



## December 2004—Free Article for Publication

*provided courtesy of the American Subcontractors Association, Inc., as part of ASA's Stand Up! campaign*

### Control Risk With the Right To Cure

One of the best business lessons for subcontractors to learn is to control unquantifiable risks. One example is the “additional insured” requirement in subcontract agreements, which makes the subcontractor liable for any insurable loss attributed to the “additional insured.” Many subcontractors have learned about the unpredictable costs of “additional insured” endorsements and aren’t around to tell their stories. They learned too late that there *are* ways of addressing the risks of “additional insured.” Another risk that can have unpredictable consequences is defective construction. As with “additional insured” requirements, there are ways subcontractors can address this risk — and live to tell about it.

Claims of defective construction pose unquantifiable risks for subcontractors that do not take steps to control the outcome of claim situations. For example, if a general contractor is free simply to select another subcontractor to remedy defective construction, who knows what the final bill will be for the original subcontractor that is liable?

A white paper published by the American Subcontractors Association (ASA), “Warranty: Right To Cure,” explains the construction defect risks that subcontractors contend with in warranty practices and warranty provisions common in the construction industry. ASA’s white paper concludes that one of the best ways for subcontractors to control the risks associated with construction defect claims is to preserve their “right to cure”:

... one of the most important limits on remedies a construction contractor or subcontractor can implement is recognizable as a cousin of the consumer “repair or replacement” warranty, and is commonly called the “right to cure” or “right to repair.” A construction subcontractor’s “right to cure” gives the subcontractor the right to be notified of any claimed defects, the right to make an inspection of claimed defects, and the right to have the first chance to either make or propose a cure, all enforceable by a waiver of claims in the event that the proper notice and opportunity is not given to the subcontractor.

When the subcontractor has the right to cure, it has control over costs.

The right to cure can be established through provisions in subcontract agreements. However, ASA’s white paper notes that many provisions that seem to protect subcontractors are too narrow. For example, many model contract documents limit the subcontractor’s right to cure defective construction to a period of one year after substantial completion. The white paper states: “The one-year period of correction is an odd compromise on the right to cure, considering that there is a much greater chance that older claims are actually explained by defective maintenance or other fault of the buyer than claims originating during the first year...”

ASA’s “Addendum to Subcontract” (2004) offers language lacking the one-year period of protection and, thus, provides broader coverage for the subcontractor: “Upon discovery of any nonconforming work, the Contractor shall promptly notify the Subcontractor, in writing, and shall provide the Subcontractor with a reasonable opportunity to inspect and correct the work at Subcontractor’s expense...”

Learn more about the right to cure. Visit ASA’s Web site at [www.asaonline.com](http://www.asaonline.com) and click on “Stand Up! for Subcontractors” or call ASA at (703) 684-3450.