

Legal Stuff

- None of this presentation is legal advice
 - These are simply strategies to consider
- The laws of different jurisdictions vary
 - Consult with your legal counsel about any action or strategy you plan to implement



DISCLAIMER





Presented by Gregory Chertoff
Co- Managing Partner, P&A's NY Office
GChertoff@Pecklaw.com

Basic Training – Operational Risk Management Fundamentals



The Topics

- Progress Payment Lien Waivers & Releases
- Change Order Management
- Subcontract Claim Triage
- Subcontract Default Strategies
- How to Make a Record
- Documenting Your Damages



Lien Waivers & Releases



What Are They?

- A “Waiver” and a “Release.”
 - The party giving is “waiving” and “releasing” rights it has.
 - You are giving something up!
 - It’s important to know ***exactly*** what is being relinquished!
 - READ THE DOCUMENTS!
 - Lawsuits won or lost one these ***ALONE!***



Progress Payment Lien Waivers & Releases

Receipt

OR

Line in the sand



The Receipt

- Waiving and releasing
***“to the extent of
payment received.”***
- Very LIMITED waiver.
- Merely acknowledging
payment received.



The Line in the Sand

- Waiving and releasing ***“all claims through the date of ...”***
- Very BROAD waiver.
- Giving up all rights through the indicated date – not limited to extent of payment.



Are you giving or getting?

If getting from subcontractor

- You want to get:



If giving to an owner

- You want to give:



Did you read your contract?

- Does your owner contract have a lien waiver/release form as an exhibit?
 - Negotiate now!
- Does it require you to give the same form to the owner that you get from the subs?
 - Resist!
- Does your subcontract dictate a form?
 - It should!



What if the Sub Won't Give a Line in the Sand Waiver?



Fall Back Position



Specific List of Reserved Claims

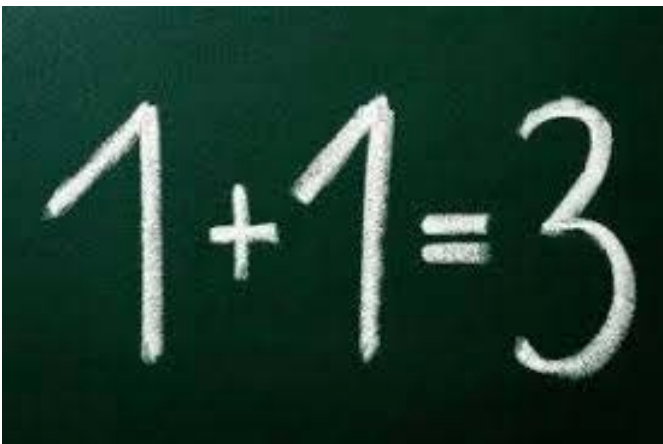
- Waiving and releasing “all claims except those listed on Exhibit A to this waiver/release...”
- Advantage – reasonable position
 - Not holding hostage money due for a complete waiver.
- Burden on waiving party to make sure it is disciplined in creating the list.
- Forces issues to be identified and promotes resolution and limits scope of disputes.

Lien Waiver & Release





- Sub marking up your form with “*” or reservation of rights language.
- Form not filled out completely or correctly.
 - All the numbers and info should be correct.
- Not signed or notarized.



Call in Reinforcements!

IN-HOUSE!



Change Order Management





Change Orders are
NOT fine wine! They
don't get better with
age.

Don't let them Fester!



Avoid the Change Order Rock Pile



Resolve Change Order Issues Early

- Typical sub lawsuits involve many disputed change orders.
- Most, individually, not worth a legal battle.
- Collection of many small disputes is very costly to fight.
- Push hard for resolution, even if not a perfect solution.
- The compromise of resolution is often less costly than the fight.

Resolve Change Order Issues Early

- A pile of change order disputes gives the subcontractor ammunition to claim ***you*** breached by not paying, and frustrated their ability to perform, excusing their breaches.





If you CAN Resolve a Change Order Claim

- Get the full benefit of change order closure!
- Ensure the resolution is **fully** documented.
 - With complete explanation and details of the scope resolved.
 - Resolve **all** cost implications.
 - Expressly address **all** schedule impacts.
 - Expressly address **all** impacts and inefficiencies.

Change Order Waivers

- Get a ***COMPLETE*** waiver
- ***All*** Direct Costs
- ***All*** General Conditions
- ***All*** Time Adjustments
- ***All*** Impacts to productivity and efficiency

CASE CLOSED



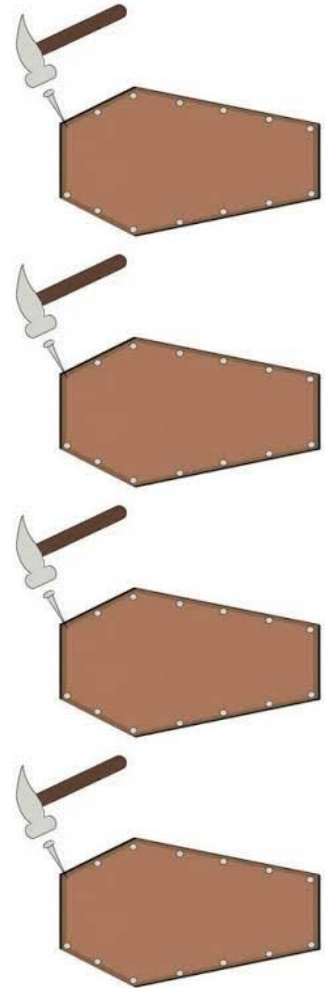
If You CANNOT Resolve a Sub's Change Order Claim

Take the Credibility High Ground!

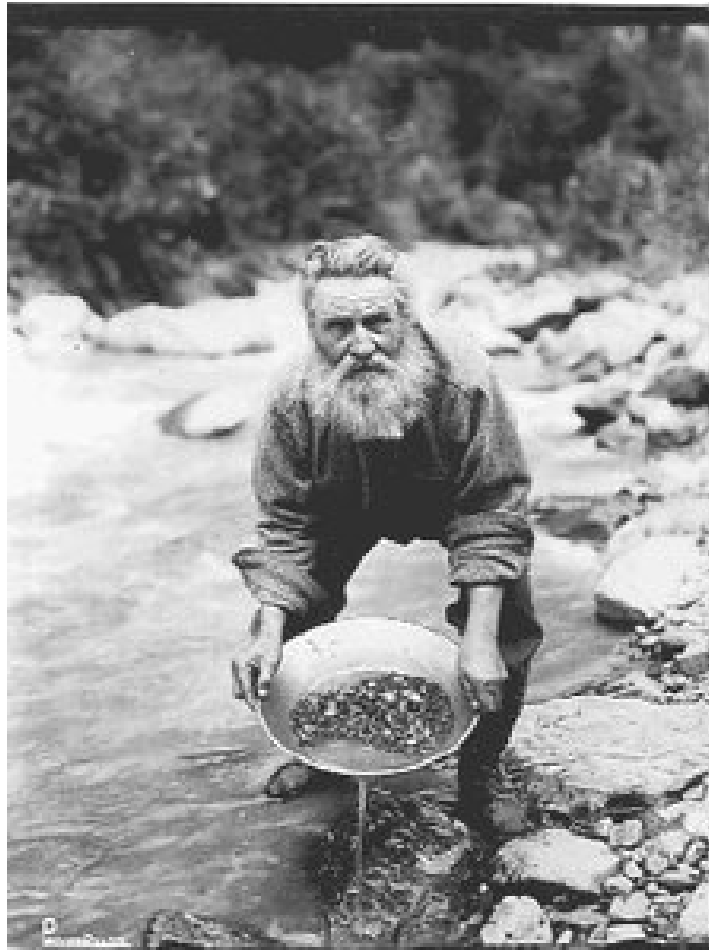


If You CANNOT Resolve a Sub's Change Order Claim

- Send the sub a well-documented, real time, record of your rejection, with a ***complete*** package of support for your position:
 - Documents and a ***narrative*** demonstrating the work was in-scope, for example.
 - References to contractual bars to entitlement.
 - Challenges to sub's support (or lack thereof).



Subcontractor Claim Triage



What to do with a Sub's Claim?

- Ignore it?
- Reject it out of hand?
- Study it – and document to the sub that you are.
- Pass it to the Owner – *neutrally*.
- Influence its presentation.
- Call in reinforcements!



Call in Reinforcements!



Subcontractor Default

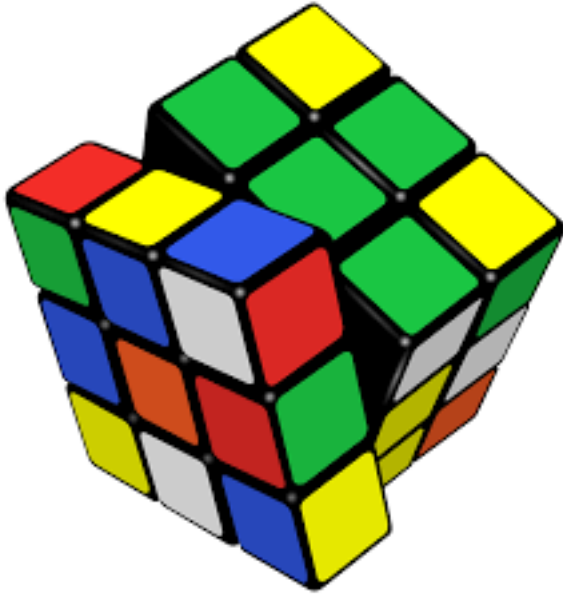


Strategic Consideration #1

**"HOPE IS NOT A
STRATEGY."**

USAF Special Ops pilot

Defaulting/Terminating is Complicated & High Stakes!



The Risks

- If you don't do it right
(*procedurally & substantively*)
 - ***YOU** are in breach!*
 - *You don't collect damages*
 - *You pay damages to the subcontractor!*



Start the Process Early!



Follow Procedure!

- Failure to follow subcontract procedures means ***YOU (probably) BREACHED THE CONTRACT!***
- Notices
- Time periods
- Opportunities to cure (even if you think impossible)
- Method of delivery

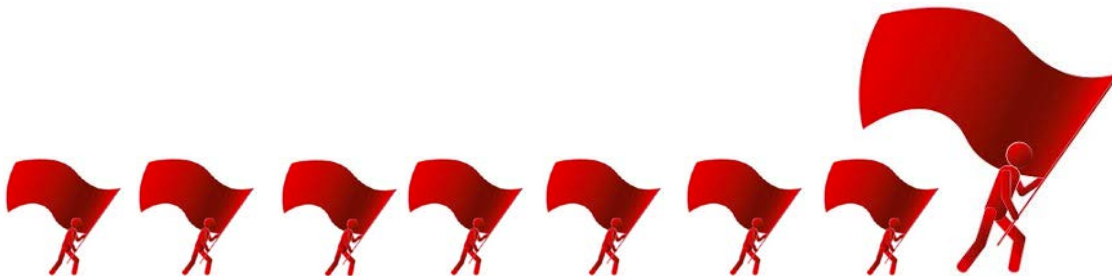


You Better See it Coming!



Subcontractor Default Red Flags

- Not performing
- Not showing up for meetings
- Lack of communication
- Not ordering long-lead items (check on them!)
- Materials not showing up on schedule
- Going on the offense – claims/change orders
- Calls for money from lower tiers
- Lower tier liens threatened or filed

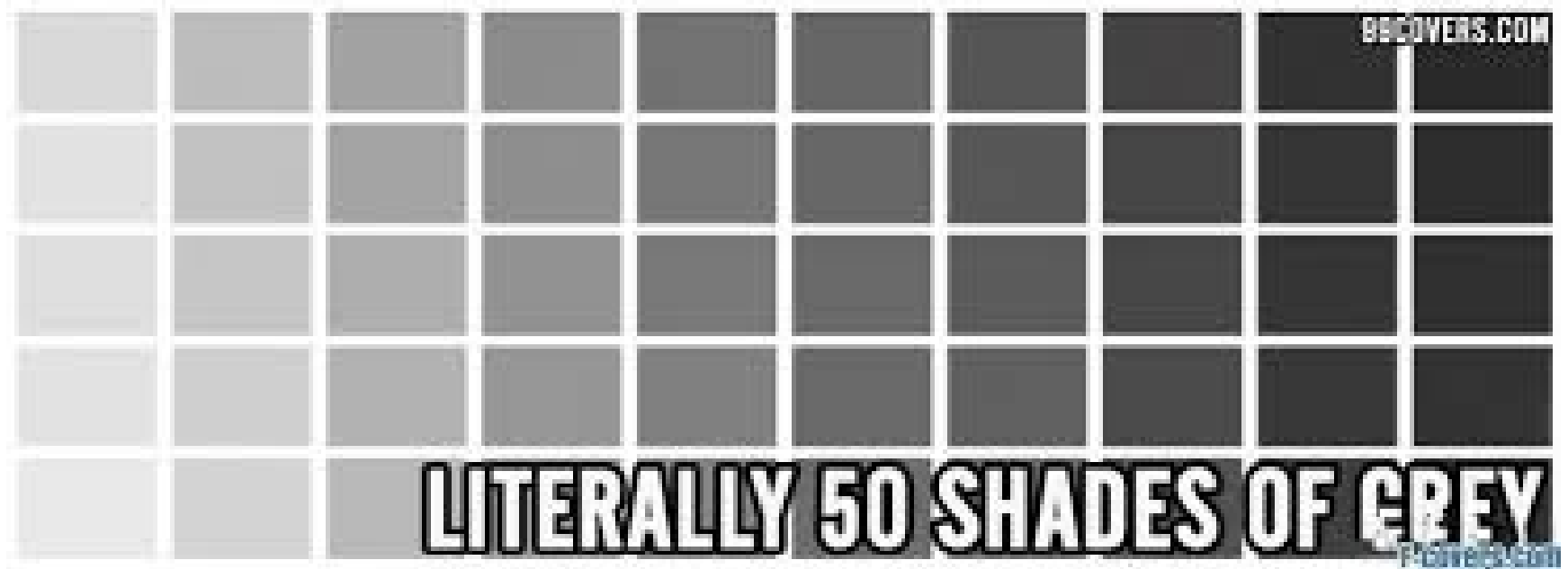


If you see the red flags

- Act swiftly!
- These are opportunities



Gray to Black and White Strategy



Subjective v. Objective

Bases For Default

Subjective

(Bad – Easy to argue about)

- Opinions:
 - “I think,” “I believe,” “I know”
- Predictions:
 - What may (or may not) happen in the future
- Value judgments:
 - Is there “enough” of something

Objective

(Good – Hard to Argue About)

- Historical facts:
 - Sub *didn't* bond off lien.
- Did something already happen or fail to happen?
 - Sub already missed an established deadline.
- Comparative checklist:
 - Sub agreed (in writing) to have 9, but only had 3 workers, *yesterday*.

It cannot be rushed.

- Need to analyze the facts.
- Need to identify objective bases.
- Need to develop and implement strategies to make subjective objective.

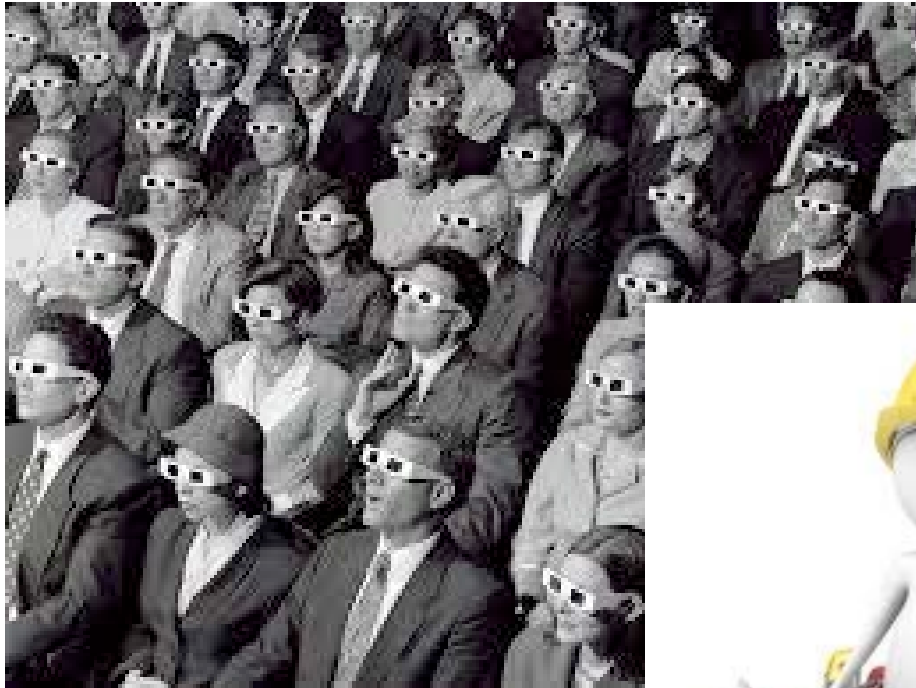


Some Possible Approaches

- Get sub to agree (in writing) to fixed levels of manpower.
- Get sub to agree to fixed milestones.
- If sub asks for advance funding – get a quid pro quo – admission of default.
- If sub does not resolve lower tier liens – often objective default.
- Document
- Document
- Document
- Explain the prejudice

Making a Record





Call in Reinforcements!



Document Your Damages!



Have a Strategy!



What You Need to Prove

- What costs you incurred because of default
- How you incurred those costs
- That the costs were reasonably incurred

Separate & Document



If you didn't
document
you didn't
do it.

As Many Buckets as Possible

- Not just one new cost code
 - Different costs will face different challenges
 - Tracking costs discretely provides flexibility when trying to tie costs to liability



Document Effectively

- Credibility comparison:
 - real time v. after the fact
- Create short narratives
- Take many *effective* photos
 - Not just a few examples
- Take video
- Think about the audience



Prove Reasonableness

- If possible, competitively bid completion work
- Buy completion apples-to-apples
 - No extra or different work scope
 - If you can't – document and carve it out
 - Don't over-reach – giving things up creates credibility
- If not taking low-bidder, make a record as to why
- Schedule related costs require special attention

P R E N O T I C E

Key Takeaways

- Ask for help – early and often.
- No one-size-fits all answers.
- Awareness is critical for early action.
- Properly defaulting/termination is like building a project:
 - Requires expertise
 - Requires a strategy
 - Requires diligent implementation
- Call in the reinforcements!

That's all Folks!