# Mastering MSAs

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Master service agreements (MSA) can appear in every aspect of construction contracting. They may be referred to as MSA, on-call, task order, delivery order, or IDIQ contracts, but no matter what the name, these efficient contracting tools provide consistency and rapid project delivery across a variety of different (or similar) construction projects. MSAs are a tool that every contractor and construction attorney should be utilizing in their practice when appropriate.

## Overview: What Is an MSA?[1]

Many owners and general contractors work with the same contractors, subcontractors, and trades, project after project. Although many general contractors will readily admit that they live and die by their subcontractors, at the end of the day they still have a large degree of bargaining power over their subcontractors. It goes without saying that owners typically have even more bargaining power over their contractors (although this can vary with the market and region).

Given these well-entrenched business relationships,[2] several factors become key in the allocation of risk via contract, through drafting, negotiating, pricing, letting out to bid, award, and execution. Scope, schedule, and budget are the variable factors; everything else, for the sake of consistency, predictability, efficiency, and fairness, can and should (for the most part) stay the same from project to project. Subcontractors appreciate a known quantity in dealing with their customers; shouldn't the parties create a contractual framework that establishes that known quantity and thereby achieves the goals of consistency, predictability, fairness, etc.?

MSAs therefore work in two parts: the terms and conditions that constitute the "master" portion of the agreement and then a triggering work order/purchase order/initiating document (generically referred to as a "work order" in this paper) that ties the MSA to a particular project and its variables: typically, scope, schedule, and budget.

In order to complete this union, the work order must reference the MSA executed between the parties and then identify the variable factors (project name, work order date, parties, scope, schedule, and budget) and the other project-specific or special documents (contingent on approval by owner/prime contractor). Project-particular contract documents typically include:

1. the MSA itself and all documents referenced in the MSA;
2. the work order and all documents referenced in it;
3. any drawings, specifications, manuals, supplements, schedules, addenda, bulletins, RFI responses, or other documents identified in the applicable work order;

4. any modifications to the MSA or the work order;
5. the prime contract—including any general, supplementary or other conditions thereto—between the owner or any other prime entity and the contractor (the Prime Contract); and
6. other documents referenced in the Prime Contract and any modifications thereto.

With the MSA framework set in concrete, and with the work order project requirements coupled to it, the agreement will be an enforceable document—offer, acceptance, and consideration—to the extent intended by the parties.[3] Because the MSA has already been negotiated, drafted, and agreed to, it can be easily and efficiently be invoked by the work order, and the parties are on their way.

This ease of creating an enforceable contract between parties sharing a longstanding (or they hope longstanding) relationship is not without hazards. An MSA should include a clear statement that, although executed by both parties in apparent anticipation of future projects, it is no guarantee of future work. Each discrete project can and should be effectuated only by a written, complete, executed work order or other project-specific document, clearly identifying the scope of work for that particular project and incorporating the MSA by name.

As a further protection in this regard, the parties may opt to pin the MSA to a specific length of time and state that the MSA's term is automatically renewed unless cancelled by a party within a certain period of time before the end of the term (much like many leases). One potential drawback of a nonrenewing MSA is that the parties may be tempted to crack it open annually and renegotiate terms, thereby defeating one of the primary purposes of having an MSA.

Because of all the different moving parts—the MSA, the work order, the contract documents, the flow-down of the Prime Contract—the MSA should include an order of precedence. Typically, the underlying work order (which tends to be more specific) should govern in the event of a conflict, followed by the MSA. Again, if the goal of the exercise is efficiency and consistency, setting up the MSA to trump all other potentially conflicting documents (except the work order) can ensure that goal is met.

## Key Provisions of MSAs

### *Project Schedule*

Like any (good) agreement, an MSA must contain provisions regarding the schedule. After all, time is money. Typically, the MSA will contain key provisions like "time is of the essence" and then will specifically hold that the contracting party must start work promptly after being notified to do so and carry the work forward to full completion, to meet the agreed-upon schedule in the work order(s) for the particular project(s). It is recommended that the schedule for the project covered by the work order be attached as an exhibit at the time of execution of the work order, or at some future time once the schedule is agreed upon. The MSA may also generally obligate a party to complete the work in accordance with the overall master schedule for the project, as such schedule may be changed from time to time.

Because the needs of any particular project may change over time, even if a party is not in default or has not otherwise fallen behind the project schedule, it is also important to include language in the MSA that permits a party to require the other party to work overtime and/or accelerate its work in order to expedite completion of the project. It is also important to consider including provisions providing for how such overtime or acceleration will be paid for (i.e., actual excess cost of the labor over the regular time rate, or some other agreed-to rate). Of course, provisions should also be included to provide the upstream party (i.e., owner or contractor) with the right to order the downstream party (i.e., contractor, subcontractor, or design professional) to work overtime and/or accelerate its work if it has failed to keep the project on

schedule, if the downstream party has failed to keep up with the general progress of the work, or due to any other breach or failure. In this scenario, the costs of the overtime/acceleration would typically be borne by that defaulting party.

### *Scope of Work*

MSAs must specify what scope of work is covered by the agreement. The particular scope of work would, of course, be detailed in the underlying work order that is issued as each particular project is assigned to the downstream party. Nonetheless, the MSA should contain the general framework surrounding what scope is covered by the MSA by specifically referencing the work order(s) that will follow. It is recommended that the MSA include a general provision stating that the downstream party shall provide, perform, and furnish all labor, materials, equipment, and services necessary or incidental to complete the scope of work described in the work order. For example, language can also be included in the MSA that the scope of work includes "all things shown on or reasonably inferable from the Contract Documents."

## Drawings and Specifications

The work order that is issued should specifically enumerate (or attach as an exhibit) the drawings and specifications that are included in the scope of work. Care should be taken to ensure that the relevant revision dates of the applicable drawings are properly specified. The scope of work should be specifically reviewed and confirmed by the responsible businessperson to ensure that the scope included in the work order is comprehensive and accurate for the agreed-upon price. It is common (for better or worse) for parties to attach a proposal from the downstream entity to describe the scope of work. If this is done, it is good practice to only include the actual parts of the proposal that describe the scope of work/services and not attach the terms and conditions of the proposal (unless, of course, those terms and conditions are part of the parties' business deal). Wholesale attachment of a proposal inevitably leads to conflicts with the terms and conditions of the MSA.

## Design Work: Copyright Considerations

If the MSA includes design services, provisions must be included to govern ownership and use of the design. One benefit of an MSA is not having to renegotiate copyright and license terms with every contract. The AIA B121-2018[4] provides that the architect and its consultants are the authors and owners of their instruments of service and grants a nonexclusive license to the owner to use the instruments of service for the particular project.

Parties, of course, may negotiate these terms in a variety of different ways such that the building owner and not the design professional becomes the owner of the instruments of service created for a particular project. If the building owner obtains a license in the instruments of service, and not ownership, will the owner have a right to use the instruments of service for other phases of the project? Or for renovations, additions, or repairs to the project? Or for other projects? Will a further license fee be required? While these issues are not unique to MSAs, it is especially important to ensure that the parties' business deal is properly reflected in these provisions in the MSA, especially as one of the primary points of the MSA is to have set terms and conditions to govern all future projects.

### *Owner/General Contractor Safety Program*

Perhaps one of the most important components to any construction project is to ensure that an adequate and appropriate safety program is in place, understood, executed, followed, and monitored. The construction industry has one of the highest rates of fatalities of any industry sector (the construction industry accounted for 46.2 percent of all fatal falls, slips and trips in 2021 and nearly one in five workplace deaths occurred in the construction industry).[5]

### Imposition of Safety Programs

In an MSA, while the particulars of any underlying work order may not yet be known, it is important for the upstream party to impose whatever specific safety requirements it requires ( in addition to any OSHA and any other state or local requirements), and then also ensure that the downstream party (and anyone further downstream) implements, executes, and monitors a corresponding safety program.[6]

### Delegation of Safety Responsibility

The MSA is an important opportunity to set the expectation regarding safety on a project and ensure that the downstream parties also have appropriate safety responsibilities and obligations in their agreements. An owner can typically reduce their safety risk through delegating all safety responsibilities to the (independent) contractors on site and making any owner consultants solely responsible for safety of the consultant's employees. Typically, the owner will delegate safety responsibility to the general contractor and will thereafter reduce the risk of being liable for any injuries that might occur, so long as the owner does not retain control over the actions of the independent contractors.[7]

A general contractor, on the other hand, cannot delegate to a subcontractor its responsibilities to maintain a safe workplace under OSHA regulations.[8] Specifically, 29 C.F.R. § 1926.16 provides as follows:

> (a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.
> (b) By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.
> (c) To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.
> (d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

A contractor, however, can still ensure in an MSA that an appropriate safety program and safeguards are in place so a subcontractor is contractually responsible for such safety obligations.

#### *Flow-Down*

Probably one of the most important parts of any contract is an appropriate flow-down provision, to ensure that the requirements of the applicable upstream agreements "flow down" to all of the downstream parties. Otherwise, an upstream party will be left exposed to risk that could have been shifted to the downstream party if it is not otherwise part of the underlying agreement. An MSA can easily address this concept by specifically incorporating the upstream contracts and the other contract documents enumerated therein.

Some provisions of the upstream agreements may be so important that you might want to (or must[9]) expressly include them in the downstream MSA and not just incorporate them generally through a clause like § 3.1 of the AIA A421.[10] For other issues, consideration should be given to adding provisions so the timing mechanisms work for the downstream party to comply with its obligations to the upstream party (for instance, when a finite time is required to give the upstream party notice of delay or changed conditions or change order requests). If you merely have a general incorporation clause without adjusting the timing mechanisms in the downstream agreement, you may have issues.

If the MSA is between any tier below owner and general contractor (or the equivalent), oftentimes the MSA will specify whether the downstream party will have direct access to the owner/general contractor. In general, when our clients are the upstream party preparing the MSA, they do not want this direct access for a variety of reasons, except in the case of emergencies that mandate direct communication. If this is your client's preference, consider including a provision expressly prohibiting direct communication with your client's upstream party (and above) unless otherwise directed in writing.

#### *Risk of Loss*

MSAs provide a convenient opportunity to negotiate who bears the risk of loss and until what point. A risk-of-loss provision defines the point at which the risk for loss or damage to the work (or equipment, materials, etc.) passes to the other party. The MSA should specifically establish this trigger. The parties should verify insurance coverages to make sure there is adequate coverage in place. Will the risk of loss transfer upon delivery of the equipment or installation of the equipment/materials? Or will the risk of loss not transfer until final acceptance of the work? Regardless of the point at which the risk of loss transfers, care should be taken by the upstream party to make a carve-out for any loss or damage stemming from the direct and sole negligence of the downstream party.

#### *Contract Price/Sum and Payment*

Payment provisions are often the first things on our clients' minds as they prepare contract documents. MSAs are no different. There are numerous issues to be addressed when it comes to payment provisions, especially in a document that is designed to be used for a variety of projects.

### Lump Sum vs. Unit Prices vs. Cost Plus

In most circumstances, parties to an MSA will likely want to be able to choose from several different options for how to structure the pricing of the work for a particular project. For this reason, the MSA should be drafted in a way that can accommodate lump sum, unit pricing, cost plus, or any other pricing structure. The work order should be drafted so the user may easily select from the common pricing options. This can be accomplished through a "check box" option where stock language for each pricing structure is included, and the user can check the one that is applicable and then fill in the blanks for the appropriate pricing arrangement.

If "cost plus" pricing is used, it is imperative that the MSA include a clear and well-thought-out definition of all the different items that will be considered the "cost of the work." If unit pricing is used, it is important to clearly define how units are to be measured and who is going to be the arbiter of the accuracy of the measurements (i.e., engineer of record, contractor, third-party inspector, etc.). If pricing is included in the MSA instead of the work order, which is not typical, care should be given to the method of accounting for adjustments in rates over the passage of time. Pricing is better left to the work order for this reason.

### Paying Parties Contractually Downstream

It is not uncommon that disputes arise between two contracting parties, and the upstream party may be

willing to issue a payment, but not directly to the other party because of a justified fear that the money will not make its way into the hands of the subcontractor who actually performed the work and who will lien the project or otherwise file a claim if they are not paid. Under these circumstances, the hesitancy of issuing payment usually has nothing to do with the subcontractor who seeks payment, and who may not be at fault, but rather arises from unrelated issues that have created a dispute and potentially a justified reason to withhold payment.

When this occurs, the upstream party is in a better position if it has a contractual right to issue payments in a way that ensures they are actually received by the trade subcontractor who performed the work, in order to minimize claims and liens by other parties. The typical way to achieve this is through contractual provisions that allow the upstream party to issue a joint check or to issue payment directly to the subcontractor. In either situation, the contract should clearly state that such payments are then deducted against the contract balance and are treated as if the payment was made directly to the downstream party. These are perfect provisions to include in an MSA so this situation is covered for all included projects.

### Pay-If-Paid/Pay-When-Paid Provisions

Payment provisions that are contingent on the passage of time or the payment of funds from an upstream party are often the most contentious provisions found in construction contracts. As a result, these are great provisions to negotiate once and include in an MSA so the parties do not have to continually battle over the issue on each and every project. If the intent is to establish a pay-if-paid clause, the drafter must be as explicit as possible that receipt of the upstream payment is a condition precedent to any downstream payment obligation, and that the downstream party bears the risk of any nonpayment by the upstream parties. Even then, pay-if-paid clauses are not enforceable in all jurisdictions.[11] However, if the clause is deemed unenforceable, there is typically no downside to including it because if it is deemed unenforceable, then the upstream party is in the same position it would have been in had it used a payment provision that did not include a pay-if-paid clause.

### Retainage

Retainage, or other forms of withholding or reserves, is a very common feature in almost every construction contract, and it is often regulated in different ways by different jurisdictions. Therefore, MSAs that are designed to be used across a multitude of jurisdictions can result in retainage compliance issues if not handled with care. Some states place limitations on the amount and timing of retainage (e.g., Alabama limits retainage to 10 percent of the contract balance for the first half of the project and none thereafter[12]), some require it to be held in trust (e.g., Missouri requires that it "shall be held by the owner in trust for the benefit of the contractor and contractor's subcontractors"[13]), and, depending on the size of the project, others require it to be held in an interest-bearing escrow account (e.g., Tennessee[14]).

The goal of this article is not to document and list the various forms of retainage restrictions but rather to highlight how the variety of retainage laws complicates compliance when using documents across multiple jurisdictions. In the context of an MSA, one strategy that should increase compliance is to employ a straight flow-down of the upstream retainage provisions. In other words, the retainage allowed by the owner in the prime contract would be the same retainage the general contractor would be able to withhold from its subcontractor. In many states, this is a cap on retainage required by law.[15]

Other approaches to maximize compliance would be inserting language limiting the retainage provision's applicability "to the extent authorized by law" or adding language expressly authorizing courts with a blue-pencil doctrine to modify the limits of retainage within the confines of applicable law. While multiple jurisdiction-specific retainage provisions could theoretically be used, this approach may be cumbersome and, because retainage statutes are not static, could still lead to outdated provisions if the law were to

change in the years following the first issuance of the MSA. The most common approach, and likely best practice, is to use the same retainage downstream as upstream and make any desirable alterations to this in the work order for a specific project as needed.

### Final Payment

Providing specific requirements regarding every occurrence necessary to trigger the obligation to make final payment helps eliminate disputes at the end of a project that can be especially problematic as all parties are trying to wrap things up. Of course, anything required by upstream contracts not otherwise flowed down should be part of the final payment requirement in an MSA. It is also advisable to include express requirements such as receipt of final claim and lien waivers (for the downstream party and perhaps any of their own sub-subcontractors or suppliers), completion of any punch lists, all close-out documents, all written warranties, and the like. Any project-specific items can be included in the special terms and conditions of the project work order.

### Billing and Accounting Systems

More and more often, the parties involved in a construction project are required to participate in proprietary or off-the-shelf electronic billing systems. Sometimes these systems require a party to register and pay a user fee, and, of course, anyone using the electronic system will need to become familiar with it, which may require a certain amount of training. Parties who are new to these systems, or who do not have sophisticated billing departments, may balk at participation, which can lead to disputes and headaches for the other parties who are required to bill in a certain way upstream.

For this reason, it is preferable to include language in the MSA that requires the downstream party to conform and participate in any billing systems imposed by upstream contracts. Any project-specific billing requirements also should be inserted into the applicable work order so there is no confusion about each party's obligation to participate.

### Cost Escalation

Although perhaps not traditionally considered a payment provision per se, material and other cost escalation clauses have obvious and enormous impacts on the parties' respective payment obligations when costs unexpectedly increase after execution of the contract. Particularly since the global COVID-19 pandemic, cost escalation has been one of the most significant risk factors in construction contracting, and the problem has been compounded by war in Ukraine, supply chain disruptions, labor shortages, and the rise of inflation.

Different contract payment structures (e.g., lump sum versus cost plus) have different risk profiles when it comes to cost escalation. It is important for the parties to clearly set forth which party bears the risk of cost escalation, and under what circumstances. Even when one party bears the risk of certain cost escalations, provisions such as force majeure clauses may sometimes be drafted to provide some relief under certain unforeseen circumstances. The theory behind such clauses is that it is more economically efficient to exclude those risks from the contract price because they are relatively rare situations that are not expected to occur. Otherwise, the party bearing such risk would need to price it, which drives up the contract amount for a risk unlikely to occur. By providing such a "safety valve," the risk is managed, and the price of such risk is deferred until it arises, if ever.

Using a force majeure clause in an MSA is appropriate, but there are some downsides that need to be evaluated. A force majeure clause traditionally covers unforeseen risks. To be unforeseen, there cannot be a history of the risk occurring on a frequent basis. Because MSAs are often drafted and in place for long periods of time, what may have been unforeseen at the time the MSA was drafted may no longer

be unforeseen by the time the risk emerges in a work order several years later. The COVID-19 pandemic presents a classic example of this concept. A force majeure clause that provides relief in the event of an unforeseen, generic "pandemic" would be much more likely applicable and enforceable in the year 2019 than it would in the year 2024. It is much harder to argue in 2024, after years of experiencing disruptions due to COVID-19, that this particular pandemic is an unforeseen risk. For this reason, cost escalation and/or force majeure clauses would be stronger if they specifically identify COVID-19 as an excluded risk rather than a generic "pandemic." If a generic force majeure clause is utilized in an MSA, the drafter of a later work order may wish to modify the language in the work order itself to update the provision so it provides the protection that was intended at the outset of the contracting relationship.

### *Indemnity*

Indemnification is one of the most important provisions in any construction contract, and entering into an MSA is often justified by the rationale that the parties can negotiate the terms of the indemnity once and then have it apply to all projects where they work together. To that end, great care should be put into making sure that the indemnity is adequate, fair, and broadly enforceable. The provision should define what claims and types of damages are covered, what events will trigger an indemnity obligation, whether a duty to defend will be included, whether the indemnity obligation is limited in any way (i.e., personal injury, property damage, subject to insurance coverage, etc.), who is covered by the indemnity obligation, and whether the indemnity provision is broad form, intermediate form, or narrow form.

This last factor may be determined by where the work will be performed so the parties can ensure compliance with any applicable anti-indemnity statutes that have the potential to invalidate all or part of the indemnity provision if it is noncompliant. One approach is to include a narrow form indemnity provision in the MSA that would be broadly upheld across the country as a baseline level of protection but that could be supplemented and strengthened in the work order, depending on the location, with intermediate or broad form indemnity (although this may be more challenging to negotiate for future projects rather than initially). Other options are to include state-specific provisions in the MSA for the states where work is most likely to be performed (i.e., create multiple subparagraphs tailored for a number of states that only apply when work is performed in that state). Due to some jurisdictions requiring a certain level of prominence to indemnity provisions,[16] it is not uncommon for the text of these provisions to be in bold and all caps. Finally, in addition to the commonly used indemnity provisions for personal injury and property damage, it is good practice to also include coverage for liens and claims that are filed by downstream subcontractors and suppliers, and coverage for damages and costs due to the introduction or discovery of hazardous materials.

### *Pass-Through Claims*

Construction projects inevitably bring together numerous parties to accomplish a common goal of creating something tangible from a set of intangible plans. Each of these parties may impact the other parties, even though most of them will not be in contract with one another. Due to the lack of privity, construction contracts anticipate the need for one party to assert a claim against another party with whom there is no direct contract. Filing a claim against one party who is a passive participant, and then forcing that passive party to assert a claim it may know nothing about, and for which there may be little motivation, against an upstream party is not an efficient method of resolving a dispute.

Instead, lawyers have devised contractual methods to allow such a claim to be passed through the passive party so the two real parties in interest are able to control asserting and defending the claim, respectively. For example, in the context of an owner who has hired a general contractor who has subcontracted out a trade, a pass-through claim provision allows the subcontractor to file suit in the name of the general contractor directly against the owner even though the subcontractor is not in privity with the owner.

To do this properly, it is important to establish a process and procedure for how the pass-through claim will be asserted, along with a notice requirement for letting the interested parties know about the existence of a claim and triggering the agreed-upon process for presenting the claim. Most pass-through provisions will limit the upstream party's liability to the amounts recovered on behalf of the downstream party. It is also important to address who will be responsible for the legal fees (usually the party asserting the claim), consulting fees, arbitration fees, court costs, etc.

It is best to identify which party has the authority to make decisions on important points, such as settlement terms, deciding whether to appeal, etc. The claimant may need certain assistance from the passive "pass-through" party and adding a duty to cooperate would be useful for the claimant. However, there should also be certain limitations on this duty to cooperate if the passive pass-through party believes the claims are vexatious, in bad faith, invalid, or otherwise improper. These limitations are especially important in public works projects because the pass-through party must avoid being put in a position where it is presenting a false or fraudulent claim in violation of the False Claims Act.[17] Similar concerns, including reputational and client relationship damage, also exist in private projects.

### *Changes*

Although changes are common on most construction projects, they are especially likely under an MSA simply because of the increased amount and varied types of work that may be performed. Consider the likelihood of substantial changes when determining what type of MSA to draft. For instance, a lump-sum MSA may be beneficial for projects where significant changes are not anticipated since the contract price is predetermined based on expected total costs. A cost-plus MSA could benefit parties on projects with a less-defined scope of work, or where significant changes are possible or likely because the contract price is determined based on reimbursement for the cost of the work plus a contractor's fee. Similarly, a time and materials MSA, wherein the contract price is based on reimbursement for the time spent and materials obtained on a project based on pre-negotiated rates, is flexible and could accommodate significant changes in the scope of the work.

Changes under a contract often arise due to site conditions that differ from those anticipated, such as the presence of utility lines where none were expected or disclosed. Differing conditions may cause additional work and expenses, and the parties can mitigate these effects by thoroughly describing the site conditions in the work order or even commissioning a geotechnical report to describe surface conditions. If, despite the parties' efforts, the site conditions encountered differ from those described in the agreement or those reasonably expected based on the location, the contracting party whose work is impacted will likely request a change order.

Whether additional work may or must be performed under an MSA or whether it requires a change order to be issued depends on if the additional work is reasonably related to the original scope of work. Although specific projects are typically governed by a work order, as discussed below, the MSA's broader scope of work should still be drafted with the intention of helping the parties determine whether additional work is reasonably related to the initial scope.[18]

Impacts of changes can be limited through careful planning while drafting the MSA. For instance, change provisions under the prime contract should be expressly flowed down to the MSA. The parties should also ensure the MSA's incorporation of the prime contract's terms are "clear and unequivocal" to avoid ambiguity and potential disputes regarding interpretation of the agreements.[19]

Another method of limiting the impact of changes on work under an MSA is to predetermine the hourly rates and markup percentages that will apply in such an event. However, attempting to predetermine

such details in an MSA that may encompass various projects, locations, and/or scopes of work may be inefficient or counterproductive if not tailored to the specific work being performed and changes likely to occur; consider whether these details are best placed in the work order issued for the specific work under the MSA.

### *State-Specific Riders or Clauses*

Like standard, single-project contracts, MSAs are often drafted with a particular jurisdiction in mind based on the expected location(s) of the work to be performed. However, because the nature of MSAs is to govern a continuing and evolving relationship between parties, they can easily fall prey to "jurisdiction creep"—over time, work opportunities arise in jurisdictions unanticipated at the time the MSA was drafted, and applicable law in the new jurisdiction may no longer be consistent with the terms of the MSA. Work orders issued for specific projects under an MSA identify the applicable terms, as discussed below, but they also expressly incorporate the MSA, including its provisions that clash with the applicable law of the new jurisdiction.

The best way to guard against jurisdiction creep and mitigate the associated risks is through diligent contract administration, including robust documentation and supervision practices. However, the parties may also craft contract mechanisms to conform the MSA to the specific jurisdiction through use of state-specific riders or clauses. A rider is an attachment to the work order that adds jurisdiction-specific provisions in place of nonconforming provisions; for instance, all work orders for projects located in Texas would include a rider attachment specific to Texas. A clause, in contrast, is a part of the MSA but with specific limiting language indicating it will only apply when work is performed in a particular jurisdiction; for instance, "In the event the project is located in Texas, the following language shall apply. . . . In the event the project is located in Florida, the following language shall apply. . . . For projects located in all other states, the following language shall apply. . . ."

Although parties should ensure compliance with applicable law in all aspects of a contract, certain provisions are more likely to require state-specific language. For instance, indemnification provisions must be tailored to the applicable state's laws because most states have enacted "anti-indemnity statutes," as discussed above, that limit the indemnification of various parties in certain situations. Florida law prohibits an indemnitor under certain private construction contracts from agreeing to indemnify an indemnitee for the indemnitee's own acts "unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any."[20] Tennessee law prohibits a promisor from agreeing to indemnify a promisee against liability arising out of damage "caused by or resulting from the sole negligence of the promisee," and no exception exists for monetary limitations.[21] Maine has no anti-indemnity statute, although courts disfavor indemnification provisions that indemnify a party for its own negligence.[22]

Parties should also check applicable law if including a pay-when-paid or pay-if-paid clause, as such clauses are unenforceable in some states.[23] (See discussion above.) Most states also have enacted prompt pay laws that require payment under a construction contract or subcontract within a certain time period; various states impose different penalties if the statutory deadline is not met, and these penalties can have significant impacts on a contract and relationship between parties.[24] As discussed above, jurisdictions also vary in the amount of retainage, or retention, a party is permitted to withhold from a payment during the course of the project, and these restrictions are often part of a state's prompt pay statute.[25]

Parties should also be aware of lien law differences in relevant jurisdictions and draft state-specific lien provisions to protect themselves in the event they have to bring or defend against a lien claim. Lien

statutes often impose firm deadlines, notice requirements, and waiver requirements that parties must strictly adhere to, and these often vary by state. For example, several states have statutorily required lien waiver forms.[26] Some states require additional notices during the construction process in order to preserve lien rights.[27] Ensure your MSA is drafted with the deadlines and requirements in mind, and provide standard lien waivers (including conditional and unconditional waivers, and partial and complete waivers, as appropriate) to mitigate noncompliance.

### *Form of Work Orders*

While the MSA is drafted to encompass a broad scope of potential work, work orders issued for each project under the MSA are used to outline the specific terms. Accordingly, work orders are vital and should be carefully drafted to account for the specific type of contract and work being performed.

A well-drafted work order should simultaneously mirror and supplement the MSA as appropriate so both documents will be given maximum effect. Each work order should identify the MSA by number and date and expressly incorporate the MSA by reference to eliminate any ambiguity if a dispute arises later over governing terms. Because each work order is tailored to the specific work being performed on a project, the work order should govern in instances where it conflicts with the MSA. Consider inserting a controlling provision such as: "In the event of any direct conflict between the terms of this Work Order and the terms and conditions of the Master Service Agreement, the provisions of this Work Order shall control." Such a provision ensures that the document drafted with the specific scope of work in mind will be given precedence over the broad framework created under the MSA and allows the parties to maintain some flexibility from project to project.

Another good practice in drafting a work order is to specifically state that capitalized terms contained therein shall have the same meaning assigned to them as under the MSA. Incorporating the previously defined terms under the MSA into each work order saves the parties time and promotes cohesiveness between documents governing the relationship.

One part of tailoring a work order to the specific terms of the scope of work being performed thereunder is selecting what type of work order makes sense. As discussed above, various scopes of work lend themselves better to certain contract types—cost-plus, lump sum, time and materials, equitable adjustment. The parties have flexibility to select the best contract type to suit their needs based on the work.

A work order should contain many of the terms contained in a traditional construction contract that are typically omitted from the MSA to make the MSA broadly applicable to a relationship between parties. First and foremost, the work order must identify the scope of work for the project; it is important to be specific when identifying the scope of work of each work order so the various work orders under a single MSA are easily distinguishable. The scope of work should also refer back to the portions of the design documents that will be performed under the work order. If necessary, a work order's scope of work may include generic language supplemented by blank spaces that may be filled in with additional details.

Additionally, the work order should identify the applicable plans and specifications of the project for which the work order is issued and the applicable prime contract documents, including as much detail as possible. It also should specify the performance schedule, including the date the work is to commence and any other milestones as needed (e.g., the date of substantial completion). The work order's performance schedule should be developed with the MSA's schedule in mind and should refer to any schedule requirements of the MSA that may impact the specific scope of work under the work order. Any payment terms or billing requirements that differ from those identified in the MSA should be specified in the work

order; such terms and requirements often vary based on the scope of the work, and the requirements under one work order may not be appropriate under another. For example, depending on the scope of work, the work order may need to contain a rate schedule to identify the rate of pay for the various laborers needed to perform the work; the types of laborers necessary to perform the scope of work often vary such that including a rate schedule in the MSA would be cumbersome and inefficient.

Often, the minimum insurance requirements contained in an MSA are insufficient based on the scope of work under a particular work order. In such a case, a work order should specify the minimum insurance requirements that will apply only to that work order. Similarly, a work order should provide for appropriate lien waivers based on the type of work being performed under the order and the state in which the work is performed. As discussed above, lien law varies by state, and the applicable statutes often have strict requirements, including firm deadlines, for parties seeking to preserve their lien rights or protect against future lien claims. As such, it is important for all parties that the work order supplies standard lien waivers (whether conditional or unconditional, partial or final) appropriate for the work order in question.

With regard to personnel, consider whether a work order should identify specific individuals as party representatives or qualifying individuals based on the scope of work. For example, if a work order calls for work to be performed that requires a particular license (or supervision by a person with such a license) under state or local law, consider identifying the licensed individual who will satisfy those requirements on the job site. Another best practice is to include the parties' respective license numbers in the applicable jurisdiction relevant to the type of work being performed. The parties to an MSA may each hold numerous licenses in various jurisdictions such that including all license information in the MSA would be inefficient; identify the appropriate license on each work order instead.

### *Claims*

The main ways in which MSA claims sections vary from standard contract language likewise key in on efficiency and consistency. Because the genesis of claims lies in the conduct of the project while it is underway, typically, the wise MSA drafter should extensively interview their client to find out the client's preferred (and most likely to be adhered to) protocol for claims processing. MSA notice requirements should be a bottom-up, not attorney-imposed, top-down, procedure. For example, what is an appropriate process for providing and accepting notice of a potential claim? Should it be in writing? (Answer: yes.) Which individuals or departments at your client will be the point people for receiving and responding to claims and how quickly do they need notice of the underlying causes of a claim? If an appropriately short timeframe is imposed, your client's project personnel will be in a better position to address the underlying causes and mitigate the losses.

Likewise, what timeframe does your client's team require to appropriately evaluate and respond to a claim? A realistic internal deadline that is fair to all parties, like the notice deadline, is best derived through a frank assessment of your client's human resources, particularly if there is a level at which claims have to be sent "upstairs" to executive personnel for evaluation and response.

Will the failure to submit a claim in compliance with the notice deadline constitute a waiver? Will the failure to respond definitively to a claim in compliance with the review period notice deadline constitute an acceptance of the change request? The ultimate answers to these questions depend on the parties' bargaining power, appetite for risk, and relationship history. If the parties intend to create an MSA that starts more from a midpoint between them (to avoid protracted negotiations, if not outright rejection by the other side), this would be one area in which a less-draconian outcome should make an appearance in the draft MSA.

(If the parties opt not to have a blanket attorney fees provision for prevailing parties under the MSA, the claims section may be one place to permit a prevailing party to recover its legal expenses.)

### *Damages and Waivers*

From the general contractor's perspective, the most important characteristic of the MSA's damages provisions is the avoidance of liability upstream to the owner that cannot be recovered from the subcontractor (assuming the subcontractor is responsible for the loss). Many owner/general contractor agreements contain a mutual waiver of consequential damages that provides a significant layer of protection for the general contractor. If the owner waives consequential damages such as lost profits from a business's delayed opening due to general contractor delay, the general contractor can limit its liability to direct damages resulting from negligent construction.[28] If the owner does not waive consequential damages, the MSA's flow-down provision will do a great deal of heavy lifting as the general contractor seeks to pass through losses to the responsible party. One option to avoid any doubt would be to include a mutual consequential damages waiver that is effective between the parties unless the owner is entitled to recover from the general contractor indirect losses (the most prominent example being liquidated damages). In addition, the consequential damages waiver could be enforceable against the subcontractor, unless and to the extent the general contractor is able to successfully prosecute those losses upstream to the owner. The last thing the general contractor wants to achieve at the end of the MSA-drafting process, and consequently the end of each project, is middleman status: liability to one party, without recourse against the other.

One subset of consequential damages is delay damages, the typical "remedy" to which is excluding recovery for delay damages via a no-damages-for-delay clause. Again, parity is key. If the general contractor is entitled to only time in the event of owner-caused delay, it does not want to be liable to its subcontractors for anything more than time (such as increased site costs, e.g., trailers). Delay damages therefore can be limited to only those that the general contractor can recover from the owner. Another potential workaround would be permitting a time extension in lieu of money damages for an aggrieved subcontractor, and then only for critical-path delays to the subcontractor's work.

Because owner/general contractor agreements can vary greatly in their damages-waiver provisions, and because of the above-described challenges lying in the MSA flow-down provisions, this is likely to be one area in which the goals of efficiency and consistency will be especially difficult to accomplish.

### *Dispute Resolution*

Despite its name and implications, the dispute resolution section of the MSA is an excellent area in which to preserve the parties' relationship while maintaining efficiency and consistency. "Step" negotiations make sense in this context, requiring the parties to first attempt to resolve the matter via the project leads, and, failing that, by higher-ups within the organization. As in so many situations, good fences make good neighbors, and it is beneficial to have the parties contractually obligated to "play nice" regardless of the dispute's provenance. Not surprisingly, some parties treat disputes clinically, while other participants (the reader can probably think of a dozen as they read this) permit ego to play a proactive, vocal role. Regardless of the personalities, creating a consistent step-negotiation protocol gives the parties no choice but to try to work matters out. MSAs, if done right, create a culture between the parties, either by imposing it from above or by simply reflecting the culture that has arisen organically prior to the MSA. Nothing could ruin that culture more quickly than to have a completely silent MSA on dispute resolution, forcing the parties to race to the courthouse at the slightest provocation.

MSA-required mediation would likewise reinforce the effort to maintain party relationships. Strict deadlines and brisk prep schedules serve this purpose, as do clear a priori mediation agreements: Will

there be pre-mediation statements? Will they be exchanged or submitted in confidence to the mediator? If the parties do not have many items to hash out before the mediation takes place, there will be fewer outlets to express anger and frustration via costly legal gamesmanship and posturing. A thorough MSA dispute resolution section will also clarify ahead of time who pays the mediator's fees. (In the author's own professional experience, even presaging the splitting of the mediator's costs will not guarantee that an opponent of limited means will furnish its check well in advance of the mediation date, if ever.)

The decision whether to pursue arbitration versus litigation has been extensively covered by insightful Forum members via other presentations and papers.[29] Keeping the twin goals of efficiency and consistency in mind, here is also a large potential for a catastrophic divergence between the upstream prime agreement (e.g., litigation in federal court in the state where the project is located) and the downstream MSA (simultaneous binding arbitration in the contractor's home forum, miles away from the project site, witnesses, and law of the local forum). The best way to protect the general contractor against this inconsistency in the MSA is to (1) decide with your client which dispute resolution mechanism is their preferred forum; (2) in as much detail as possible, lay out the prescriptions for that process (locale, controlling law, etc.); and (3) make all of the foregoing either subject to the general contractor's decision or subordinate to the prime contract's dispute resolution process, or both.

The prudent MSA author will have an open talk with their client as to the advisability of attorney fees provisions. Used appropriately, they permit underfunded parties the ability to counter unfair treatment. Used inappropriately, they instill false courage in litigants, who never seem to doubt the one hundred percent validity of their case and nurture dreams of litigating for free. Attorney-fee provisions can take on a life of their own, eventually becoming a tail unrelentingly wagging a dog of a case. Attorney-fee provisions are many things, but they are not "no-brainers."[30]

### *Default*

MSA drafters would benefit from first interviewing their clients regarding the previous times they have had to default another party. How smoothly did it go? Were the bases for default completely and sufficiently documented and explained? Was there a notice and cure period involved, was it met, and if not, why not? Although fighting the last war is not always a valid strategy in contract drafting, it makes little sense not to learn from prior experiences and ensure that your client's resulting corporate culture (or hoped-for corporate culture) is sufficiently reflected in the default provisions.

Default provisions come with notice provisions, typically in writing, and often with a cure period. It is difficult to anticipate an appropriate cure period for every contractor/subcontractor/design professional on every project. One size does not always fit all. Nonetheless, an owner/general contractor's corporate culture built around a consistent default process and standardized cure period has its own advantages, which the MSA can concretize.

After notice is given, obligations placed on the contractor/subcontractor include the duty to commence and continue satisfactory correction of such default to the satisfaction of the owner/contractor. The parties' standard concerns regarding cure periods still come into play. Is commencement sufficient? Does the cure have to be completed within the time frame? What if the contractor/subcontractor disputes the cause of or responsibility for the source of the default allegation and intends to seek payment for the corrective work as a claim? In answering these questions, consistency is key and will help ensure the efficiency of the contracting process.

What rights would the owner/general contractor like to reserve for itself in the event the contractor/subcontractor fails to cure the default? The owner/general contractor could withhold payment in an

amount sufficient to correct the default (and perhaps add a markup for its own overhead and costs to administer the work). The owner/general contractor may opt to reserve the right to perform and charge the cost thereof back to the contractor/subcontractor (and should probably expressly state in the contract it has the right to set off that amount against the next pay application). More broadly, the owner/general contractor may want to leverage the default under this particular work order and back charge it against amounts otherwise due under other work orders.

In a more dramatic step, the owner/general contractor can terminate the contractor/subcontractor, take possession of the contractor's/subcontractor's tools and equipment, and take assignment of any sub-subcontracts to complete the work. (A thorough MSA should require the contractor/subcontractor to put this part of the agreement in its contracts with its sub-subcontractors.) Similarly well-known are contract provisions permitting the owner/general contractor to convert a termination for default into a termination for convenience if the underlying default circumstances are later ruled invalid by a tribunal. These are fairly standard remedies in the event of default in non-MSAs but should not suffer from short shrift in the MSA.

### *Insurance Requirements*

The most important section of a contract is obviously one of the trickiest when it comes to creating an MSA. MSAs can be helpful in establishing core insurance requirements that must be maintained. Of course, to the extent a particular project requires additional kinds of, different coverage amounts of, or special endorsements to the insurance, those can be addressed as alternatives in the MSA or negotiated at a later point in time in the subsequent work order(s).

On nearly every project, the owner/contractor agreement creates an obligation on the general contractor to provide the following types of insurance: Commercial general liability (CGL) is intended to cover tort liability for third-party property damage and personal injury or wrongful death. CGL insurance coverage for defective construction work that does not result in personal injury or property damage is not uniformly applied across the 50 states. In some states (Pennsylvania, most notably), defective construction is not considered an unanticipated condition, or a sudden and calamitous occurrence, triggering CGL coverage.[31] Because of the critically important interplay between contract risk and insurance protections, an MSA intended for use in multiple jurisdictions should account for this potential gap in coverage.

Workers' compensation coverage, also a staple of owner/contractor agreements (and thus typically a pass-through requirement of subcontractors), is likewise susceptible to state-specific requirements, but this time via statute as opposed to common law. If parties expect their MSAs to be used across different states, the MSA must account for this.

Excess liability coverages, too, are oftentimes dictated by owner/general contractor agreements and must be addressed in MSAs. For all coverages, the limit amounts are more properly reviewed and approved by an owner or general contractor's risk management team and insurance brokers/consultants; attorneys are not well qualified to opine on the appropriateness of insurance limit dollar amounts. Tort remedies are variable not just across states but across counties and MSAs need to be that granular (if and to the extent the owner/general contractor contract allows for any variation in or discretion regarding insurance types and amounts).

Key to all of these coverages is including in the MSA a requirement that names the owner, the general contractor, the architect, and anyone else specified in the owner/general contractor contract as additional insureds on the subcontractor's policy. Some additional-insured obligations in the prime contract can get quite specific, such as a need to provide coverage on a "primary, noncontributory" basis. Waivers of

subrogation, too, are routinely recited in prime contracts and passed through to subcontractors. Notably, the AIA B121 does not include a waiver of subrogation as part of its standard provisions but instead provides that, to the extent damages are covered by property insurance, each party waives all rights against the other (and the contractors, etc.). Although much of these downstream requirements can be viewed as boilerplate, a general contractor's failure to pass them down to a subcontractor could lead to a breach of contract, thereby making the general contractor liable as a de facto (primary, noncontributory) insurer of the owner's liability. Dictating a subrogation waiver in a contract is not the same as a subcontractor actually obtaining a policy that contains an agreement by its insurer to waive subrogation or honor a subcontractor's subrogation waiver.

Given the idiosyncratic and even site-specific obstacles in contracting for and ensuring the provision of insurance coverages, an owner and general contractor are left with few options for addressing them in the four corners of the MSA. One potential work-around is to ensure the owner or general contractor's project team is diligent about obtaining not just certificates of insurance but all additional-insured endorsements from subcontractors on projects. It is also recommended to include requirements for providing copies of at least certain other endorsements to ensure that proper coverage is actually in place (for example, copies of any endorsement(s) of nonstandard exclusions or endorsements providing jurisdiction-specific coverage). Additionally, MSAs oftentimes deploy project-specific insurance requirements in the form of an exhibit to the triggering work order. Here, too, well-trained project personnel and contract management teams should know which owner-specific or state-customized rider is to be used on each project (and ensure it is in place for all subcontractors working under an MSA on that project).

The MSA should specify for what period of time each required insurance should remain in place. For example, the AIA A121 provides as a default that the insurance will remain in place "until the expiration of the period for correction of Work" unless a different period is specified in the agreement.[32] By contrast, the AIA B121 provides that the insurance shall remain in place until "termination of the agreement." The period of time that the insurance must remain in place will often vary by the type of insurance at issue. For example, automobile liability likely only needs to be in place until the work on a project is completed. Professional liability or general liability policies could be triggered (well) after a project is completed if a third party later suffers an injury at the project, or other defects with the work itself present, and thus it is advisable to consult with an insurance broker to determine the appropriate period for coverage (until a certain number of years after a project is completed, or until the statute of repose runs?).

Insurance riders as exhibits to work orders can also accommodate those projects on which an owner-controlled insurance program (OCIP) or contractor-controlled insurance program (CCIP) has been selected. Insurance sections in the body of MSAs should contain, in addition to thorough recitations of necessary insurance types, an acknowledgment that a project-specific set of insurance requirements may be in effect on a particular project and, therefore, any rider or other work-order-established set of insurance requirements should be consulted and, if in place, will trump the language in the body of the MSA.

### *Miscellaneous*

- The refrain of any discussion of the miscellaneous issues that fall outside the above-discussed categories will be "check the work order." Although this threatens to defeat the purpose of an MSA, if requirements are dictated in an MSA and are omitted in the work order, a well-trained project staff will know the MSA language well enough to ensure compliance. For example, subcontracts will usually require a subcontractor to state the identity of sub-subcontractors/suppliers and their contact information. If this obligation is set forth in the MSA, and the project manager knows it, the project

manager can enforce the obligation by notifying the subcontractor directly, even if the work order was silent on the topic and/or the information was not completely available to the subcontractor at the time of the work order's initiation.

- The wise MSA drafter will include, in the section explaining the work order trigger, an acknowledgment by the subcontractor that commencing work after issuance of a work order constitutes acceptance of terms of the MSA. A signed MSA and work order should be sufficient to lock in this obligation, but this reinforces the chain of offer/acceptance/consideration.
- MSAs, because of the potential for interplay between projects underway simultaneously, can lead to activity (or, more likely, inactivity) on one project, leading to conflict on another. The reader has probably encountered (and the authors certainly have encountered) situations where a dispute on one project (e.g., a contractor/subcontractor's extras claim on one project) might lead to a dispute on other projects (e.g., that contractor/subcontractor stops work on all projects until the extras claim is resolved). An owner- or general contractor–friendly MSA will include an obligation for the contractor/subcontractor to continue working in the event of a dispute. An owner/general contractor–friendlier MSA will permit the owner/general contractor to link projects and withhold payment on one for a performance failure on another. The degree to which this section of the MSA will favor the owner/general contractor obviously depends on the parties' relative bargaining strength.
- MSAs' compliance-with-laws provisions should necessarily be robust, anticipating local prevailing-wage statutes, stormwater regulations, local-hiring requirements (if the project is for a large municipality), and Federal Acquisition Regulations if the project is for the federal government (in which case many contract provisions could be trumped by the FAR). This is an area in which the owner and general contractor will be able to leverage the employment of local contractors/subcontractors well-versed in site-specific legal requirements (indeed, it is probably why they were hired), and shifting this risk on to the contractor/subcontractor is key.
- Because of the unique nature of an MSA—solidifying a relationship consistently and efficiently—the familiar clause barring assignment by the contractor/subcontractor absent the owner/general contractor's permission is de rigueur. The contractor/subcontractor, though, may justifiably request a mutual nonassignment clause, in light of its own investment (and risk assumption).
- All thorough contracts include an integration or merger clause, reciting the parties' prior negotiations and previous contract drafts are not enforceable: the enforcement and interpretation of the contract will be based on the language of the final, executed contract and its exhibits. The exigencies of MSAs provide additional justification for ensuring the parties deploy a robust merger clause in both the MSA itself and potentially even each work order. Such a clause should identify all other documents incorporated by reference: the contract documents, the plans and specifications, etc. MSAs' efficiencies lie in stabilizing as many moving parts as possible via the main text of the MSA. But permitting customizability via the work order, its exhibits, and any other ancillary documents can undermine this stability unless carefully patrolled by the owner/general contractor's project and contract-management staff.
- Ensuring labor harmony is challenging, and only more so in an MSA. The sagacious practitioner will include statements that labor will not interfere with labor used by other contractors and will work in harmony on the project. In the event of labor disputes caused by or attributable to the contracting entity, they should be obligated to take all steps to end the issue. Because a contractor with a skilled trade may be signatory to a collective bargaining agreement for a jurisdiction, it is easy to imagine one troubled labor relationship spreading domino-like across multiple projects governed by the one MSA and several work orders. There may, however, be industry-wide labor issues impacting multiple projects subject to the MSA.[33] General contractors typically account for such labor actions involving a single union local, across an entire jurisdiction. Although the general contractor will not place a particular burden on the subcontractor to proactively address the work stoppage, the general contractor is not likely to excuse the subcontractor's nonperformance just because its employees (or

its material suppliers' trade unions) have opted to go on strike (and the same holds true for owners towards contractors).
- MSAs, like stand-alone contracts, include express warranty and guarantee language. The basic requirement is that the contractor/subcontractor warrants that its work will be done in a good and workmanlike manner, with all equipment and materials to be of new and good quality and free from defects, and all within compliance and conformity with the contract documents. Warranties are typically coupled with a call-back requirement (e.g., within a year (or sometimes more))—that the contractor/subcontractor return and repair or replace the defective work (and surrounding work, if the initial work has been closed up), at its own expense. Warranties of this nature can then reapply the one-year call-back for the repaired work, although contractors/subcontractors with greater relative bargaining strength will resist this as it is akin to a maintenance agreement. The main risk in the authors' experience in a one-year call-back warranty is that it tends to transfix the parties' attention and distract from other potential express warranties. When coupled with a "sole remedy for defective work" clause (frequently requested by contractors/subcontractors), it carries the potential for eliminating an owner's or general contractor's ability to seek contribution from a contractor/subcontractor for general failures to perform to the contract's requirements (i.e., building to the plans and specifications and in accordance with building codes/industry standards).[34] Assuming that the MSA successfully excluded such a limitation on recovery for defective work, it provides an optimal platform for ensuring the parties memorialize their de facto working relationship and fulfill the twin promises of efficiency and consistency that underlie every MSA.

## Case Law Examples

While there is extensive case law that addresses disputes that arise out of MSAs, few of the cases actually explore issues unique to MSAs (versus stand-alone construction contracts). Nonetheless, some recent cases are worth highlighting for some of the pitfalls to avoid.

### *Flowing Down Provisions Appropriately, Especially Dispute Resolution*

Explicitly providing the forum for dispute resolution in an MSA is of critical importance. You may end up litigating in two forums (perhaps intentionally, or not) if the MSA is not consistent with requirements set forth in a related prime contract. For example, in *SR Construction, Inc. v. Peek Brothers Construction, Inc.*,[35] a contractor and subcontractor entered into an MSA with an arbitration clause that stated:

> Contractor and subcontractor shall not be obligated to resolve disputes arising under this Subcontract by arbitration unless: (i) the prime contract has an arbitration requirement; and (ii) a particular dispute between Contractor and Subcontractor involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract.[36]

The contractor then entered into a prime contract for services in the construction of a hospital, and the prime contract included the following arbitration provision:

> Arbitration shall be utilized as the method for binding dispute resolution in the Agreement[.] [A]ny Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement.[37]

During construction of the project, the subcontractor incurred additional costs of $140,000, for which it sought recovery.[38] The contractor passed a claim for extra costs through to the owner, but the owner rejected the claim and directed the contractor to initiate arbitration against the subcontractor.[39] Before

the contractor filed a demand for arbitration, the subcontractor initiated litigation in the district court asserting claims for breach of contract and unjust enrichment, among other claims.[40] The contractor then commenced an arbitration and moved to compel arbitration in the district court litigation.[41] The district court denied the contractor's motion to compel arbitration, holding that the prime contract only governed disputes between the owner and contractor, so the subcontractor's claim was not arbitrable because it did not involve the owner.[42] On appeal, the Supreme Court of Nevada reversed the district court's decision and granted the contractor's demand for arbitration.[43] The court determined the claim was to be arbitrated because the arbitration clause in the prime contract was broad, and thus the "MSA provision's purported limits are nearly illusory."[44] "[T]he MSA provision incorporates the prime contract provision, which is broad, so the presumption of arbitrability applies, which [subcontractor] fails to rebut."[45] Moreover, the court held that even if the arbitration clause was construed narrowly, the claim would fit within the clause because the contractor was bound to arbitrate the issue under the prime contract.[46] While this result may seem obvious under these facts, it emphasizes the importance of ensuring the parties choose the desired forum for dispute resolution (i.e., litigation or arbitration) and that it is appropriately flowed down either in an MSA or underlying work order if it needs to differ from that specified in an MSA.

By contrast, the US District Court for the District of South Carolina recently determined that when a subcontract agreement does not mandate arbitration, then there is no obligation to arbitrate regardless of what provision an incorporated MSA may otherwise provide.[47] In that case, the underlying subcontract contained the following dispute resolution provision:

> Any claim or dispute arising out of, or related to this Agreement, that is not informally resolved shall be resolved by mediation, arbitration or litigation, with mediation serving as a condition precedent for any subsequent arbitration or litigation. If the parties' [sic] do not both agree to arbitration, the dispute will be resolved in litigation.[48]

The MSA between a subcontractor and the upstream contractor provided that any controversy "not relating to or arising from any action or inaction of any Upstream Contractor and/or the Owner and not involving the Contract Documents shall be decided by arbitration. …"[49] The upstream contractor argued that its subcontract incorporated the MSA through a "flow down" provision ("The Subcontractor shall assume toward [Contractor] all obligations and responsibilities which [Contractor] assumes toward the General Contractor, Construction Manager and/or Owner/Developer pursuant to [Contractor's] Subcontract or any Prime Contract.").[50] The court held that the plain language of the subcontract clearly demonstrated "the parties' intent to litigate or arbitrate disputes arising out of the agreement after first having pursued informal resolution and mediation, and if both parties do not agree to arbitration, then the dispute is to be resolved through litigation."[51] As a result, the court held that the subcontractor was not bound to arbitrate its claims against the upstream contractor.[52] A cautionary tale when flowing down provisions is to ensure that you capture your client's (or the parties') intent and provide for specific guidance if there is a conflict of provisions.

### *Ensuring That the MSA Identifies the Necessary Parties Who Will Be Indemnified*

The MSA provides perhaps an easy avenue to ensure that all the parties that need to be indemnified from future claims are in fact indemnified. Consider generic descriptions of some entities whose specific identity many not yet be known, like "Owner's lenders" or "Owner's investors." By way of example, in *Duval v. Northern Assurance Co. of America*, the court had to determine whether third-party insurers could enforce an MSA's defense, indemnification, and insurance obligations.[53] In *Duval*, an energy exploration company (Principal) entered into an MSA with an oilfield service company (Contractor) hired to support offshore construction. The MSA contained reciprocal indemnity obligations and required the parties

to support their respective indemnity obligations with liability insurance.[54] An employee of another contractor of Principal was injured on a job site and sued Contractor for negligence. Principal accepted tender of the defense of the employee's claims. Months later, the Contractor filed for bankruptcy, and the bankruptcy court ordered that the employee would only be able to collect from Contractor's insurer. Contractor's insurers then attempted to tender the defense of the employee's claims to Principal. The court determined that while "the MSA required [Principal] to protect, defend, indemnify, release, and hold harmless [Contractor] against [employee's] claim," this contractual duty did not extend to Contractor's insurers.[55] Thus, the Fifth Circuit affirmed the district court's grant of summary judgment in favor of Principal. While there may be little sympathy for the insurers here, this case reinforces the concept of ensuring whether an MSA may be assigned and ensuring that all the necessary entities are listed as indemnified parties (if required).

### *Assignment Clauses, Beware*

While it is possible to have "floating" forum selection clauses, that float can have real, perhaps unanticipated, consequences. In *AFC Franchising, LLC v. Purugganan*,[56] a contractor (based out of New York) and a franchising company (based out of Maryland) entered into an MSA (specifically a Master Developer Agreement) to develop urgent care centers in New York and Connecticut. After a series of acquisitions, an Alabama-based franchising company was assigned the MSA, and the contractor was notified of the assignment, which was permissible under the terms of the MSA.[57] Importantly, the MSA contained a floating forum-selection clause, which provided that jurisdiction would lie in the state or federal court where the franchising company's principal place of business was located.[58] When the relationship soured, the contractor threatened to sue the franchising company in Connecticut or New York.[59] The franchising company filed a declaratory judgment in Alabama state court to confirm that the parties had to litigate in Alabama and for a declaration that the franchising company had not breached the MSA. The contractor removed the case to federal court (District Court for the Northern District of Alabama) and then moved to dismiss the case for a lack of personal jurisdiction and improper venue.[60] The district court sided with the contractor and found that there was no personal jurisdiction over the contractor who had "minimum contacts" with Alabama, and more importantly, found that the contractor had not waived its "personal-jurisdiction defense by agreeing to the forum-selection provision."[61] On appeal, the Eleventh Circuit held that the contractor had waived its objections to personal jurisdiction by agreeing to the floating forum selection clause.[62] The court further found that because the MSA expressly authorized assignment, the franchising company acquired all of the prior franchising company's rights under the contract, including the right to litigate in the state or judicial district containing its principal place of business—especially because the MSA had an unrestricted right of assignment.[63] The court dismissed out of hand the contractor's argument that the MSA expressly provided that there were no intended third-party beneficiaries that would somehow impact or lessen the otherwise unbridled (and specific) right of assignment.[64] The court noted that when two clauses might seem in conflict and one is general and the other is specific, the specific stipulation takes precedence over the control.[65] As a caution to all of us drafting and negotiating MSAs, they can have a very long life (e.g., 15 years in the case of *AFC Franchising*). Care must be taken to ensure that your client has the flexibility it needs, or by contrast, to ensure it is not subject to litigation in a state in which it has essentially no contact. As the court wisely stated, while the contractor "may be dissatisfied with the litigation forum, it is not our task to save [him] from the consequences of an agreement [he] freely entered into."[66]

It is our job as skilled practitioners to ensure (as best as possible) that our clients understand the risks and rewards associated with MSAs. They can help business relationships flourish, but if those relationships sour, the MSAs become a critical document to govern the resolution of the remains.

## Endnotes

1. For an excellent guide to master service agreements, the authors recommend Andrea G. Woods et al., *Checklist 23: Master Services Agreements*, *in* Construction Checklists: A Guide to Frequently Encountered Construction Issues 163 (Carrie Okizaki et al. eds., 2d ed. 2022).

2. *See*, *e.g.*, I.R. Macneil, *The Many Futures of Contract*, 47 S. Cal. L. Rev. 691 (1974); I.R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 Nw. Univ. L. Rev. 340 (1978).

3. *See, e.g.*, Alaska Fur Gallery, Inc. v. Tok Hwang, 394 P.3d 511 (Alaska 2017) (option to purchase too indefinite to enforce); Keystone Land & Dev. Co. v. Xerox Corp., 152 Wash. 2d 171 (en banc) (2004) (agreement to agree unenforceable); Stout v. Fisher Indus., Inc., 603 N.W.2d 52 (N.D. 1999) (agreement to agree unenforceable without reasonably certain and definite terms); *but see, e.g.*, Denbury Onshore, LLC v. Precision Welding, Inc., 98 So. 3d 449 (Miss. 2012) (enforcing agreement to agree when scope and price were sufficiently definite); Fischer v. CTMI, L.L.C., 479 S.W.3d 231 (Tex. 2016) (enforcing "sufficiently definite" clause in agreement to agree); Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996) (agreement to agree binding because it did not lack essential terms to render it unenforceable).

4. Am. Inst. of Architects, AIA Document B121-2018, Standard Form of Master Agreement Between Owner and Architect for Services Provided Under Multiple Service Orders.

5. *Construction Deaths Due to Falls, Slips, and Trips Increased 5.9 Percent in 2021*, TED: The Econ. Daily (May 1, 2023), https://www.bls.gov/opub/ted/2023/construction-deaths-due-to-falls-slips-and-trips-increased-5-9-percent-in-2021.htm.

6. Even though not included in the AIA form documents for design professionals, the AIA still recommends that design professionals have safety plans in place. *Professional Service Firms Should Have Health and Safety Plans*, AIA-Trust, https://theaiatrust.com/resource/professional-service-firms-should-have-health-safety-plans/ (last visited Dec. 22, 2023).

7. *See, e.g.*, Seabright Ins. v. US Airways, 258 P.3d 737 (Cal. 2011); Beil v. Telesis Constr., Inc., 11 A.3d 456 (Pa. 2011).

8. 29 C.F.R. § 1926.16; *see* Alloway v. Bradlees, 157 N.J. 221, 237–38 (1999) (a general contractor on a work site has a nondelegable duty to maintain a safe workplace).

9. *See, e.g., S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F.Supp. 1014 (S.D.N.Y. 1984, aff'd, 762 F.2d 990 (2d Cir. 1985) (for example in New York, incorporation clauses "bind a subcontractor only to the prime contract provisions relating to the scope, quality, character and manner of work to be performed by the subcontractor."). Items such as indemnification provisions and dispute resolution clauses cannot be flowed down through a generalized incorporation by reference clause. *Spiegler v. Gerken Bldg. Corp., 35 A.D.3d 715 (NY 2nd Dep't 2006) (indemnification clause cannot be flowed down through generalized incorporation); Secured Sys. Tech., Inc. v. Frank Lill & Son, Inc., 2010 WL 11549354 (W.D.N.Y., June 17, 2010) (dispute resolution provisions cannot be flowed down through generalized incorporation)*.

10. Am. Inst. of Architects, AIA Document A421-2018, Standard Form of Master Agreement Between Contractor and Subcontractor Where Work Is Provided Under Multiple Work Orders.

11. *See, e.g.*, S.C. Code Ann. § 29-6-230 (pay-if-paid clauses are unenforceable in South Carolina).

12. Ala. Code § 8-29-3.

13. Mo. Rev. Stat. § 436.303.

14. Tenn. Code Ann. § 66-34-104.

15. *See, e.g.*, Ala. Code § 8-29-3(f) ("The percentage of retainage on payments by the contractor to the subcontractor shall not exceed the percentage of retainage on payments made by the owner to the contractor.").

16. *See, e.g.*, Dresser Indus., Inc. v. Page Petroleum, 853 S.W.2d 505 (Tex. 1993) (requiring an indemnity provision in a contract to be "conspicuous" on the face of the document).

17. 31 U.S.C. § 3729–3733.

18. *See, e.g.*, Brandt Cos., LLC v. Beard Process Sols., Inc., No. 05-17-00780-CV, 2018 WL 4103210 (Tex. App. Aug. 29, 2018) (remanding a quantum meruit case brought by a subcontractor against a contractor because the claims could "be resolved only after it is determined whether the installation of the drain supports and the drains onto

the modules fell within [the subcontractor's] scope of work" rather than under the change order process, and the jury failed to find those facts).

19. *See, e.g.*, Waldner Consulting, Inc. v. Miller Contracting, Inc., 152 Wash. App. 1015, at *5 (2009) (finding that a prime contract's terms were not incorporated into the MSA because the language indicated clear and unequivocal incorporation of certain prime contract provisions but not incorporation of the "prime contract in a general and unlimited manner").

20. Fla. Stat. § 725.06(1).

21. Tenn. Code Ann. § 62-6-123.

22. *See, e.g.*, Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983) (citing Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208–09 (Me. 1979)).

23. *See, e.g.*, S.C. Code Ann. § 29-6-230 (pay-if-paid clauses are unenforceable in the state because payment by the owner to the contractor or by the contractor to the subcontractor is not a "condition precedent" for payment to a lower-tier subcontractor).

24. *See, e.g.*, Tex. Prop. Code Ann. § 28.002 *et seq*. (requiring payment from owner to contractor on a private project within 35 days and from contractor to subcontractor within seven days thereafter and imposing 1.5 percent interest per month on unpaid amounts); La. Stat. Ann. § 9:2784 (providing no deadline for payment from owner to contractor but requiring a contractor to pay subcontractors within 14 days, and imposing a penalty of 0.5 percent interest of the amount due with a maximum penalty of 15 percent).

25. *See, e.g.*, Ala. Code § 8-29-3(i) (limiting the amount of retainage allowed under a contract between an owner and contractor to "no more than 10 percent of the estimated amount of work properly done . . . , and after 50 percent completion has been accomplished, no further retainage shall be withheld").

26. *See, e.g.*, Tex. Prop. Code Ann. § 53.284; Fla. Stat. § 713.20.

27. *See, e.g.*, Ga. Code Ann. § 44-14-361.5(b) (requiring the owner or contractor to file a notice of commencement of work within 15 days after the contractor "physically commences" work on a project).

28. The insurability of non-tort construction damages should be carefully considered in conjunction with drafting consequential damages waivers. *See*, *e.g.*, Westfield Ins. Co. v. Nat'l Decorating Serv., Inc., 863 F.3d 690 (7th Cir. 2017); *but see Acuity v. M/I Homes*, 2023 IL 129087 (November 30, 2023).

29. *See, e.g.*, Michael D. Wilson Jr. et al., *Checklist 83: Pursuing ADR*, *in* Construction Checklists, *supra* note 1, at 591.

30. Given the frequency with which the author deals with attorney-fee provisions (maybe the top five most frequently consulted provisions), the astute MSA drafter would do well to consider placing such a provision on the front page of the MSA, perhaps even in bold type, to prevent readers from wasting too much time hunting for it.

31. *See*, *e.g.*, Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co., 908 A.2d 888 (Pa. 2006); *but see Acuity v. M/I Homes*, 2023 IL 129087 (November 30, 2023).

32. Am. Inst. of Architects, AIA Document A121-2018, Standard Form of Master Agreement Between Owner and Contractor Where Work Is Provided Under Multiple Work Orders.

33. Nick Ulanowski, *Local 150 Strike Causes the Slowing of Local School Construction, Public Works Projects,* Homewood-Flossmoor (IL) Chronicle, July 22, 2022.

34. *See* Breckenridge v. Cambridge Homes, Inc., 246 Ill. App. 3d 810 (1993).

35. 510 P.3d 794 (Nev. 2022).

36. *Id*. at 796.

37. *Id*. at 797.

38. *Id*.

39. *Id*. at 797–98.

40. *Id*. at 798.

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*. at 799.

45. *Id*. at 802.
46. *Id*.
47. Greenwood, Inc. v. IES Com., Inc., 609 F. Supp. 3d 401 (D.S.C. 2022).
48. *Id*. at 403.
49. *Id*. at 404.
50. *Id*. at 406.
51. *Id*. at 407.
52. *Id*.
53. 722 F.3d 300, 302 (5th Cir. 2013).
54. *Id*.
55. *Id*. at 304.
56. 43 F.4th 1285 (11th Cir. 2022).
57. *Id*. at 1289.
58. *Id*.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*. at 1291.
63. *Id*. at 1291–92.
64. *Id*. at 1294.
65. *Id*.
66. *Id*. at 1296 (citing Preferred Cap., Inc. v. Assocs. in Urology, 453 F.3d 718, 724 (6th Cir. 2006)).