



## ASA 2021 Advocacy Accomplishments

**State Chapter Visits:** ASA Government Relations Director Mike Oscar visited in person or met virtually with the following Chapters:

- Carolinas (Charleston and Midlands)
- Central PA (Virtual)
- New Mexico (Virtual)
- Southwest Florida
- Utah (Virtual)
- San Antonio
- Colorado
- Michigan
- ASA North Texas
- ASA of California

### **Legislation:**

#### **Infrastructure:**

- On Monday, November 15, 2021, President Biden signed the Bipartisan Infrastructure Bill into law allowing for \$1 trillion in infrastructure spending. Included in that law was one of ASA's legislative priorities, the Promoting Infrastructure by Protecting Our Subcontractors and Taxpayers Act of 2021 (P3 Legislation) led by Sens. Van Hollen (D-MD) and Rounds (R-SD) and Reps. Lynch (D-MA) and Balderson (R-OH), which will direct the U.S. Department of Transportation (DOT) to ensure public-private partnership (P3) projects using Transportation Infrastructure Finance Innovation Act (TIFIA) financing have appropriate payment and performance security bonds.

#### **Federal Prison Industries (FPI)**

- ASA working with Reps. Brooks (R-AL) and Huizenga (R-MI) in drafting legislation that would:
  - Elimination of Mandatory Sourcing for Government Contracts
  - Elimination of Small Business Set-Asides for Federal Prison
  - Report To Congress: Not later than 180 days after the date of the enactment of this Act, after consultation with the Small Business Administration and the Secretary of the Department of Labor, the Attorney General shall report to Congress on the extent of which domestic markets Federal Prison Industries compete with domestic capacity in the private sector, including small business, and identify new markets overseas for Federal Prison Industries to begin to compete for in which there is no domestic capacity in the private sector, including small business. Such a report shall focus on the loss of revenue for FPI removing itself from domestic competition, and what percentage is needed in the respective overseas markets to make up for the loss of revenue from ceasing to compete domestically with the private sector, including small business. Such a report shall also focus on the development of an expedited timeline and the necessary action items needed for such a transition.
  - On August 20, 2020, Kerrick Whisenant hosted Rep. Brooks on the above.

## **Miller Act Bond Threshold**

- **H.R. 2949:** ASA supported this legislation that would exempt increases to the Miller Act bond threshold. Additionally, on December 15, 2021 ASA secured this legislation in the FY22 NDAA. Maintaining Miller Act Bond Threshold at \$150,000 is big win for small business contractors. Arbitrarily increasing the Miller Act bond threshold based on inflation exposes businesses, including smaller and disadvantaged businesses working as subcontractors and suppliers, to loss of vital payment protections on federal construction projects. Maintaining the bond threshold at \$150,000 protects U.S. taxpayers by ensuring tax dollars are not being placed in jeopardy by the absence of performance bonds due to a rote inflationary indexing.

## **Disaster Relief Flexibility Act**

- **H.R. 5735:** ASA supported this legislation that would expand the eligible uses of the Coronavirus Relief Act (CARES) funds to include infrastructure, disaster relief, housing, community development, and other investments that will have a long-term economic return.

## **FY22 NDAA (Defense Act)**

- ASA supported the overall legislation and specifically worked to ensure that the Department of Defense submits a report on the effects of the Cybersecurity Maturity Model Certification (CMMC) on small businesses. CMMC is one of the most ambitious cybersecurity compliance requirements ever undertaken by Department of Defense and the program is designed to be a mandatory requirement on all defense contracts. The potential of excluding a significant portion of small business defense contractors and the ability for agencies and prime contractors to meet small business goals should be evaluated and reported to Congress and the public.

**Congressional Caucus (Construction Procurement Caucus) Introduced on April 22, 2021: ASA Founding Member**

## **Regulatory Actions:**

- On November 17, 2021, ASA issued a press release applauding the Associated General Contractors (AGC) of America's legal challenge against the Occupational Safety and Health Administration (OSHA)'s COVID Vaccine Mandate Emergency Temporary Standard (ETS).
- On November 5, 2021, ASA requested a delay of OSHA's Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Advance Notice of Proposed Rulemaking (ANPRM).
- ASA and AGC submitted comments on the Defense Department's Past Performance of Subcontractors Interim Rule.
- ASA worked directly with the Small Business Administration (SBA)'s Surety Bond Guarantee Program regarding retainage bonds.
- ASA closely monitored OSHA's new enforcement exposure guidance on beryllium dust.
- ASA worked with OSHA to exempt the construction industry from their COVID-19 Safety Rule.

## **Attorneys Council Accomplishments:**

### **Attorneys' Council**

- Full Council Meetings in 2021:
  - Virtual Attorneys' Council meeting in March
  - In Person Attorneys' Council meeting in October (San Antonio, TX)
  
- Resource Documents
  - The Attorneys' Council undertook the updating of several documents and resources for the ASA community in 2020 and 2021.
  - ASA Subcontract Document Suite and Subcontractor Negotiating Tips
  - ASA Retainage Law in 50 States resource
    - September release of updated 50 state manual
  - ASA State Contract Law Clauses and Pay if Paid resources in addition to updates to Ten Killer Contract Clause and Constructor Negotiation presentations up next for new and updated resources with the group

### **Contract Documents Task Force**

- Broad effort to increase awareness on the value of resources available on ASA InfoHub and ConsensusDocs subcontractor agreements as industry best practices being undertaken this year
  - State-based Education from local Attorneys (*See ASA of Metro Washington Indemnification Event example, Attachment A*)
  - ConsensusDocs sponsored webinar to our members webinar in June 2021 entitled *Subcontract Negotiations: When the Juice Ain't Worth the Squeeze When You Really Want the Fruit*

### **Subcontractors Legal Defense Fund**

- Low number of cases received for review over the last year have led to lower costs for SLDF
- Fundraising Efforts continue to keep SLDF finances strong
  - January 2021 appeal mailing to 250 previous SLDF donors
  - February 18th Virtual Beer Tasting fundraiser. Almost \$14k raised between fundraiser and mailing.
  - New/renewing member opt-out contribution under consideration again for 2021
  - SLDF Whiskey Tour and Tasting scheduled in San Antonio in October to coincide with the Attorneys' Council meeting was supported by both meeting participants and local ASA San Antonio members. Event raised \$5,000.
- 2021 new and pending cases:
  - H2K Technologies, Inc. (Oklahoma lien waiver case) – approved
  - Extech Buidling Materials, Inc. (New Jersey lien fund preservation case) - denied
  - State Construction (Washington lien and bond claims case) - approved
  
- Oklahoma: *H2K Technologies, Inc. v. WSP USA, Inc. and Fidelity and Deposit Company of Maryland*
  - ASA Counsel: David Walls, Esq., David A. Walls, PLLC
  - The appeal arose following the judgment by a trial court in favor of an Owner, dismissing the lien claim of a Subcontractor who provided labor and materials to improve the owner's property.
  - In the original contract, the Contractor agreed to waive its lien rights and to insert similar lien waivers into any subcontracts it entered into. When the Contractor hired Subcontractor, however, the agreement did not contain any such lien waiver language, did not refer or incorporate the prime contract and did not advise Subcontractor its lien rights were purportedly waived. This

Contractor eventually filed for bankruptcy without having paid Subcontractor anything for its work. The Subcontractor then filed a lien against Owner's subject property.

- SLDF produced an application to file an amicus curiae brief in the Oklahoma Supreme Court this week, asserting that the outcome of the case at hand could have significant adverse consequences for subcontractors and suppliers
  - While the Court denied the application for amicus, the application served a purpose in highlighting the importance of the issue. Now the Court will be aware ASA wanted to intervene, which underscores the gravity of the matter at hand.
  - In a victory for subcontractors last month (Nov. 2021), the Supreme Court held that a subcontractor's statutory right to waive its lien rights may not be exercised by anyone other than the subcontractor.
- New Jersey: *Extech Building Materials, Inc. v. E&N Construction, Inc., et als.*
    - Inquiry received in June 2021 denied because the case is not yet to appellate stage
  - Washington: *State Construction, Inc. v. Sammamish, Porter Brothers Construction, Inc., Hartford Fire Insurance Company and Bond No. 52BCSDL1582*
    - ASA Counsel: Brian Esler and Jim Yand, Miller Nash, serving as pro-bono counsel
    - This case involves an appellate court decision affirming the dismissal of a subcontractor's lien and bond claims as untimely due to its conclusion that (1) the date of "completion of the contract work" for purposes of determining a retainage claim deadline is determined principally by reference to the general contract, and (2) that an owners certification of a completion date is "legally conclusive and cannot be challenged factually."
    - Washington Supreme Court panel denies further review on July 9, 2021

#### **Communications:**

#### **Podcasts:**

- Two Podcasts for Women in Construction Month (3/21)
  - Mike Oscar interviewed Shelia Ohrenberg and Dana Thompson (Women in Construction Coalition)
  - Shannon Oscar interviewed Bethany Beck (ASA AC Chair)
- Podcast with Jordan Howard, AGC's Director of Federal & Heavy Construction, on May 20, 2021
- Podcast with Dalton Defendis, the Surety & Fidelity Association of America's GRC Director, on July 28, 2021
- Podcast on H2K Oklahoma SLDF Case on September 28, 2021

#### **Voter Voice:**

- Three Campaigns (OK, CO, DC Metro) = 109 ASA participants sent 1,189 messages

## **Social Media:**

### **Facebook**

- As of December 2021, 1,500 people like the ASA Facebook page, up from 1,312 likes from September 2019
- 2,092 people follow the page up from 1,773 followers in September 2019
- The most popular posts continue to focus on ASA Staff/members meeting and engaging:
  - Two posts on October 22, 2021 focused on the Attorneys' Council meeting and SLDF Fundraiser in San Antonio were viewed 575 times with 59 engagements.
  - A January 25, 2021 post on an ASA Panel Discussion on managing growth reached 431 people.
  - Our Thanksgiving message reached over 300 members with 22 engagements.

### **Twitter**

- 3,279 followers, up from 2,307 in September of 2019