A401 5/20/71

Speech by Rocky Rothschild to ASA - Rocky will be at ASA Convention and speaking too

You probably wonder why I am here. That's natural curiosity since the Construction Contract says that as an Architect I'm not supposed to talk to subcontractors except to advise - on inquiry - how much has been certified on a sub's account in any payment to the Contractor. And most of you are afraid to even ask that question because (and this is a stock answer) the Contractor is a nice guy, although sort of slow pay and heavy on the back-charges, and you don't want to get on his "list" and maybe miss the next slow-pay heavy back-charged job he has to give out at a price 5% below what you bid but which he guarantees is the actual low price which your competitor will take if you don't want it at that figure! - Well, to put an end to your curiosity, I'm here because times are changing, because the approach to building is changing. It is my personal opinion that the time has come for the Architect to make an overt effort to talk to the subcontractor on a professional basis and to champoin the subcontractor's equal participation in our industry discussions. As a result of my few encounters to date with your organization I have gotten the feeling for the first time that I am talking to the collective Subcontractor rather than a group representing a specialty subcontract interest. Perhaps the fact that ASA exists is what has brought about the first meaningful conversations between AIA and subcontractors. I do not mean to infer that we will no longer talk with the General Contractors or the specialty subcontractor groups or that we absolutely advocate a basic change in the historic relationships of the various design and build elements of the construction industry. I believe that in face to face meetings the broader the representation by the fewest people at the table, the simpler it is to work out viable and acceptable decisions.

Something is happening in the construction industry - slowly, subtly and almost imperceptably - which tends to auger a fundamental change in the

contracting business as now conceived but not necessarily practiced. If I were to ask you what is bringing about any change in our approach to construction I am sure the answers would include the computer, or sophisticated construction machinery, or advanced technology. They all contribute but in my opinion (and it's strictly personal) the most important change in these times is the over-organization of labor. For example: At one time the carpenter was a jack of all trades: he ran piping, wired outlets, laid brick - all to speed up his job working wood. Now he can't do these things, even if he is capable, without getting himself and his boss in trouble. I recall a remodeling job many years ago where the entire project was delayed several weeks because no steam fitters were available to remove a steam heating system which was being abandoned. Even the plumbers, plentiful on the job, didn't dare dismantle the useless steam piping. As each skill has become separately organized, based on the premise that specialization was the key to greater efficiency these services have become collectively offered for that skill only and a new subcontractor has appeared on the job. Years ago you could count the subs on a job without having to take off your shoes: plumbing and heating, electrical, roofing, plastering, painting, paving. The Contractor - general contractor in name and function - did his own grading, concrete work (including mixing it), carpentry, masonry, glazing, storefront work, provided common labor and did the few other things required. On a recent Atlanta job, as an example of the change I am describing, just the concrete was handled by five subcontracts: centering and wood forms, metal pans, reinforcing, concrete in place, finishing. Another building now under construction was described as having a subcontract for virtually every trade and even job superintendence and common labor are being provided under subcontracts. In this instance, the so-called General Contractor is responsible only for limited purchasing, coordinating and expediting. He is in fact a construction manager rather than

a general contractor - and the only difference between his role and that of the new breed called construction managers is that he entered the picture at the construction stage while the new approach starts with design. And if one carries this approach to an extreme, it is possible that what we now consider as subcontracts ~~could~~ become separate prime contracts with the Owner, administered and coordinated by a manager who has a quasi-professional rather than a profit-motivated interest in building the project.

The foregoing should make it increasingly obvious that something is happening to historic relationships. Many general contractors in all sincerity decry the advent of the broker-contractor but it is quite possible they are trying to hang on to something which is predestined to pass from the scene. With this slow and subtle change, subcontracting has gotten to the point where the Architect must look to a closer relationship with subcontractors. How to do this - at least for now - within the present frame of building contracting is the subject for long, cooperative review - not the adversary point of view we've taken for so long. The subcontractor - although subordinate in the contractual chain of command - has actually become the muscle of the industry and can no longer be treated as a party of the third part to be completely ignored.

The subject of Construction Management, Construction Administration, or whatever name you wish to give it, is too broad to discuss this evening. I presume however that you will continue to give serious thought to this aspect of change. As principal spokesman for the profession, The American Institute of Architects is evaluating the position of the Architect in this change - as it relates to his architectural practice, as it relates to the construction of the buildings he designs. As a most elementary first step in the latter area, it is the Institute's intention to make overtures to and establish

liaison with your ASA group (and, unofficially, I think that AGC may have this in mind, too). As a forerunner, AIA is also reviewing its Standard Form of Subcontract - Document A401 - and attempting to update it. As an aside, I might state we recognize that the AGC and some Specialty Subcontractor groups have standard subcontract forms (not to mention the private letters of marque floating around!) but it is our feeling that the AIA document, prepared on neutral ground so to speak, has the opportunity to become accepted as the impartial standard in much the same manner that the AIA General Conditions and Agreement forms have become pretty much the industry standards. Since this should be of some importance to you I would like to describe how AIA goes about its documents work in general and how we're handling the subcontract form in particular.

AIA Contract Documents are all drafted with great care, legal and insurance counseling and input from representatives of small, medium and large firms, so that they present the most equitable contract that can be conceived in a printed form for general usage. The documents which are either to be created or updated are discussed at great length by a committee designated as the Documents Board. This Board is composed of six practicing Architects of considerable experience and background, legal counsel, insurance advisors and two staff members both of whom are architects and attorneys; the six regular members are backed up by six alternates of reasonably comparable background. This Board has four three-day meetings each year and there is considerable "homework" done between meetings. Documents destined to come to the Board for review are first handled by a one- or two-man Task Force which does the leg work of getting the material in shape for the review. When it comes to the Board you would find it hard to believe the word by word, punctuation mark by punctuation mark evaluation the document gets!

Every interpretation that can be given a word, phrase or sentence is considered and the final words are hammered out with great care and legal blessing. This doesn't mean each document is letter-perfect, but it does mean that any errors made are inadvertent, not plain careless. It is recognized that the documents cannot ever be considered "perfect" so we have a file called the "icebox" wherein are kept suggestions, questions, problems, sent in by persons who have experienced some specific difficulty, real or imagined, and these are brought out every two to five years for review and determination to accept or reject for inclusion as a revision when a new edition appears to be called for. Documents relating to the construction phase are, when moulded into shape, further reviewed jointly with a Documents Review Board of the AGC. This adds additional refinement as the contractors and their legal counsel argue from their point of view. When finally jointly approved by these two groups, the finished product goes to the AIA Board for final approval and the AGC Board for official endorsement.

That's the general picture. However the AIA Subcontract Form is receiving slightly different treatment. The subject was considered too critical to start in a task force as limited as say two men. Therefore a group was appointed in St. Louis (it was actually the continuation of a committee that had dealt with the subcontract situation locally) composed of Architects, General Contractors and Subcontractors. They have had legal advice and in addition your own Association's legal counsel, McNeil Stokes, has participated in their meetings. To broaden the background even more, a sub-Task Force was activated in Detroit, this in turn reporting to St. Louis. This sub-Task Force, too, has very broad representation. The results of the work of these groups are anticipated to be in the hands of the AIA and AGC

for review in August and hopefully by November a revised document will be ready for approval and publication. I hope you recognize that ASA will be thoroughly involved in the document that goes for final review and will, hopefully, be part of the final approval for publication. We don't guarantee that each and every recommendation coming out of this in-depth study will be incorporated in the published version - but a real effort will be put forth to make this totally acceptable to those who will use it.

The major areas of study in the subcontract updating relate to such items as monthly payments, final payment, back charges, retainage and reduction of retainage. Note that these generally refer to money - and I guess this is the principle area of all your disputes. We also hope to clear up some fuzzy areas such as post-bid addenda or modifications, furnishing of temporary facilities, and the hold harmless provisions. Our intent is that this document should be as equitable as possible for both parties and as stated before we hope that it will become a widely-used industry standard. There is no way to really force its use but certainly if it provides an equitable base for both parties, continuing effort on your part could bring about its general acceptance. With more and more of each project being subcontracted the Architect must be concerned with the continuing economic well-being of the subcontractors. And as this situation grows the Architect is going to have to be highly critical of the subcontractor selection - at least so far as he is able to control it on private work. Let's talk a bit about what architects think important in considering the quality of the subs.

Subcontractors, like the General Contractor group, too often have a tendency to equate "get it done the best you can and hope it's covered up before anyone sees it" with successful business. You can fool the Architect once, you may fool him twice, but the third time it's liable to cost you a

bundle! The key to a good sub is his field superintendent and we like subs who always put a reliable superintendent on the job. The man who makes a good superintendent is the fellow who wants it done right the first time and has it corrected before he's told that it's wrong. He may cost you more in salary than some other punk who winks at slipshod work but I'll bet the profits will be consistent in the long pull if not necessarily higher. If any of you here are involved with air conditioning I don't have to describe for you the tortures of balancing a system when dampers are not adjusted, when fan speeds aren't checked and, yes, when fans aren't even running! What do you think it cost the sub on a job we had some years ago when he sent men back three or four times to find out why certain toilet rooms didn't have adequate ventilation and after the Owner raised particular hell because nothing was being done it took our engineer to find out that the starter for the exhaust fan wasn't even wired up! And I can show you the required certification that the subcontractor submitted from an independent testing agency stating that all systems were "go"!

After the quality of the field work, the thing that bugs Architects most is the high rate of illiteracy among subcontractors. Maybe they really can read but just don't! It's a simply-corrected problem but it can be a source of real annoyance. It all starts during the bidding period. I hate to generalize but a majority of subcontractors give the impression they haven't read or examined all the contract documents. I realize the roofer only has to know how many plies of what kind of felts, type of deck, insulation if any, and the kind of related sheet metal. But the cold fact is he has to know more - and the day he starts installation is a bad time to find out that curbs aren't high enough, that insulation board isn't made in the specified thickness, that pitch pockets are called for but not detailed, that there's a problem getting close to the building with his

kettle, that only certain named products may be used. Is he aware about progress payments, retainage, final payment? What about overtime work? There are many other questions, but too often I get the distinct impression that subcontractors casually glance at the plans, read only the appropriate section of the specs and quote a ball-park price. They don't - or I should say many don't - read the General Conditions, the Supplementary Conditions and Division 1. These may not seem important to you - in fact they appear to relate entirely to the general contractor - but they are the ground rules for playing the game. Continuing my pick on the roofers! A factory representative called me one day to find out why I had rejected his roofing products. They are among the industry standards and we were using them on two other jobs then under construction so what the hell gives? When I pointed out that three manufacturers were named in the basic spec, one was added by addendum and inadvertently, perhaps, his products weren't among the four cited; he said so what. I called his attention to the famous Article E-03 and our ten days prior qualification and he exploded with criticism of such a ridiculous provision; he'd never heard of such a thing (he was new to Atlanta!) and anyway I should know that roofing contractors never read that crap up front. He might have been right - but it didn't alter the picture and as far as I know he's still muttering to himself about ridiculous requirements. I might editorialize that whether or not that kind of requirement is ridiculous depends on whose ox gets gored! If the general contractor won't give you the entire project manual and the full set of drawings to review, demand it. Just because the front end and all the other sections of the specification than your own don't seem to refer to your work specifically, Article 5 of the General Conditions requires the General Contractor to bind you to him with the same terms he is bound to the Owner. Get savvy - read the fine print! My first contact with Mac Stokes concerned

a modified AIA subcontract form - modified pretty critically to the detriment of the sub who signed it. What was apparent to me was that the sub didn't read what was offered to him - he just said "where do I sign?" and rushed off to get started. I know the argument you'll give in rebuttal - the General said "take it or leave it" - and I guess I'll have to agree a guy's got to take some chances. However, with subcontracting becoming such a large part of the construction picture it is imperative that, as businessmen, the subs and the generals treat each other with greater respect and understanding. I know it's silly to preach the Golden Rule to business men who realize it's dangerous to give an inch, but the consistently petty disputes that plague the subcontractor-contractor relationships have no place in an industry that's already trying to price itself out of existence!

In summary, it is my opinion that the subcontractor is moving into a new position in the changing construction industry. He is facing the prospect of his now-subordinate role being exchanged for that of a prime contractor with the Owner - one of a great many. Certainly then, but perhaps even more so now, as one of many separate elements on the job he must improve his performance and his awareness of contract terms if he expects to reach equality at the conference table. Many of the inequities in present day subcontracting practices are brought about by lack of interest in performance by both parties. If each demands high quality of the other, all of us will be better off because of it.

A401

Bernard B. Rothschild, FAIA, FCSI
New York - 6/20/72

The 1972 updating of The American Institute of Architects' Standard Form of Subcontract - A401 - has caused interesting reaction. Undoubtedly some of this has been brought about by the first thorough reading of the document in recent years - perhaps for some people the first reading ever. Contractors, for years, have merely filled in the blanks, inserted a xeroxed page or two with very interesting supplementary requirements on retainage, backcharges, delayed payments, lien waivers, all apparently without ever reading the body of the document. This worked out beautifully since a vast majority of subcontractors seem to have their roots in Missouri - the "Show Me" State. When handed a subcontract they simply say: "Show me where to sign."! It appears that what has come as a major surprise to many people is the fact that this latest edition was only an update of the form last revised in 1967 and was not a totally new document.

It has apparently been difficult to understand that the 1966 change to the document from earlier editions merely added to the subcontract form contractually pertinent material relating to requirements set forth in the General Conditions. This change paralleled the major textual revisions to A201 which took place that same year: clarification in wording, reorganization of text but minimum change in contract terms. As it relates to the subcontract this is really nothing new since the General Conditions, which are a part of the Contractor's Agreement with the Owner, have, since it was first published, been a part of the subcontract by direct reference. Stated another way: the terms of the present A401 are little different from the A411 subcontract form issued in 1951 (or the older C1) except that the current document is more explicit. The current revisions were done not to cause a rhubarb among members of the construction team but rather to update

the subcontract to conform with the Owner-Contractor Agreement and its latest General Conditions. Nonetheless there have been some pretty loud squawks - especially from AGC. It isn't reasonable for me to try to interpret why they have been fighting use of the 1972 edition. We don't try to evade the fact that there are added items which may be controversial; unofficially several contractors have pointed out things which they felt weakened their hand in their day-to-day relationships with subcontractors.

Since the Owner-Contractor Agreement in toto is clearly made a part of the subcontract, making the subcontract track the related AIA documents is in our opinion consistent with what we've done with all of the AIA standard contract forms. Based on this concept, I find it difficult to accept the philosophy that the ploys of delaying approved and authorized payments until 90 days after receipt of funds by the Contractor or retaining amounts in excess of those described in the general contract are the only clubs a contractor has to keep subcontractors in line, and that our changes make this difficult if not impossible to do. From our experience we would observe that if the relationship between Contractor and Subcontractor is on a high level, there is no need for the Contractor to be concerned about the new provisions that may be in the contract between them - or any others for that matter; it's only when the relationship between them deteriorates or becomes a constant duel to see who can outmaneuver the other that the Contractor need fear equitable terms. There are really only a few 1972 changes of any contestable significance: (1) subcontractor's right to demand payment if Contractor has not been paid; (2) subcontractor's right to be paid interest on overdue money; (3) protection of subcontractor's lien rights. The strange thing about many of the publicly stated objections is that they relate to paragraphs unchanged from the 1966-67 edition of A401. The most recent blast from CMSCI as quoted in the Engineering News-Record for June 8, 1972, is a case in point. Let me cite only one instance from the news article. Strong

objection is expressed to the hold harmless clause now included in the subcontract form yet no change has been made from Paragraph 11.20 in the 1967 edition except to subdivide the paragraph to conform to the General Conditions numbering system and substitute the words "the Subcontract" for "the Contract Documents" in citing the limits of the subcontractor's obligations. It is almost identical to Paragraph 4.18 in the General Conditions which until revised to its present wording caused extended debate back in '66 but is now acceptable to the Contractors and is insurable. The ENR article, incidentally, quotes CMSCI as condemning this paragraph on account of legal complications based on statutory considerations in several states. To my admittedly uncertain knowledge only two states outlaw all hold harmless agreements; others which have passed restrictive legislation ban the broad form only. The hold harmless clause in both the General Conditions and A401 is the intermediate form and as such is generally acceptable. A quick clarification of this point. The difference between these as related to your subcontract is that the broad form hold harmless provides for the subcontractor to hold the Contractor harmless from damages due to anyone's negligence for whom the subcontractor is responsible, including the Contractor's. The intermediate form has the sub hold the Contractor harmless from all negligent acts for which the sub is responsible, including the contractor's related negligence only when the damage is caused in part by the Contractor. It should be noted in passing that the General Conditions state that the contract is governed by the law of the place of building: if this indemnification clause is contrary to local law it is an unenforceable requirement. Parenthetically - and stepping momentarily into Mr. Aksen's territory - this same situation applies to the arbitration clause which is not enforceable in about 24 states that do not recognize agreements to arbitrate future disputes (New York is not one of these!). Unfortunately standard documents must of necessity be broad in scope and it is incumbent on the user to be familiar enough with local idiosyncracies in the law to modify the documents via supplements to make them conform. We constantly bring this to our

members' attention but it is quite difficult to make them realize the necessity of doing this. By the same token contractors and subcontractors have to be alert to the same problems when they use any standard form for the contract between them. I didn't mean to get even as deep as this into the document - I'm sure you know its ramifications.// One problem which certainly concerns you is the Architect's attitude toward use of A401 and what is he doing to require its use. I'm afraid I can't be encouraging about this concern. Architects generally have adhered very faithfully to the admonition that there is no contractual relationship between subcontractors and the Owner. Aside from an occasional hesitancy on acceptance of a sub or two, most of us are reluctant to ever even reject a subcontractor. We make a concerted effort to follow the contractual requirement that we talk only to the Contractor - and issue all instructions through him. The true facts are, I might add in passing (and I'm sure many of you can verify this), that actually we get to know and work well with many major subcontractors. We only pull the manly silence routine when a problem develops and we want the Contractor to set things straight. Be that as it may, in my nearly twenty-five years as a principal I have never been given a subcontract to approve on any of our jobs: I never thought it was any of my business. But it was. From the first edition of the subcontract in 1915 until 1963 the General Conditions Article on subcontractors read in part:

> "The Contractor agrees to bind every Subcontractor and every Subcontractor agrees to be bound by the terms of the Agreement, the General Conditions of the Contract, the Supplementary General Conditions, the Drawings and Specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the Owner or Architect."

It was always after the fact when I found out about subcontracts with terms quite different from the General Contract. In its earlier days the importance of the subcontract form was less obvious: there were fewer subcontractors, the dollar values were smaller and everybody from the boss to the lowest laborer wanted to do a good job. Now things have changed: subcontracts make up the major portion of every job, dollar values for many subs are as large as entire jobs used to be and probably the boss is the only guy who really gives a damn about doing a good job and now he's only a figurehead! With this reversal of values the economic health of the job lies in the equitable relationship between Contractor and Subcontractor. Officially, we believe that A401 works toward that end. Officially, we encourage its use but I'm afraid that that's as far as we can go under today's ground rules. Most unfortunately the word "we" I use is editorial and reflects the attitude of the Institute only: as a generalization, the average architect is not really aware of the undercurrents that eddy in the construction industry.

What can the Architects do to promote the use of A401? The answer at present is quite a negative one: very little. The prime effort must be made by you. Subcontractors must stand together, firm in their insistence on use of the form - even if for starters you have to modify a clause or two. The next step would be to actively promote national liaison on an eyeball to eyeball basis with AGC and AIA jointly - primarily in the area of documents. In addition it is essential that similar efforts be made at the local level. As a matter of interest: in Chicago they have a very active joint group, the Construction Industry Affairs Committee, which has been wrestling with local problems for several years. Architects, engineers, contractors, specifiers and subcontractors man the group with the subcontractor representation by the specialty contractors. The fine hand of the subs is visible in their

publications, too. Their No. 1 statement on Retainage is a case in point. The "in" method of reduction proposed by many local AIA-AGC groups - other than stopping all retainage at the 50% point (which at 10% is really 7-1/2% for the full job) - is to refund half of the retainage at the 50% completion point and retain only 5% thereafter - again assuming 10% at the beginning (and this is truly 5% for the total job). This method is great for the general and the tail end trades, but it means that the sub who finishes before the project is 50% complete never really benefits from the reduction. Chicago's recommendation is for reduction by the line item on the payment request - thus when any item in the job cost breakdown reaches the 50% completion point any retainage ceases and the balance is paid in full (the only improvement would be the 50% refund route!). This is a lot of work for the Contractor and Architect but it's the most equitable for the subcontractors. I am certain the subcontractors held out for this, a real plus for their participation. And so back to the question: what can Architects do to promote A401? We can take the initiative in inviting your participation at the conference table and from thereon in we can help you in your discussions with the generals. It's quite possible that from all this might actually come the break we've searched for in trying to hold the line on cost of construction: equitable contracts equitably performed on and true cooperation both up and down can only give us a better building climate and ultimately price stabilization. In liaison, I realize that it doesn't make a great deal of difference if the subcontractor is from ASA or CMSCI as long as the subs' interests are represented forcefully and fully. Be that as it may, if the united subcontractors front is the logical approach to speaking for all subs, you're going to have to have the industry think of ASA first (I'm not trying to cause a civil war among subcontractor organizations - I just have the gut feeling, to use a current cliche, that in the long pull you'll do a lot better

at the conference table by presenting a united voice). In my opinion, collaborative effort is the only way we'll ever dispel the clouds of suspicion that hang over our solo action. It will take time for all of us to get used to the idea of our three groups working together but I think it's a necessary step to repair the fracturing that's been taking place in our industry.

I know you must feel cheated to have me come from Atlanta to tell you that the Architects in reality can't do very much for the subcontractors. Actually what I'm trying to get across to you is that the Architect is on the Owner's side and if equitable treatment of subcontractors via an equitable subcontract works on behalf of the Owner - and I sincerely believe that it does - then we're strong for the revised A401.

I can't emphasize too much that strong pressure must come from you, the subcontractors, for the use of A401; I can only reassure you that we will be circulating the word that we believe in AIA's document.

I suspect that in regard to A401 I must appear to AGC to be the bastard at the family reunion. My willingness to discuss the subcontract and to further AIA's end is not intended to curry any particular favor with you. We feel strongly that somehow or other there must be a return to the day of the handshake contract; while it is realized that in this litigation-happy climate this is an impossibility, we would hope for a return to the spirit of that trust. Our goal in AIA is to make every contract form we publish an equitable document flowing equally in both directions and I hope that time will prove this is what our Subcontract form really accomplishes.