• 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
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
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

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Peckar & Abramson, P.C.
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
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

strategy
(strāt' ə-jē ) n.
1. Plan of action designed to achieve a particular goal.
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!

- [ ] Next
- [ ] Tomorrow
- [ ] Later
- [x] NOW
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

LITERALLY 50 SHADES OF GREY
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
PREJUDICENOTICE
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!