. Hall & Underdown Heating & Air Conditioning, 358 S.E.2d 539 (N.C. Ct. App. 1987).

[2]Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958); Saliba-Kringlen Corp. v. Allen Eng'g Co., 15 Cal.App. 3d 95, 100 (1971); Stanfield Constr. Corp. v. McMullan & Son, 14 Cal. App. 3d 848, 852 (1971); Norcross v. Winters, 209 Cal. App. 2d 207, 215 (1962).

[3]See Hughes & Hurley, *Home Electric/Hall versus Drennan/Star Paving: Mutuality is No Substitute for Equity*, 10 A.B.A. SEC. THE CONSTRUCTION LAWYER 3 (Aug. 1990); Daus & Ruprecht, *The Pit and the Pendulum: Balancing the Equities in the Construction Bidding Process*, 10 A.B.A. SEC. THE CONSTRUCTION LAWYER 3 (Aug. 1990); Lawrence & Siegfried, *Home Electric v. Hall & Underdown Heating & Air Conditioning: Mutuality Remains the Only Solution to the Construction Bidding Problem*, 9 A.B.A. SEC. THE CONSTRUCTION LAWYER 4 (Nov. 1989).

shall be controlling.

B. Payment Clauses - Clearly, one of the most important (if not the most important) items to a subcontractor is being paid for his or her work. Subcontractors must specify the terms under which they want to get paid, otherwise they are left to the mercy of the contractor's form agreement.

1) Method of Payment - First, subcontractors must determine under what method their payment will be calculated. The three major methods are lump-sum, cost-plus and unit price. Subcontractors should make sure that the method of payment is compatible with the type of work they will perform. For instance, a unit price contract would not work for an electrical subcontractor working on a few buildings of different sizes under the same contract.

2) "Pay when Paid" - A warning bell should go off in a subcontractor's head when he or she sees this clause in an agreement. Also known as a contingent payment clause, it means that the contractor does not have to pay the subcontractor until the owner pays the contractor, or within a reasonable time after payment is due. Some states strictly enforce this clause and a subcontractor will not get paid unless and until the owner pays the contractor. This leaves subcontractors to bear the burden of a fallout between the owner and contractor which has nothing to do with the subcontractor. In today's tight construction industry, this type of clause is particularly devastating to thinly-

capitalized subcontractors. Some examples of these clauses are:

1. "Payment shall not be due unless and until the Contractor receives payment from the Owner."

2. "Payment to the Subcontractor is wholly contingent upon Contractor's receipt of payment from Owner."

3. "As a condition precedent to payment to Subcontractor, Contractor must be paid in full by Owner."

In Florida, these clauses must be clear and unambiguous to be enforceable against a subcontractor.[4] If the clause is ambiguous, the contractor must pay within a reasonable time.[5] However, even when payment is contingent, the contractor must seek compensation from the owner in good faith and with due diligence or the provision will be unenforceable.[6]

C. Flow-Down/Flow-Up and Incorporation by Reference Provisions - These provisions are used to make one document a part of another through the technique of incorporation by reference. A flow-down provision incorporates all the duties owed to the owner by the contractor into the contractor-subcontractor agreement. A flow-up provision incorporates all the duties owed to the contractor by the owner into the contractor-subcontractor

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[4]OBS Company v. Pace Construction Corp., 558 So.2d 404 (Fla. 1990); Bentley Construction Dev. & Eng'g, Inc. v. All-Phase Electric & Maintenance, Inc., 562 So.2d 800, 15 F.L.W. D1498 (Fla. 2d DCA May 30, 1990).

[5]Bentley, 15 F.L.W. at D1499. In Bentley, ninety days was deemed to be a reasonable time.

[6]Walker v. Chancey, 117 So. 705 (Fla. 1928).

agreement. As a matter of course and for protection, a subcontractor should never agree to a flow-down provision without a corresponding flow-up provision.

The following example illustrates typical flow-down and flow-up provisions:

> The subcontractor binds himself to the contractor for the performance of a Subcontractor's work in the same manner as the Contractor is bound to the owner for such performance under the Contractor's contract with the Owner. The pertinent parts of such contract will be made available upon subcontractor's request. The Contractor further assumes all duties to the Subcontractor that the Owner has assumed to the Contractor under the contract documents.

Flow-down and flow-up clauses can create certain practical problems. Occasionally, the contractor will assume a special duty to the owner so that the language of the flow-down provision fails to pass to the subcontractor. A textbook example is the contractor's oral, or subsequently written, representation to perform work to the satisfaction of the owner's mother-in-law. If this duty has not been passed on to the subcontractor, the contractor must take special pains to supervise the subcontractor and ascertain the quality of the work.

On the other hand, subcontractors often enter into subcontracts containing flow-down provisions without ever seeing the owner-contractor agreement. When this happens, the subcontractor is agreeing to be bound by unknown provisions. This kind of situation is inexcusable. If the general contract is for a public work, it is a public record available from the

governmental entity. If the job is private, the state mechanic's lien law generally entitles a subcontractor to a copy of the general contract upon written demand to the owner or general contractor. Because the owner-contractor agreement may be modified after the subcontract is signed, the subcontractor should obtain copies of the documents, initial and date them, and attach them to the subcontract.

Under no circumstances are flow-down and flow-up provisions substitutes for specific language setting forth the rights and obligations of the parties. When the incorporation is clear and unambiguous and when reciprocal flow-down and flow-up provisions are used, the provision will be enforced. If, however, the slightest ambiguity exists between specific and incorporated language, the courts are reluctant to favor the incorporation[7], especially when ambiguous provisions appear to require arbitration or if a waiver of lien clause is incorporated.[8]

D. Scope-of-Work Clauses - The scope-of-work provision sets forth the work to be done under the subcontract and all accompanying or incorporated documents, including specifications and drawings. This provision is often glossed over by

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[7]Frank J. Rooney, Inc. v. Charles W. Ackerman of Florida, Inc., 219 So.2d 110 (Fla. 3d DCA 1969).

[8]Woods-Hopkins Contracting Co. v. C.H. Barco Contracting Co., 301 So.2d 479 (Fla. 4th DCA 1974). VNB Mortgage Corp. v. Lone Star Industries, Inc., 209 S.E.2d 909 (Va. 1974); *but see MCC Powers v. Ford Motor Co., 361 S.E.2d 716 (Ga. App. 1977) (waiver of lien provision in owner-contractor agreement incorporated by reference in subcontract)*

subcontractors because they feel they know what is expected of them. If the subcontract is prepared by the general contractor, it will usually contain a broad definition of the scope of work to be performed by the subcontractor. Thus, if any disputes arise, the contractor will be able to tie the subcontractor into as much work as possible. A subcontractor should insure that a clear, concise description of work is set forth in the subcontract. This also eliminates any overlapping between your work and the work of other subcontractors.

Because the scope of work often incorporates other documents, such as the plans and specifications and the owner-contractor agreement, the subcontract should contain an order of priority clause. This ranks the various documents incorporated so that the parties will know which description governs in the case of a conflict between the documents. This will also cover problems encountered when the plans and specifications are ambiguous or erroneous. Additionally, the subcontractor should insert language stating that any work not covered by the scope-of-work clause will be subject to an "extra" or "change order", with a corresponding price adjustment.

Finally, the subcontractor should make certain that the scope of the work submitted in their bid is the same as the scope-of-work described in the subcontract. If they did, the subcontractor must insist that the language at least parallel that contained in the bid, or that any additional work be defined in specific terms. Also, the subcontractor should be sure that any exclusions from the

scope of the work in its bid are likewise deleted from the scope-of-work described in the subcontract.

E. Change Order Procedures - In almost every job, changes to the scope of a subcontractors work may be made. These changes may occur because of concealed conditions which are found at the site, materials which may be unavailable or are no longer cost effective, or simply because the owner changes its mind. Hence, the subcontract should contain a provision detailing the procedure for approving change orders. In small jobs, the procedure is often informal. Conversely, on big jobs, the procedure is more complicated and may require approval by more than one party. If the contract does not specify who approves the change orders and extras, the sole power of approval lies with the owner.

It is important to know the distinction between a change order and an extra and to be sure that those terms, and the procedures for each, are defined in the subcontract, or in the general contract which is incorporated by reference into the subcontract. A change is a modification to work already contemplated by the agreement. For example, the subcontractor may make a change in the brand of materials. An extra is something outside the agreement which is added. Both generally require additional compensation. It is important to have the proper party approve certain changes, such as a change in the brand of materials to be incorporated into the project, and that that party specifically authorizes the change as an acceptable substitute. Otherwise, disputes may arise regarding whether the substitution was proper. Remember, the owner

and general contractor will always look for ways to back charge you. No matter how small the job, it is important that the changes be in writing and specifically described so that the owner cannot later contend that it believed the work to be included in the scope of the contract.

A less formal method of making changes in the work has been recognized in the 1987 revision to the AIA Document A-201, which may be incorporated by reference into the subcontract, called the Construction Change Directive.[9] A change under this method requires the written approval of only the architect and owner and states the basis for adjustment for the change in either the time for completion or contract amount. Under the AIA A-201, a change order requires approval by the architect-owner and contractor. The primary purpose for a construction change directive is to expedite the delay normally resulting from disputes between the owner, architect and contractor regarding change order terms. Note that if the contractor signs the construction change directive, it becomes a change order.[10]

F. Scheduling Provisions - Although most subcontracts do not have a specific scheduling provision, a subcontract may incorporate by reference a provision in the owner-contractor agreement requiring the contractor to have a CPM or Pert schedule or bar chart. If this is the case, it is up to the subcontractor to

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[9]AIA Document A-201, Article VII (1987).

[10]AIA Document A-201, Section 7.3.5 (1987).

review the schedule and to make sure that his work follows the trade of a compatible subcontractor. Moreover, the subcontractor must insure that he has adequate time to complete his work. Otherwise, the subcontractor should insert a provision into his/her agreement to provide for time extensions and to relieve himself from liability if the proceeding subcontractor causes delay. Otherwise, a subcontractor may be backcharged or countersued for damages caused by delay of the project. Any request for an extension of time to complete the work, or notifying the contractor, architect or owner of project delays, should be in writing.

G. Damages Provisions - Generally, three types of clauses deal with damages caused by the failure of a party to perform its work on time: Actual Damage Clauses, No Damages for Delay Clauses, and Liquidated Damages Clauses. If no damage clause is contained in the agreement, the Actual Damages Clause usually will be applied. If an Actual Damage Clause applies, delay is considered a breach of contract, and damages are calculated according to the actual monetary loss sustained. Because the general contractor is responsible for delays caused by subcontractors, the AIA owner-contractor agreement defines three (3) types of delay. Excusable delay is caused by factors beyond the contractor's control, and entitle the contractor to seek an extension of time. Nonexcusable delay is caused by circumstances within the contractors' control and does not entitle the contractor to an extension of time or additional compensation for delay. Compensable delay is delay

caused by the owner and which entitles the contractor not only to an extension of time, but to compensation for the increased costs caused by the delay.

Many owners try to circumvent their liability for compensable delay by including a "No Damage for Delay" clause. These provisions state that a party to the contract waves its right to seek reimbursement for the owner's delay. Subcontractors should determine if their subcontract contains a no damages for delay clause or if such a clause has been incorporated by reference. Despite a "No Damages for Delay" clause, delay damages may be recovered if the owner unreasonably and willfully interferes with performance or misrepresents material facts to the contractor, or if an unreasonably long delay occurs.

Sometimes subcontracts include a liquidated damage provision. Although not a part of the AIA form contract, it may be inserted as an addendum. A liquidated damage provision provides for a set sum to be assessed against the general contractor for delay, and which is arbitrarily divided among all the subcontractors on the project even though some may not be at fault. These provisions should be extracted from a subcontract whenever possible, even if the provision includes a "bonus" if the project is completed ahead of time. Not only are these provisions harmful to subcontractors, but tend to result in shoddy work on the project by subcontractors fearful they may not complete their job by the specified date. Obviously, this leaves subcontractors wide open for damages caused by sloppy workmanship.

However, even if a subcontractor finds himself in an agreement containing a liquidated damages provision, the courts have found ways to protect them from unfair results. Even though a court may hold a subcontractor liable for delay damages even though the delay was caused by other subcontractors, the owner must prove that the subcontractors' delay was a substantial factor in the delay of the project.[11] Additionally, if damages appear to be easily calculated, or if the liquidated damage amount is grossly disproportionate to the probably loss, the liquidated damages clause may be held unenforceable.

H. Risk of Loss and Disclaimer Provisions - A subcontractor should be aware of whether the subcontract allocates risks to him for which he is generally not responsible. As a general rule, risk of loss or responsibility may be contractually allocated to any party as long as the provision is clear, unambiguous and visible. Although the clause may be visible, risk is often allocated by negative implication. Thus, if a provision states that the contractor is not liable for some event, by implication the subcontractor is responsible. Likewise, if the general contract absolves the owner for responsibility for all design errors, by implication the contractor may be held liable for deviation from the plans along with the design professional's responsibility for those deviations. The contractor's risk may be passed along to a subcontractor if he or she fails to notify the design professional

[11] Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. ____ DCA 1980).

of irregularities in the plans. Similarly, if the contractor indemnifies the owner from any claims made against the owner, this risk may be passed along to subcontractors. Subcontractors would then be required to obtain additional insurance to cover this risk.

I. Forum Selection Clauses - Sometimes, particularly when dealing with an out-of-state contractor, a forum selection clause will be inserted into the subcontract. A forum selection clause determines which state, or countries, law governs the contract. For example, an Illinois contractor may insert that the law of the state of Illinois is to govern the contract. Thus, a subcontractor may subject himself or herself to a law unfavorable to subcontractors under a particular set of circumstances. This is another reason why it is important for a subcontractor to review the owner-contractor agreement if it is incorporated by reference into his subcontract.

J. Waiver of Lien Provisions - Waiver of lien provisions insure the owner that its property will be unencumbered by liens. Often this is accomplished by the contractor providing a surety bond to cover liens. Otherwise, waiver of lien provisions in Florida, which require the contractor, subcontractor or material supplier, to waive its right to claim a lien in advance when he signs the contract are unenforceable.[12] It is questionable whether a waiver of lien provision would be enforceable in Florida if the contract specifically stated that it was to be governed by the law

[12]Section 713.20(2), Fla. Statutes (1988).

of the state which validates waiver of lien provisions.

K. Arbitration/Dispute Resolution Provision - These provisions provide for a specific means for resolving disputes between the parties. Again, this provision may be incorporated by reference into the subcontract from the owner-contractor agreement. Under the AIA A-201 form, a claim must be filed with the architect for resolution within twenty-one (21) days after the claim has arisen. Additionally, written notice must be sent timely and in the manner provided in the provision. If the parties are not using the standard AIA form, different time limits for different claims may apply. For instance, there may be a different time limit for a delay claim than there is for a change order or extra. These different time limitations can be particularly onerous and a uniform time should be inserted by the subcontractor whenever possible.

Arbitration may be the designated means of dispute resolution. This is a highly favored method as it allows for decision of the dispute by persons actively involved in the construction industry. One of the primary arguments for arbitration of construction disputes is that many judges and juries do not understand the intricacies of the construction process. It is also usually more expeditious than the judicial system. However, a subcontractor with a small claim may be forced into a multiple party arbitration which may take much longer than if his or her solitary claim is decided by the courts. In any event, a subcontractor should be aware of the means designated in his subcontract for dispute

resolution, if any, so that he does not waste time and money filing his lawsuit in court later to find that he was compelled to arbitrate it.

L. Termination Provisions - Most contracts provide for termination as the remedy when the other party materially breaches the contract. The subcontract should spell out the rights, duties and obligations of the parties in the event of termination. It should also define which events warrant termination. Generally, nonpayment, anticipatory breach, or insolvency, will justify termination of the contract. However, termination may be justified if the site was not prepared for a subcontractor[13] or if the contractor hinders a subcontractor's operations.[14] Sometimes, an owner is given the right in a contract to terminate for "convenience". In other words, if it is economically infeasible to continue the project, the owner may terminate and compensate the contractor (and its subs) for work performed to date and any losses incurred. Although "convenience" infers a very broad spectrum of circumstances, the termination must be done in good faith.[15]

M. Attorney's Fees Provisions - A subcontract may contain a provision awarding attorney's fees to the prevailing party in any dispute under the contract. If an arbitration provision is also

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[13]Great Lakes Construction Company v. Republic Creosoting Company, 139 F.2d 456 (8th Cir. 1943).

[14]Citizens National Bank v. Vitt, 367 F.2d 541 (5th Cir. 1966).

[15]National Factors, Inc. v. United States, 492 F.2d 1383 (Ct.Cl. 1974).

contained in the subcontract, a clause providing for attorney's fees to the prevailing party in arbitration should also be inserted. Otherwise, attorney's fees incurred in arbitration are not recoverable by the winning party unless specifically stated in the contract. Also, the subcontract may provide that the contractor is entitled to attorney's fees if it is the prevailing party in a lawsuit or arbitration, but has no such reciprocal provision if the subcontractor is the prevailing party. If the subcontractor brings a claim under the Florida Mechanic's Lien Statute, he will be awarded attorney's fees under Section 713.29, Florida Statutes (1987), if he or she is the prevailing party. Additionally, Section 57.105, Florida Statutes, provides that if a contract allows recovery of attorney's fee by one party if it is the prevailing party, attorney's fees will be awarded to the other party not covered by the agreement if he or she is the prevailing party.

N. Miscellaneous Provisions - A subcontractor has a duty to read each and every provision in his or her subcontract. Generally speaking, parties can contract for or against any right they may have. If a provision is particularly unfair, it will probably disallowed; however, it is better to be safe than sorry and to understand every right and duty you sign up for in your subcontract.

III. Means of Dispute Resolution.

Unfortunately, some of the most well-drafted contracts end up in litigation. Not every dispute is resolved in the court system

and, as discussed above, many agreements set forth the method of dispute resolution. Before any method is selected, it is wise for the parties to attempt to settle the dispute on their own. In the long run, it is the least expensive means of settling the dispute and usually the most satisfactory to the parties. If private settlement is not feasible, the parties will have to resort to one of the following avenues available for resolving disputes. Before proceeding along one of these routes, a subcontractor should compile written documentation of all contact with his or her adversary regarding the claim and should send a demand letter. This puts the other party on notice that you mean business and also provides him or her an opportunity to settle the matter before it gets costly. Additionally, written documentation preserves the memory of the parties as to what happened and is invaluable as evidence if the dispute is resolved by any formal means. The most innocent party's claim may be denied if there is no evidence to support his or her position.

A. **Arbitration** - Arbitration is an informal method of dispute resolution by which the parties voluntarily submit their conflict to an independent third party, the arbitrator, or arbitration panel, for hearing and determination. It is usually more expeditious than the judicial system and is particularly effective for construction disputes.[16] The arbitrator is selected

[16]However, even the courts have initiated their own arbitration process. See Rules 1.700 and 1.800, et seq., Fla. R. Civ. P. Court-ordered arbitration may be binding (Rule 1.830) or non-binding (Rules 1.800 and 1.820).

from a list of individuals trained to arbitrate and who are "experts" in the field. Thus, the arbitrator is familiar with the construction process and is more qualified than a judge or jury to resolve a dispute. There are no rules of evidence in arbitration and discovery must be specifically requested. Arbitration streamlines the judicial procedure and is governed by the Federal Arbitration Act or by the state's arbitration statute,[17] depending upon whether the dispute involves a question of federal or state law, and by the Construction Industry Arbitration Rules. The decision of the arbitrator is usually binding on the parties, unless a party can show that the award was tainted by corruption, fraud, other undue means, or if the award was entered when no valid agreement to arbitrate existed.[18]

Arbitration is not completely removed from the judicial system. If a case is filed with the court, the court may have to interpret the agreement to determine if it requires arbitration. As discussed earlier, some subcontracts require that all disputes be submitted to an arbitration panel for resolution.[19] Some

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[17]Florida's arbitration act is found in Chapter 682, Florida Statutes.

[18]Section 682.13, Florida Statutes. See also Austin v. Stovall, 475 So.2d 1014 (Fla. 3d DCA 1985).

[19]These are known as "broad form" arbitration clauses. An example of a broad form clause is found in Section 4.5.1 of the AIA Document A-201 (1987):

> All claims, disputes, and other matters in question between the contractor and owner arising out of, or relating to, the contract or the breach thereof shall

contract clauses, however, are not as specific as to whether a dispute has to be arbitrated. If the clause is ambiguous, the courts will construe the provision in favor of arbitrability. In this situation, it is best for the parties to mutually agree to another dispute resolution method if they do not wish to arbitrate.

A question may arise with regard to the scope of arbitrability. In other words, it may not be clear whether the dispute is one "arising out of" or directly relating to the contract or if it involves an issue outside the scope of the agreement. At this point, the parties may have to submit this question to the court. This can be costly, so again, it is advisable to agree to the method of dispute resolution.

Additionally, the court may have to confirm an arbitration award if the losing party fails to pay the sum awarded.[20] Once the court confirms the award, it becomes a judgment which may be collected through various means of execution, such as garnishment or a levy on property.[21]

Although arbitration is a favored means of resolving construction disputes, it is important to know the drawbacks. First, arbitration has become increasingly more formal than

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be settled by arbitration in accordance with the Construction Industry Arbitration Rules ....

[20]Section 682.12, Florida Statutes.

[21]Haskell v. Forest Land and Timber Co., Inc., 426 So.2d 1251 (Fla. 1st DCA 1983).

originally intended, causing the case to drag on for years. Many construction attorneys are selected as arbitrators, and are more apt to allow extensive discovery and presentation of evidence. Additionally, attorney's fees are not collectable by the prevailing party unless specifically provided for in the arbitration agreement. However, if the court confirms the arbitration award, it may award the winning party attorney's fees incurred in the confirmation proceeding.[22]

B. **Mediation** - Another informal means of dispute resolution quite similar to arbitration is mediation. Like arbitration, the parties submit their dispute to an independent third party called a mediator and no formal procedures or evidentiary rules apply. Mediation really precedes arbitration and a mediator can be recommended by the American Arbitration Association. All discussions occurring in mediation are not admissable as evidence in court proceedings.

Mediation has also been adopted by the courts as a forced attempt at settlement before the case is set for trial.[23] Although this is a good idea, in reality, the parties are less likely to settle at such a late date. The mediator does not render a decision, but merely makes a recommendation to the parties in the hope that they will settle. Settlement in mediation usually means

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[22]Zac Smith & Co., Inc. v. Moonspinner Condominium Ass'n, Inc., 534 So.2d 739 (Fla. 1st DCA 1988); Newport Motel, Inc. v. Cobin Restaurant, Inc., 281 So.2d 234 (Fla. 2d DCA 1973).

[23]Rule 1.700, Fla. R. Civ. P.

foregoing attorney's fees, as the mediator has no power to award attorney's fees.

C. **Litigation** - Traditionally, most disputes are litigated through the judicial system. This is the most time-consuming and costly of the resolution methods. Subcontractors need to be aware of changes in lien laws and of new decisions creating or reducing liability for them. Construction litigation is one of the most creative areas of the law and new theories are carved out by the courts almost daily. To avoid paying your lawyer for being creative, subcontractors should always attempt to collect monies owed to them through the procedures outlined in the Mechanic's Lien laws.[24] It is the quickest, most sure way to get paid on a job. Unfortunately, many subcontractors fail to adhere to the time deadlines and lose their lien rights, leaving with the sole remedy of suing an oftentimes insolvent contractor.

Because of the cost and the opportunity for the defendant to stall the case through procedural means, litigation provides the least effective means of expeditiously settling a dispute. On the other hand, litigation is often necessary to force payment. Most people will not pay unless threatened with the possibility of a judgment which will cost them not only the amount owed, but interest, court costs and attorney's fees. In some cases, punitive or special damages may also be collected.

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[24]Chapter 713.01, et seq., Florida Statutes (1987). The Florida legislature recently amended Chapter 713, the changes will take effect on October 1, 1990.

Once in the case is filed in court, certain methods may be employed to expedite payment or resolution. A settlement conference should be scheduled immediately. If settlement is not effected, discovery should be commenced to outline the issues, strong points and weak points of the case. Prior to trial, settlement should again be attempted, as the largest cost of litigation is incurred during trial preparation.

D. **Liquidating Agreements** - Another cost-effective device for subcontractors is a liquidating agreement. These agreements are used when the subcontractor is trying to obtain payment from its prime contractor, and the prime contractor is involved in a larger dispute involving the owner, architect/engineer, or other third party and in which the prime contractor is the innocent party. In this situation, it is advantageous for the prime contractor and subcontractors to band together in the litigation. The parties can enter into a liquidating agreement wherein they agree to split the legal bills and the subcontractor agrees to absolve the contractor from liability unless the contractor receives payment from the owner. In many of these agreements, the subcontractors assign their lien rights to the contractor to pursue in the litigation. Liquidating agreements provide a cost-effective means of litigating a large dispute and create a united front to battle the defaulting party.[25]

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[25]An example of a liquidating agreement can be found in Construction Industry Formbook, 1987 Cumulative Supplement, Shepard's/McGraw-Hill, Inc., pp. 182-185.