

ASA's

THE CONTRACTOR'S




Compass

THE OFFICIAL EDUCATIONAL JOURNAL OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

WWW.ASAONLINE.COM

APRIL/MAY 2019

Spring Update

 **ASA Advocates for Subcontractors in the Courts Through Its Subcontractors Legal Defense Fund**
by Courtney Little, President, ACE Glass Construction, and 2018-19 President, American Subcontractors Association

 **Construction Companies May Use a Different Method to Lessen Truck Order Backlog In 2019**
by Brian Holland, FleetAdvantage

 **2019 – The Year of Talent**
by Gregg Schoppman, Principal, FMI Corporation

 **Construction Field Management**
by Brittany Olssen, Raken, Inc.



American Subcontractors Association

1004 Duke St. · Alexandria, VA 22314 · www.asaonline.com

(703) 684-3450 · communications@asa-hq.com

SEE IF WE FIT.

We are committed to your success,
not just a sale.

JOB COSTING

PROJECT MANAGEMENT

MOBILE



FRED & THE ODE FAMILY
3 generations | 33 years | 5,000+ clients

FOUNDATION software

AMERICA'S #1 CONSTRUCTION ACCOUNTING SOFTWARE®

www.foundationsoft.com/asa (800) 246-0800



THE CONTRACTOR'S *Compass*

FEATURES

EDITORIAL PURPOSE
The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to *The Contractor's Compass* do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

MISSION
 FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

FASA BOARD OF DIRECTORS
 Richard Wanner, President
 Courtney Little
 Richard Bright
 Anthony Brooks
 Brian Cooper
 Jack Austhof

SUBSCRIPTIONS
The Contractor's Compass is a free monthly publication for ASA members and nonmembers. For questions about subscribing, please contact communications@asa-hq.com.

ADVERTISING
 Interested in advertising? Contact Richard Bright at (703) 684-3450 or rbright@asa-hq.com or advertising@asa-hq.com.

EDITORIAL SUBMISSIONS
 Contributing authors are encouraged to submit a brief abstract of their article idea before providing a full-length feature article. Feature articles should be no longer than 1,500 words and comply with The Associated Press style guidelines. Article submissions become the property of ASA and FASA. The editor reserves the right to edit all accepted editorial submissions for length, style, clarity, spelling and punctuation. Send abstracts and submissions for *The Contractor's Compass* to communications@asa-hq.com.

ABOUT ASA
 ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@asa-hq.com, or visit the ASA Web site, www.asaonline.com.

LAYOUT
 Angela M Roe
angelamroe@gmail.com

ASA Advocates for Subcontractors in the Courts 10
Through Its Subcontractors Legal Defense Fund
by Courtney Little, President, ACE Glass Construction, and 2018-19 President, American Subcontractors Association

Construction Companies May Use a Different Method 14
to Lessen Truck Order Backlog in 2019
by Brian Holland, FleetAdvantage

2019 – The Year of Talent..... 16
by Gregg Schoppman, Principal, FMI Corporation

Construction Field Management..... 18
by Brittany Olssen, Raken, Inc.

DEPARTMENTS

ASA PRESIDENT'S LETTER 4

CONTRACTOR COMMUNITY 5

QUICK REFERENCE

ASA/FASA CALENDAR 20

COMING UP 20

ASA PRESIDENT'S LETTER



Dear ASA Members:

Spring is fully here. The flowers are in bloom, the weather is warm, and it is time to begin looking at renewing your American Subcontractors Association Membership. I hope that the benefits of being a member of ASA continue to support you and your employees. ASA exists for its members, and we are here for you.

First and foremost, I want to thank you for being a member of ASA. Without our members this vital organization would not exist, so thank you for partnering with us to support the needs of our industry. Together we will continue to work towards strengthening the subcontractor community, supporting each other as we work towards our common goals, and fighting together for the issues that affect all subcontractors.

As you all know, ASA has many key priorities that we fight for every day. We strive for improvements in every aspect of the industry, including fighting for important legislation and helping you navigate the relationship between your labor force and management. ASA resources, such as the Subcontractors Legal Defense Fund, continue to fight for cases that protect the interests of all subcontractors.

ASA is grateful to all of its members, and I'm proud to know that this organization offers stellar benefits as part of your membership to make sure your partnership with us is worthwhile. Weekly and monthly publications highlight the important work being done for our members and all subcontractors. ASA also offers a robust library of members-only resources that are free for all of our members to use. Events such as SUBExcel each Spring allow us to come together, support one another, and be a louder voice for our industry. In addition, ASA offers engaging and informative webinars and educational opportunities throughout the year that will strengthen large and small contracting companies.

ASA has been fighting for the subcontracting community for over 50 years, and we've only just begun. With the help of our members, we will continue to find new and innovative ways to strengthen and support our industry. I look forward to working with all of our members going forward, and I ask you to continue to stand alongside the American Subcontractors Association in the future.

Thank you for making ASA the organization it is today,

Courtney Little

President, American Subcontractors Association



Worker Classification Continues to Be Critical for Contractors Under the 2017 Tax Act

The 2017 Tax Act ushered in a renewed focus on the proper classification of contractors as either employees or independent contractors. Over the last several decades, worker classification has been a concern for employers who engage independent contractors, due to the risk that the IRS might seek to reclassify the contractors to employees. If such a reclassification occurred, the employer may owe significant back taxes and would typically be required to treat such workers as employees going forward. The disparity in tax treatment between contractors and employees has been further heightened by the 2017 Tax Act, which created some new tax advantages for contractors over employees. Under the new tax law, an independent contractor is permitted to claim the new 20% qualified business deduction against its earned income, while employees

are not permitted to claim the qualified business deduction against wages. Also, under the new tax law, employee business expenses are no longer deductible, yet independent contractors continue to be permitted to deduct their ordinary and necessary business expenses.

I. Worker Classification

Historically, the importance of determining whether a worker was an employee or independent contractor related to the difference in employer tax obligations. Wages of an employee are subject to withholding of income tax and FICA by the employer, and the employer has the additional obligation to pay the “employer portion” of the FICA and FUTA on the wages. Conversely, there is no employer withholding on the earnings of an independent contractor, nor is the company

responsible for any FICA or FUTA with respect to the contractor’s compensation. Companies often view the independent contractor status for workers more favorably because of the tax savings as well as the avoidance of employee benefits. In certain industries, contractor status for workers is viewed as necessary by companies, since competitors are treating workers as contractors resulting in lower cost structures for a workforce and potentially a competitive advantage.

Conversely, the IRS has long disfavored contractor status because of the absence of income tax and employee FICA withholding on a contractor’s compensation, which, not surprisingly, has resulted in a higher amount of tax noncompliance among contractors compared to employees. For this reason, the IRS routinely conducts employment tax

audits and examines whether workers who are classified as contractors should be reclassified as employees under applicable law. Regardless of how the company classifies its workers or classes of workers, whether as independent contractors, subcontractors, or otherwise, if the worker is more properly classified as an employee, the IRS may reclassify the worker as an employee.

Under applicable Treasury Department regulations, the relationship of employer and employee exists when the employer has the right to control and direct the worker, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. The Treasury regulations also highlight the following criteria as relevant: (i) whether the employer has the right to control the manner in which the worker performs the job; (ii) whether the employer has the right to discharge the worker (if so, this is an important factor indicating that the worker is an employee); and (iii) whether the employer furnishes tools and a place to work to perform the services. The Treasury regulations, however, do acknowledge that if an employer's right to control is limited to the result to be accomplished by the worker and not as to the means and methods for accomplishing the result, he is not an employee. *Accordingly whether the company has control over the manner and method of performance is generally the ultimate question in determining worker status.*

In order to better examine whether this control test is met, in 1987 the IRS issued further guidance that sets forth a list of the following twenty factors to be examined:

- (1) instructions to worker;
- (2) training;
- (3) integration into business operations
- (4) requirement that services be rendered personally;

- (5) hiring, supervising, and paying assistants;
- (6) continuity of the relationship (permanency);
- (7) setting the hours of work;
- (8) requirement of full-time work;
- (9) working on employer premises;
- (10) setting the order or sequence of work;
- (11) requiring oral or written reports;
- (12) paying worker by the hour, week, or month;
- (13) payment of worker's business and/or traveling expenses;
- (14) furnishing worker's tools and materials;
- (15) significant investment by worker;
- (16) realization of profit or loss by worker;
- (17) working for more than one business at a time;
- (18) availability of worker's services to the general public;
- (19) firm's right to discharge worker; and
- (20) worker's right to terminate relationship.

The IRS also directs that each of the twenty factors fall into three broad categories: behavioral control, financial control, and the relationship of the parties. The less control the employer exerts with respect to each of these three categories, the more the worker is to be considered an independent contractor rather than an employee.

Behavioral Control. Factors demonstrating behavioral control include instructions and training. Specifically, if the employer requires the worker to work full-time, or regulates the hours, location or sequence of work, this supports the characterization of the worker as an employee. Additionally, if the employer requires that the worker perform the services personally, controls the hiring and payment of assistants, and requires the worker to deliver oral or written reports

on the work, this also supports the characterization of the worker as an employee.

Financial Control. Factors demonstrating financial control include how the worker's compensation and business expenses are paid, and the provision of materials and tools to the worker. The IRS will also consider whether the worker has made a significant investment in materials and tools, and whether the worker has the opportunity to realize profits or losses, each of which factors support the characterization of the worker as an independent contractor.

Relationship of the Parties. The remaining factors demonstrate the relationship of the parties for purposes of determining whether a worker is an independent contractor or an employee. If the worker is an integral part of the operations of the business, this factor will weigh in favor of finding that the worker is an employee. However, if the worker's services are available to the public or another company, this will weigh in favor of finding that the worker is an independent contractor. The IRS will also consider the firm's right to discharge the worker and the worker's ability to terminate the relationship as evidence of whether the worker is an employee or independent contractor.

Often companies attempted to document the contractor status of a worker or classes of workers by using Independent Contractor Agreements between the company and each worker. However, as mentioned above, merely labeling a worker as a contractor does not bind the IRS, which is free to examine the particular facts of the relationship to determine whether contractor status is proper.

There have been numerous judicial decisions that have wrestled with worker classification in the construction industry, with decisions coming down on each side. An example of a judicial decision in favor

of contractor status is *Illinois Tri-Seal Products, Inc. v. U.S.*, 173 Ct. Cl. 499 (1965), that held in favor of contractor for window installers status since no control existed between a window company and its installers. There, the installers were hired on a per job basis to install windows at a customer's home. The installers set their own hours and performed the work at the customer's home without supervision by the company. The Court explained that,

All work was done away from plaintiffs' premises and plaintiffs never attempted to control or direct the manner in which the installers did the work. Plaintiffs had no foremen or supervisors to direct the installers in the manner of doing the work and other than instructions contained in the worksheets – which the installers were expected to follow so that the work would be accomplished in accordance with the specifications contained therein – plaintiffs gave no directions or instructions to the installers concerning the manner or method of accomplishing the work. The installers called the plaintiffs for suggestions when unusual problems arose but this would not seem of particular significance... 'An employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee.' (Citation omitted). *Illinois Tri-Seal* at 520.

The Court determined that "[t]he factors here in their totality establish that plaintiffs did not have the right under the arrangement to control the manner and method in which the installers performed the work. They also establish that 'plaintiffs' only concern was that the [installers] accomplish a result in conformity with the terms of the contract with the owner of the structure to which the [material] was being applied.'"

(Citation omitted). *Id.* at 522. In other words, the Court found that there is no control where the company's oversight is limited to ensuring that the contract with the customer is fulfilled.

In instances where it is difficult to establish the nature of the relationship between the parties, their own view of their relationship can be determinative. In *Illinois Tri-Seal*, the Court of Claims held that, the parties believed that they were creating a principal-independent contractor relationship and not an employer-employee relationship. The installers considered that they had their own business and that they were self-employed; they paid self-employment taxes; some had their own business cards; they carried personal and property liability insurance and were required to deposit with plaintiffs a certificate showing they had such coverage before being given any installation work. Plaintiffs did not carry any workmen's compensation policy covering installers; did not pay State unemployment insurance on the earnings of installers; and did not withhold income taxes or assume liability for unemployment taxes on installers' earnings.

The Court explained that, "in close cases, such as these, the view of their own relationship which is taken and acted upon by the parties – particularly with respect to the payment of employment taxes – is very significant." *Id.* at 502.

Subcontractors working under general contractors are commonly characterized as independent contractors due to the nature of the construction industry. In *Kurio v. U.S.*, 281 F. Supp. 252 (1968), the Court determined that subcontractors who provided painting work, hung drywall and hauled materials to and from job sites were independent contractors rather than employees of the general contractor. The Court explained that,

This is the procedure followed by Kurio: he would take the

responsibility for the final product, but delegated the actual work, in very distinct parts, to subcontractors. Kurio looked only to the end result, and was not concerned with the details or means by which the result was accomplished... Each job was of comparatively short duration, and when a job was completed, the workers were free to accept a new job with another contractor – including one who might be in competition with Kurio. Permanency of relationship did not exist. Furthermore, if plaintiff were dissatisfied with the work of one of his subcontractors, he simply did not offer him another job. This is not the equivalent of the right to hire or fire, but merely is evidence of the right not to enter into a contract. (Citation omitted). *Kurio* at 261.

The Court in *Kurio* concluded that, "there is no support whatever either in fact or law for the position taken by the Government that the drywall workers, haulers or painters were Kurio's employees." *Id.* at 262. (See also Private Letter Ruling 9413001 (1993) (holding that "rig" welders hired as subcontractors by a general contractor are independent contractors); *Tristate Developers, Inc. v. U.S.*, 212 Ct. Cl. 486 (1977) (holding that roofing and siding applicators hired by a home remodeling company are independent contractors); and *Rayhill v. U.S.*, 176 Ct. Cl. 112 (1966) (holding that roofing and siding applicators hired by a home improvement company are independent contractors). See also, Private Letter Ruling 8821022 (1988) (following the reasoning in the *Kurio* decision, the IRS determined that subcontractors engaged by a painting contractor were independent contractors).

II. Qualified Business Deduction

Effective January 1, 2017 through December 31, 2025, the maximum federal income tax rate

for individuals was lowered to 37%. The 2017 Tax Act also provides for the new qualified business income deduction (QBID), which generally entitles the business owner to a deduction equal to 20% of the net business income. There are limitations on the allowance of the QBID (for example, there may be limitations if certain wages or investment in asset thresholds are not met). Assuming the QBID applies, the maximum effective federal income tax rate on business flow-through income to the owner is approximately 30% [37% - (37% x 20%)]. Sole proprietorships, and owners of partnerships and S corporations are entitled to claim the QBID against their business income. Contractors engaged in the construction industry should be entitled to claim the QBID, subject to its limitations.

Conversely, employees are not permitted to claim the QBID against wages. Again, the Treasury regulations expressly provide that merely labeling a worker a “contractor” has no bearing on whether the worker is more properly treated as an employee. Accordingly, the worker classification issues discussed above is equally applicable to whether a contractor can claim a QBID. In other words, if the contractor is reclassified as an employee, the worker would not be entitled to the QBID.

Where a contractor is organized as an S corporation, there may be significant limitations on the tax benefit arising from QBID due to the general requirement that the owner of the S corporation be paid “reasonable compensation” as an employee of the S corporation to the extent of the value of the services furnished by the owner to the corporation. In cases where the owner is the sole employee of the S corporation, most, if not all of the gross receipts of the S corporation may be attributable to

the services rendered by the owner. In which case, it is arguable that all of the net income arising from the S corporation should be paid as wages to the owner-employee. In this case, the QBID would have little value to the S corporation owner.

On the other hand, a contractor that is organized as an LLC that does not make an S election would be treated as a sole proprietorship if it is owned by one person, or a partnership if it is owned by two or more owners. In either case the owner(s) would more likely be entitled to the full tax benefit of the QBID since owners are generally not permitted to be paid wages as employees from a sole proprietorship or a partnership. As a result, the owner’s entire cash flow from the business should be treated as net income (and not wages) and eligible for the QBID. For this reason, a contractor that is organized as an S corporation may want to consider reorganizing as an LLC that does not make an S election.

For existing employees who want to take advantage of the QBID by converting to independent contractor status the Treasury regulations have imposed a significant impediment. If the contractor simply continues to provide substantially the same services to the employer, or an affiliate of the employer, the Treasury regulations provide that the worker will be presumed to provide such service as an employee for the next three years. However, if the conversion to contractor status is accompanied by a substantial change in the employer’s control over the manner in which such services are performed (thereby justifying contractor status), contractor status may be permitted immediately (without a three year waiting period).

III. Employee Business Expenses

Unreimbursed employee expenses are no longer deductible on schedule

A as a miscellaneous deduction for tax years 2018 through 2025. The limitation on the deductibility of unreimbursed business expenses does not apply to sole proprietors or partners in a partnership, such as a contractor that is organized as an LLC that is not taxed as an S corporation. Accordingly, for contractors who are engaged by a company as employees and who incur unreimbursed expenses, such as travel, the purchase of tools, work clothing and other costs, they would not be able to deduct such unreimbursed expenses against their wages. On the other hand, if the contractor is not an employee, those same expenses would presumably be deductible to the extent that they are reasonably related to the contractor’s business of performing services.

IV. Conclusion

Both companies and contractors may want to re-examine their current relationship to determine whether the current worker status is proper under applicable law or whether there is significant risk of IRS audit and tax exposure due to a misclassification. Contractors that are currently employees may want to consider whether they can convert to contractor status through the use of an LLC to perform services, and whether contractor status is supported under current applicable law. Redefining the relationship through consideration of the 20 factor test set forth by the IRS and documenting the rights and obligations of the parties through an Independent Contract Agreement make go a long way to supporting independent contractor status. For independent contractors that are performing services through an S corporation, the owner may want to reconsider the use of an LLC that does not make an S election in light of the exclusion of wages from the QBID.

LABOR PRODUCTIVITY FOR SUBCONTRACTORS

Empowering your mobile workforce with tools to make their job easier.



FINALLY, POINT SOLUTIONS HAVE A HOME

TIME | DAILIES | DRAWINGS | CORs | SUBMITTALS
RFIs | JOB COSTING | EMAILS | AND MORE



www.eSUB.com



ASA Advocates for Subcontractors in the Courts Through Its Subcontractors Legal Defense Fund

by Courtney Little, President, ACE Glass Construction, and
2018-19 President, American Subcontractors Association

It is well known that the American Subcontractors Association represents commercial construction subcontractors, specialty trade contractors, and suppliers before the executive and legislative branches of federal government. It is equally important to know that ASA represents them in the judicial branch as well. ASA was particularly busy this year, hard at work in the courts making sure that the interests of subcontractors were represented. These cases are likely to set legal precedent on issues important to our members and all subcontractors.

Most recently, ASA asked the Supreme Court of Texas to reconsider its underlying decision in an important case about employers with employees whose normal duties do not include transportation to and from the workplace. ASA's legal work was financed by its Subcontractors Legal Defense Fund, which is funded through voluntary contributions by ASA members and is the only advocacy effort in the courts by a national subcontractor association.

In the Texas case, ASA submitted an amicus, or friend-of-the-court, brief in support of respondent Amerimex's motion for rehearing in the case of *Steven Painter; Tonya Wright, Individually and as Representative of the Estate of Earl A. Wright, III, Deceased; Virginia Weaver, Individually and as Next Friend of A.A.C., a Minor; and Tabitha R. Rosello, Individually and as Representative of the Estate of Albert Carillo, Deceased, (Petitioners) v. Amerimex Drilling I, Ltd., (Respondent)*.

In the underlying case, Steven Painter, J.C. Burchett, Earl Wright,



and Albert Carillo were working the night shift for Amerimex Drilling, drilling a well for Sandridge Energy on an oil and gas drilling rig in Pecos County. The prime contract between Sandridge and Amerimex provided that Amerimex was to perform the drilling and provide the drilling crews. Due to some Sandridge restrictions, the bunkhouse for the Amerimex crew was not as close as they normally would have been, located about 30 miles from the remote drilling site. The prime contract provided that the driller for each crew would receive \$50 per day for transporting the crew between the bunkhouse and the drilling site. On July 28, 2007, after the Amerimex

crew's shift ended, Burchett, the driller, was driving the crew back to the bunkhouse when he fell asleep behind the wheel. The truck carrying the crew rolled over and ejected all four members, injuring Painter and Burchett and killing Wright and Carillo.

Burchett received workers' compensation for his injuries after the Texas Department of Insurance determined that his injuries were covered because Burchett, "was paid to transport his crew to and from the worksite and the company bunkhouse." The trial court granted Amerimex's motion for summary judgment, dismissing the claims because "Amerimex is not

vicariously liable for the negligence of JC Burchett.” The Eighth Court of Appeals, El Paso, Texas, denied the appeal.

However, in an April 13, 2018 opinion, the Texas Supreme Court reversed and remanded the case to the trial court, relying on workers’ compensation precedent holding that where an employee transports others to and from the place of employment, as either part of the contract of employment or for payment by the employer, the work is within the scope of employment for purposes of the coverage and protections of the workers’ compensation statute. Citing that case law, the Texas high court reversed and remanded the lower courts for a determination whether Burchett was acting in the course and scope of his employment at the time of the accident.

In the brief, ASA explained that Amerimex is not vicariously liable for the actions of Burchett because even if Burchett was considered to be an employee at the time of the accident, he was outside the course and scope of employment. “An employer will only be held vicariously liable for the actions of its worker if: (1) the worker was an employee; and (2) was acting in the course and scope of employment. Neither requirement is satisfied in this case. If a worker is determined to be an employee, the question is whether the employee was within the course and scope of his employment. Even if Burchett was an employee at the time of the accident, he was not within the course and scope of his employment when driving crew back to the bunkhouse. This Court has stated ‘vicarious liability arises only if the tortious act falls ‘within the scope of employee’s general authority in furtherance of the employer’s business and for the accomplishment of the object for which the employee was hired.’ Traveling to and from work, even though arguably for the employer’s benefit, has been consistently held to be outside the

course and scope of employment.”

ASA adds that travel reimbursement does not create an exception to the “coming and going” rule. “The contractual \$50 per day Driver’s Bonus paid to the driller of each crew was a travel reimbursement,” ASA wrote. “Travel reimbursements create no exception to the ‘coming and going’ rule, which states travel to and from a job location is not within the course and scope of employment. The Driver’s Bonus was to reimburse workers for the costs associated with a remote drill site, similar to the \$50 per day Subsistence Bonus that compensated crew for daily expenses and the \$50 per day Bottom Hole Bonus available to crew who remained employed from the well’s spud date through its completion.”

“The lower courts,” ASA continues, “correctly applied the principle from *Pilgrim [Pilgrim v. Fortune Drilling Co., Inc., 653 F.2d 982, 987 (5th Cir. 1981)]* that an employer compensating travel does not create an exception to the coming and going rule. Similar to *Pilgrim*, Amerimex exercised no control and had no right of control over Burchett once he completed his shift. The remote location of the drill site does not affect the coming and going rule, and in fact lends support to the argument that Amerimex is simply trying to reimburse crew members for their added personal costs due to the remote well location. The Court made an unnecessary and incorrect distinction between: (i) a contract requiring Amerimex to hire drivers to provide transportation, and Amerimex deciding to offer that extra work to Burchett; and (ii) the actual contract contemplating that Amerimex would assign the driving task to specific individuals, the drillers.”

This case is a good reminder why ASA, in 1997, established its Subcontractors Legal Defense Fund, and, later, the Foundation of ASA

established its Legal Research Fund. Both funds finance ASA’s friend-of-the-court briefs in courts around the country.

Let me be clear: These funds do not pay the legal bills of individual subcontractors. Instead, they allow ASA to file briefs to advise federal and state courts that may be dealing with a factual situation or a legal issue impacting subcontractors. ASA uses its briefs to inform courts about public policy considerations, practices in the construction industry, as well as how courts in other jurisdictions have addressed the issue under consideration.

ASA has filed friend-of-the-court briefs on a myriad of issues over the years, including prompt pay, pay-if-paid, retainage, damages for delays, mechanics lien and payment bond rights, bid shopping, indemnity, additional insured, coverage under CGL policies, and more. ASA recognizes that positive results in one state can benefit subcontractors in other states. ASA’s goal is to add to the decisions that can serve as useful precedents and guidance to courts and legislators addressing the same or similar issues.

If you want more information on ASA’s advocacy program in the courts, visit the ASA Web site at www.asaonline.com.

Courtney Little is president of ACE Glass Construction in Little Rock, Ark., and serves as the 2018-19 president of the American Subcontractors Association. Founded in 1966, ASA amplifies the voice of, and leads, trade contractors to improve the business environment for the construction industry and to serve as a steward for the community. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, a safe and healthy work environment, and integrity and membership diversity. For more information, visit the ASA Web site at www.asaonline.com.



DEFENDING OUR FUTURE

SUBCONTRACTORS LEGAL DEFENSE FUND

ASA's SLDF supports critical legal activities in precedent-setting cases to protect the interests of all subcontractors.

**FIGHTING FOR THE RIGHTS OF THE
CONSTRUCTION SUBCONTRACTOR
COMMUNITY NATIONWIDE**

ASA underwrites the legal costs of filing "friend-of-the-court" briefs to inform the Court regarding the broader impact of relevant cases throughout the country. We have won dozens of these cases since 1997, vindicating subcontractor rights today and into the future!

WE NEED YOUR SUPPORT

Funding YOUR Legal Defense

Each year, courts across the country hand down hundreds of decisions on federal and state laws, as well as court-made or "case" law, that apply to subcontractors' businesses. Many of the decisions impacting subcontractors interpret the contract provisions of subcontract agreements—provisions like pay-if-paid, hold-harmless, duty-to-defend, and no-damages-for-delay. Some of these decisions are precedent-setting and carry significance for subcontractors across state lines.

ASA's Subcontractors Legal Defense Fund supports ASA's critical legal activities in precedent-setting cases to protect the interests of all subcontractors. ASA taps the SLDF to fund amicus curiae, or "friend-of-the-court," briefs in appellate-level cases that would have a significant impact on subcontractor rights.

From its inception, the SLDF has been involved in many landmark decisions, starting with its first case in 1997, Wm. R. Clarke Corporation v. Safeco Ins., which prohibited pay-if-paid clauses in California.

**Your financial support keeps the
SLDF in operation -
PLEASE DONATE TODAY**

To make a contribution to this vital fund, visit <http://www.sldf.net> or send an email to soscar@asa-hq.com for more information!

American Subcontractors Association
1004 Duke Street | Alexandria, VA 22314
703.684.3450



FEATURE

Construction Companies May Use a Different Method to Lessen Truck Order Backlog in 2019

by Brian Holland, FleetAdvantage

Truck procurement has been the foremost challenge for private fleets, for-hire carriers and organizations that rely on trucking across many industries, including manufacturing, energy, retail and construction. This challenge has been heavily emphasized by the backlog of orders for Class-8 heavy-duty trucks, largely stemming from an American economy that has been

healthy and robust ever since the Great Recession ended in 2010, and an outdated industry philosophy toward truck procurement which is finally changing.

Class-8 truck orders and sales continued at a healthy pace through the majority of 2018, as many companies saw the need to upgrade into newer equipment or add to their equipment to handle

the extra demand in shipping goods via the nation's economic activity. According to ACT Research, Class-8 net orders made 506,300 units at the end of November 2018, the second-strongest 12-month order period in history, trailing only the 12-month period ending October 2018.

Monthly orders (28,082) still outpace the number of units being manufactured (27,973) as of



November 2018, and while this gap is narrowing it continues to show extraordinary demand for new trucks.

Oil, gas, and construction brands will especially continue to feel the results of an order backlog in 2019, if they continue their asset procurement strategy based on functional obsolescence as opposed to economic obsolescence. Firms that reduce their asset management lifecycles based on a flexible lease model will be able to plan their substitutes better and thus avoid the discomfort associated with the current backlog.

The vibrant economy means that more firms are shipping materials to job sites or commodities across the country; more businesses are in need of re-stocking shelves and inventory; more consumers are in need of goods ordered online and thus the transport of those shipments; and as a result, trucks are working overtime.

Trucks and transportation have been the essence of this economic engine.

Replacement and truck procurement strategies that help the economy stay active need to be cautiously deliberated as we get further into 2019 when companies take a closer look at their bottom line.

The long-standing business philosophy was for companies to make purchase orders of trucks en masse, while driving them for anywhere between five and ten years of service, or even longer, as a way to squeeze every penny out of the truck's usage. However, data and analytics are proving this model to be pricey and highly unproductive. Instead, private fleets and for-hire carriers are gathering that they can achieve more savings on the truck's overall impact to the bottom line, as well as maintenance

& repair (M&R) - the top variable and volatile cost of a fleet operation by moving to a shorter lifecycle.

When construction businesses drive their trucks as long as they can, they operate on functional obsolescence - making choices based on the truck's capability to stay on the road. In most cases, when companies let the truck dictate the schedule for replacement, they are left struggling to order a new truck based off limited planning cycles. Today's backlog of truck orders is a result of this, as the multiplier effect of many transportation firms and this philosophy have caught up to them.

Instead, today's leading companies are taking a new approach.

Organizations are now paying closer attention to a truck's individual TIPPINGPOINT®, the point at which it costs more to operate a truck than it does to replace it with a new one. Features such as the cost of fuel, utilization, finance costs, and M&R, are all factored into arriving at each truck's unique TIPPINGPOINT®, giving fleet operations staff and finance departments a closer look based on data and analytics into controlling and even predicting the best time to replace an aging truck.

For example, a recent analysis of long-term ownership compared to shorter lifecycle management demonstrates a significant cost savings over time. A fleet that opted for a four-year lease model on a truck would save around \$27,893 per truck in comparison to a seven-year ownership model because of the aforementioned factors such as fuel, utilization, financing, and M&R. The shorter lease model is also cost-effective when compared to just a four-year ownership model, showing average savings of \$12,710.

This approach offers flexibility to acclimate to changing markets, decreasing operational costs while maintaining a positive corporate image, driver recruitment and preservation efforts by constantly upgrading to newer trucks. Corporations are leveraging data analytics and wide-ranging fleet studies that produce a fleet modernization and utilization plan, projecting when aging equipment will need to be replaced. This is especially efficient with today's changing demand and the current booming economy as businesses trying to acquire equipment merely based on demand are faced with equipment shortages and long lead times.

Recent changes to the corporate tax rate, as well as new accounting ideals, have made it more appealing to lease equipment. With these changes, at least in the case of truck attainment, purchase of equipment remains higher compared with shorter-term leasing of the equipment. What's more, leasing remains the favored method for companies regardless if they have a stronger or weaker balance sheet. In addition, leasing also allows companies to avoid the risk of residual value and the expense of remarketing.

By implementing this new outlook of shorter truck lifecycles, industry organizations and transportation companies will become better equipped at substituting their aging truck fleets in a more cost-efficient manner as we get further into 2019.

Brian Holland is President and Chief Financial Officer at Fleet Advantage, a leading innovator in truck fleet business analytics, equipment financing and lifecycle cost management. For more information visit www.FleetAdvantage.com.



2019 – The Year of Talent A Reflection on the Major Trends Affecting the Construction Industry for 2019 and Beyond

by Gregg Schoppman, Principal, FMI Corporation



With a certain level of redundancy, the industry is still pondering the labor issues that continually wreak havoc on construction projects across the nation. In the face of amazing opportunity, the universal “governor’s switch” for the growth engine remains the war for talent. Talent at all levels seems to be the common denominator. The words “We can’t seem to find good people” remain an ever-present lamentation. However, this phrase is not new and continues to rear its ugly head, dating back to the 1980’s. Yes, the 1980’s. Scroll through various press releases and thought leadership over the last 40 years and the commonality of construction labor shortages seem to dominate the headlines. So, is it time to cut the charade and realize that this is an inevitable aspect of a challenging industry or proactively manage component of the business?

The “Year of Talent” appears to be an appropriate rallying cry for 2019. In addition to its impact on a firm’s long-term ability to execute work, no one is getting any younger. Businesses are continually wrestling with succession depth for owners and simply business leaders in all facets of the organization. Best of class firms have managed to use this industry challenge as an opportunity to develop a strong competitive yet collaborative culture that accomplishes many things – soft/hard skill enhancement, business management education, improved communications (internal and external), morale improvement and ultimately leadership growth.

Talent is but one trend that is the focus for 2019. While there is always a pall of a potential economic slowdown or market correction, businesses remain focused on developing a fact-based strategy to drive success. The

key theme is not simply riding the wave of the market highs but in fact driving the wave and being in control of any uncertainly the market will bring.

The Year of Talent

This is not simply about training and education but a full comprehensive program that examines the full complement of “people focused” strategies. These include the following:

- The Brand – What does an employee driven market think about your firm? Why would they choose you in a sea of great organizations?
- Recruiting – Where are you “fishing”? There is no “secret location” but how and where firms fish for talent has to be deliberate, consistent and disciplined.
- Hiring – How many levels does your hiring process have? How do you evaluate a candidate? What screening tools are available for ALL positions within your firm?
- On-Boarding – What does the first day, week, month, year look like? Is there structure and discipline to how new associates are brought on board?
- Training and Education – How are new associates trained? What about mid- and senior-leaders – is their training and education stunted?
- Performance Compensation – How do you reward star talent? How do you retain star talent long-term?

The knee jerk reaction for many is that these elements are not easy nor are they done on nights and weekends. More firms are evolving to a leadership position that is dedicated to full time talent growth

and development. While there is a cost impact, the cost of doing nothing to cultivate and grow associates may be far greater.

Innovation

It seems silly to mention the role of technology as being a critical trend. Every year, technological improvements move at an exponential rate in terms of innovation and growth. The best question to ponder is how your firm is keeping in lockstep with these changes. There is a fine line between fascination with technology (the bright shiny object) and true innovation (leveraging technology to enhance all aspects of performance). Whether it be the continued push towards prefabrication and modularization, enhancements in autonomous vehicles and equipment, utilization of lean/agile/six sigma principles and systems or simply using the storehouse of data firms sit on to proactively drive business decisions, technology needs to become an action point within every firm's business plan.

Risk Management

As projects get larger or more complicated or timeline compressed or some combination of all of these, there needs to be a refocused commitment to firmwide risk management. With the rise of tools that serve as "profit centers for risk", such as captive insurance programs and trade partner default vehicles, contractors will be required to comprehensively think of risk. Coupled with increased life safety requirements from customers and agencies and the ever-increasing cost of healthcare costs, risk management requires a trained professional to integrate all of these elements across business units and projects. It is not simply enough to view this as an "annual renewal" process. Rather, it will require integration into areas such as the following:

- Go/No Go Project Selectivity – True risk registers for project or client targeting

- Preconstruction Risk Planning – Balanced life safety and productivity planning
- Post Construction Reviews – Incorporation of best practices and lessons learned
- Quality Assurance and Quality Control – Limiting long-term potential sources of liability
- Employee Health and Wellness – Healthy employees correlate to lower health costs

Risk is an aspect of construction that must be measured but it is not enough to compartmentalize this within the office of the CFO or Controller. Risk management in the future requires careful, proactive installation in all corners of the firm.

Acute Infrastructure Needs

Channeling Dean Vernon Wermor from the 1978 comedy *Animal House*, "0.0." Well, it isn't quite that bad but according to the American Society of Civil Engineers, the infrastructure within the United States received a grade of D+. Anchored by D scores in the aviation, energy, schools and transit categories, the nation is grossly negligent across all the areas that serve as the backbone. While there are many questions as to the Federal, State and local responses to these needs from a budgetary perspective, it is apparent that something must be done. Consider the simple fact that Americans spend an average of 43 hours in traffic annually – what a way to spend a week vacation! What is the impact to logistical needs within the firm and employee health before you even consider the impact to the marketplace should the \$4 trillion in spending be funded? The opportunity is vast even if only a fraction of that funding comes to pass but more importantly, there remains opportunity for ancillary businesses. For instance, even if a contractor does not build in the water, wastewater, transportation, aviation, etc. sectors, it is important to consider the industries that complement them or simply the growth that will positively impact a geography.

Ramifications

There is no shortage of scenarios that may positively or negatively impact the construction industry. When leaders apply optics to these trends, they can easily provide roadblocks to growth or engines fueling opportunities. Whether the economy wanes or continues to thrive, the critical questions to ask are as follows:

- If our best customer went away, what would our business do?
- If our niche or sector(s) went away, what would our business do?
- If our best people left the organization, what would our business do?
- What aspects of the organization not only require the most continuous improvement but also what impact would that have on our long-term health?
- What should the leadership team in our organization do now to develop both craftspeople and management to run the business in the future?
- If we mined the data our organization has, what would it yield about the firm's current performance?
- What data should the organization use to make future business decisions?

Best of class performance should not be left to luck. The rising tide that raises all ships is wonderful when times are good but the high performers today may not be the same firms of tomorrow. Winning strategies and tactics require discipline, dedication and ultimately talent to make 2019 just the beginning of a dynasty.

As a principal with FMI, Gregg specializes in the areas of productivity and project management. He leads FMI's project management consulting practice. He also heads the consulting management group of FMI's Florida office. Visit website at fminet.com.



FEATURE

Construction Field Management

by Brittany Olssen, Raken, Inc.

Exceptional construction field management for subcontractors requires leadership skill and know-how to get the job done right. If you are just starting out in the field or have years of experience under your belt, our quick guide has all the answers you need on how you can be successful in construction field management.

What is Construction Field Management?

To put it simply, construction field management is the art of managing and reacting to all the moving parts of a construction project, including workforce,

resources and corresponding tasks. Field management in construction should streamline updates from the field to the office. And this is where subcontractors come in—as the basis of the project in the field, good communication begins with the subcontractor. Updates and information originate with them, then flow upstream to the superintendent, project manager and executive, allowing all parties to be in the loop. In other words, effective construction field management is based on communication of updated progress of each individual's tasks starting with the subcontractor.

The Functions of Construction Field Management

Construction field management at large is summarized in these main points:

- Identification and strategy of carrying out project goals
- Management through the entire process of contracting planning, estimating, procurement, design and construction
- Designation of resources, workforce and equipment
- Enabling communication across all agents; more specifically, workflow framework, task management, and conflict resolution



The Project Manager / Foreman Relationship in Construction Field Management

Construction project managers are in charge of overseeing the construction project from beginning to end. Essentially, they are the main individual supervising field management at the jobsite. From the beginning, a construction project manager will oversee budgeting and cost estimates to ultimately formulate the most efficient construction strategy. He or she is also responsible for scheduling timetables for all field workers, subcontractors, superintendents, and any other relevant groups. On a larger scale, the project manager will supervise the jobsite's workforce as a whole. Finally, this individual will coordinate and manage all relationships with the necessary external parties, as well as relay the pertinent information and updates to the executives of the project. This job requires competency in management ability as well as technical knowledge within construction. Since the project manager has such a large range of responsibilities, he or she relies heavily on communication from the superintendent and subcontractors about specific progress on the jobsite.

It's in the communicating clearly and effectively with the PMs that foremen can do the most to improve their relationship. A good rule of thumb to follow is "when in doubt, spell it out." That just means that if you ever feel you are overcommunicating with the superintendents and PMs on your job then it's likely just the right amount. Always err on the side of overcommunicating!

The Superintendent / Foreman Relationship in Construction Field Management

But let's face it, as a foreman you will likely not be talking to the PM too much, depending on the size of the job. No, you are going

to be working primarily with the superintendent. Superintendents are the go-to individual on the jobsite. While project managers are essentially part of the administrative staff, superintendents are much more in touch with the day-to-day happenings onsite and are more closely involved with the construction crew. The superintendent is responsible for coordinating the subcontractors chosen for the project, as well as the material and equipment for the job. This includes each employee's roles, responsibilities, and tasks. He or she also manages the varied workflows to ensure the project finishes on schedule and within budget. In total, the superintendent coordinates all onsite activities on a daily basis and communicates these updates to the project manager.

When it comes to improving your relationship with a superintendent, the best advice we can give is to not make them chase you down for your daily reports and time cards. A daily reporting app can save the superintendents time and save you a headache by making submitting your dailies a one-step process.

How to Improve Your Construction Field Management

For successful construction field management, communication between the foreman and the superintendent/project manager is vital. However, this is easier said than done. While the project manager is the head of the project and ensures everything is functioning as it should, they cannot always be on the jobsite; yet they need to know about everything happening. The superintendents and foremen, on the other hand, see the most up to date progress and are in the loop with everything in the project. Enabling the superintendent/foreman to pass along these significant updates to the offsite project manager (both thoroughly and efficiently) is the key to effective construction field management.

Mobilization

Mobilizing field management is the simplest way to enable communication between all necessary parties, and construction field management solutions can do this. Raken has a task management feature, allowing the superintendent to assign, complete, and manage tasks for subcontractors all in one interface. The superintendent can then keep track of which tasks are open or closed, receive notifications of overdue or open items and follow up on tasks to monitor and report on progress.

Communication

With many different parties of interest working on one project, it is no surprise that some things could get lost in the process. Using software for construction field management minimizes these omissions. With the ease of managing and being aware of all jobsite workflows, foremen can update the superintendent on the most important aspects of what is happening, and pass that info on to the project manager. The project manager is then able to easily update the executive as needed. All problems can be addressed immediately and handled quicker as to not slow down the entire project. With the ability to assign tasks to any individual, from the executive down to the subcontractors, projects become more efficient. Essentially, these streamlined functions connect the field to office. No more faxes, loose sheets of paper, or sporadic emails and calls. Everyone's time can be used more effectively for their specific tasks and everyone stays in the loop.

Brittany Olsson is Events Marketing Manager at Raken, Inc. Raken provides innovative mobile technology to streamline field workflows for construction workers. For more information visit www.rakenapp.com

Complimentary Webinars

Tuesday, June 11, 2019

12 p.m. to 1:30 p.m. Eastern Time

A Small Business' Guide to Human Resources

Presenter: Jamie Hasty, SESCO Management Consultants

This webinar focuses on how small businesses can focus on quality and compliant human resource practices with ease. Jamie Hasty, Vice President of SESCO Management Consultants, will discuss creating screening and hiring practices to attract and retain qualified individuals, review required employment documentation to include personnel file management, identify various employee regulations to negate liability, focus on proper development and implementation of necessary HR Systems, and summarize how the employer can engage in practical HR Management through tips and various scenarios. Finally, participants will develop the ability to properly engage in performance management and termination conversations to best protect the employer.

Register online.

Tuesday, July 9, 2019

12 p.m. to 1:30 p.m. Eastern Time

Emerging Technologies—Smart Tools, UAVs, and Others—and How They Relate to the Internet of Things

Presenter: Michael McLin, Maxim Consulting Group

Savvy construction industry professionals confess that acceptance of technology is the future. A good number resist committing their time and resources while hoping to see results by using tech for sake of tech. Tech innovations are sweeping the industry to the point that even the standard issue hard hat is changing, in addition to new advances that benefit every area of the industry. In this webinar, Michael McLin, Maxim Consulting Group, will examine some of the new technologies that are driving a more connected future.

Register online.

Coming Up

**in the June 2019
Issue of ASA's**



Theme:

All Things Tech

- Leveraging Technology to Win New Business
- Mastering Material Takeoffs Using Digital Methods
- The Increasing Use of Drones in Construction and Related Legal Issues
- Converging Technology: Creating a Long-term IT Strategy That Unifies Your Company
- Legally Speaking

**Look for your
issue in June.**

**To access past issues
of The Contractor's Compass,
please [click here](#).**

**For questions about
subscribing, please contact:
communications@asa-hq.com**



2019-2020

ASAdvantage Program

AMERICAN SUBCONTRACTORS ASSOCIATION

AN AFFINITY PROGRAM OF SIGNIFICANT SAVINGS & BENEFITS FOR ASA MEMBERS

WWW.ASAONLINE.COM

ASADVANTAGE PARTICIPATING PROVIDERS



**National
Purchasing
Partners**



Applications are now being accepted for many of the awards offered by ASA.

Certificate of Excellence in Ethics

This award recognizes subcontractors for their commitment to ASA values, such as quality construction and a safe and healthy work environment. Each applicant is required to respond to questions concerning the firm's corporate ethics policies and procedures, its construction practices, and its general business practices. Each applicant also is required to submit detailed documentation, including sealed letters of recommendation from a customer, a competitor, and a supplier.

National Construction Best Practices Award

This award recognizes prime contractors that exemplify the values of subcontractors, treat subcontractors fairly through use of level-playing-field contract terms, and consider subcontractors part of their core project teams. The program's rigorous criteria include the use of a standard subcontract whose provisions substantially reflect the best practices incorporated into the ASA-endorsed ConsensusDocs 750 Standard Agreement Between Constructor and Subcontractor, as well as highly favorable evaluations from three specialty trade contractors, based on 20 project management factors.

There are many more awards available through ASA, and more information about all of them can be found by clicking [here](#). All award winners will be recognized during the 2020 SUBExcel conference on March 4-7, 2020, in Las Vegas, Nevada. We highly encourage all ASA members to get involved in our awards program. These valuable recognition opportunities are only available to ASA members.



MAY 7TH, 8:10 A.M.

A HANDY REFERENCE TOOL BRINGS HIGHER PROFIT WITHIN REACH

IN AN INSTANT,
ARIK MULLEN
REALIZED THE
VALUE OF MOTION
IS MONEY®

AmSlab Solutions founder, Arik Mullen, is always finding ways to solidify his concrete business. So when he learned how a simple workbook available through CNA's Motion is Money® program could highlight hundreds of hours of worker inefficiencies, he called his Risk Control Specialist, conducted a worksite audit and developed a plan to minimize bending, lifting and reaching for tools. Now AmSlab productivity is up 3%, and Arik's enjoying a much healthier bottom line.

When you're looking for programs that help keep workers safe and businesses strong ... we can show you more.®

To learn how CNA's insurance programs for contractors can help your business grow more profitably, contact your independent agent or visit www.cna.com/construction.



The examples provided in this material are for illustrative purposes only and any similarity to actual individuals, entities, places or situations is unintentional and purely coincidental. In addition, the examples are not intended to establish any standards of care, to serve as legal advice appropriate for any particular factual situations, or to provide an acknowledgement that any given factual situation is covered under any CNA insurance policy. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. "CNA" is a registered trademark of CNA Financial Corporation. Certain CNA Financial Corporation subsidiaries use the "CNA" trademark in connection with insurance underwriting and claims activities. Copyright © 2019 CNA. All rights reserved.