

July 23, 2007

Dear Members of SFNE:

In June of this year the Board of SFNE approved a "Proposal" for the suggested use of our Members engaged in the fabrication and erection of Structural Steel. After approving that Proposal, a request was made for a similar Proposal designed to be used by our members engaged in the Fabrication and/or Installation of Miscellaneous Metal. We have now completed this second Proposal.

The purpose of this letter is to review this second Proposal and explain those portions of this second Proposal where, in our opinion, the document might require some clarification. In preparing this letter of explanation, we have decided to include a full explanation of this Proposal, which shall be independent of our previous introduction to the Proposal prepared for Structural Steel Fabricators.

To begin with, we shall refer to Structural Steel Fabricators with that name and to the providers of Miscellaneous Metal with that name. Having said this, and also by way of introduction, there are major differences between the nature and scope of these two providers. While the CODE of the AISC defines what is Structural Steel and what is not Structural Steel, the same is not true with regard to Miscellaneous Metal. Put another way, what is not Structural Steel under the CODE of the AISC is not necessarily Miscellaneous Metal! To avoid confusion and disputes down the line, it is strongly recommended that the Miscellaneous Metal Proposal specifically identify each item that is included in the Proposal. In addition, not all items furnished by the Miscellaneous Metal provider are installed, i.e. some items are just furnished, with installation done by the General Contractor. For this reason, it is strongly recommended that the Miscellaneous Metal Proposal itemize those items which are to be installed by the Miscellaneous Metal Fabricator as "installed" and those that are not as "furnished only". With this as an introduction, I will now proceed, Section by Section to explain this Miscellaneous Metal Proposal.

After having filled in basic information, such as the names of the parties and the name and the address of the project, we get to the essence of the Proposal. As mentioned previously, the Proposal is an offer and if the General Contractor submits a document, for example, a Subcontract, that Subcontract is merely a counteroffer, which is not binding on the Miscellaneous Metal Fabricator unless accepted by the Miscellaneous Metal Fabricator. This is where the negotiations may or may not occur! By the very terms of the Proposal, the Miscellaneous Metal Fabricator is not required to negotiate.

It should be noted that the Proposal contains language which states that if any discrepancy or conflict exists between the Miscellaneous Metal Fabricator's Proposal and any Document sent by the General Contractor, the language of the Proposal shall govern. Keep in mind that the General Contractor's Subcontract might contain a similar clause which states that the Subcontract Agreement shall supersede all prior negotiations. If this

clause is not stricken, then a contradiction in terms may occur, which could lead to complications down the road. Keep in mind that the Proposal is a “safety net” which limits the exposure of the Miscellaneous Metal Fabricator and remains available if negotiations fail.

Next the Proposal specifically defines the Work to be performed by the Miscellaneous Metal Fabricator, subject to terms and conditions which follow. As mentioned above, it is extremely important for the Miscellaneous Metal Fabricator to specifically break out each item that is included in the Proposal. Note the importance of listing all drawing numbers and dates available to the Miscellaneous Metal Fabricator at the time of bidding. This alerts the Miscellaneous Metal Fabricator, and in some cases the General Contractor, to possible inclusions or exclusions of revised drawings or specifications subsequent to the Miscellaneous Metal Fabricator having submitted its proposal. This limits the Miscellaneous Metal Fabricator's exposure with regard to items or quantities not included in the Miscellaneous Metal Fabricator's original price.

The next item that should be noted is the inclusion of the Code of Standard Practice for the Architectural Metal Industry (the “Code”) as promulgated by the National Association of Architectural Metal Manufacturers (NAAMM). This CODE is particularly useful to the Miscellaneous Metal Fabricator in resolving any ambiguities in the contract documents. All Miscellaneous Metal Fabricators should be thoroughly familiar with all Sections of this Code. In addition to the Exclusions contained in the Code, there is section which excludes all items defined as Structural Steel under the Code of Standard Practice for Steel Buildings and Bridges as promulgated by the American Institute Of Steel Construction (AISC). The Proposal's use of these two Codes, and your remembering to specifically identify the items which are included, should minimize any ambiguity as to what is covered by the Proposal.

We next turn to the Terms & Conditions of the Proposal. It should be noted that the Proposal states that Payment to the Miscellaneous Metal Fabricator shall not be conditioned on receipt of payment by the General Contractor. While pay when paid clauses should be avoided, this clause is subject to negotiation like all others. However, the mere inclusion of this clause in the Fabricator's Proposal gives the Fabricator an argument that this clause could take precedent over any such Pay When Paid clause which appears in a Subcontract.

Please take particular note of the Section entitled “Claims”. The important feature of this Section is that both parties, the Fabricator as well as the General Contractor, recognize that claims against each other may occur. Timely, written Notice by all parties is the important feature of this Section. The second feature of this Section is that in the event of a claim where Notice has been given, the Miscellaneous Metal Fabricator shall continue to perform its Work without delay. Such work is to be performed by the Fabricator under protest, with the General Contractor agreeing to an arrangement for establishing the cost of such work as set forth in this Section. The language of this Section provides two things; timely notice of the dispute, and a logical method of establishing the additional costs to all parties.

Finally, Section 9 deals with Indemnification. Issues regarding Indemnification are generally passed from the Miscellaneous Metal Fabricator to its Insurance Carrier. While this Proposal sets forth a “fair approach” to this issue, the types of Indemnification Agreements which will control a particular project are normally dictated by the Owner and the General Contractor. For this reason, the Miscellaneous Metal Fabricator must fall in step with the type of provision used by the General Contractor or Owner. It should also be mentioned that State Statutes will often limit the unfairness of such clauses. It is imperative that the Fabricator’s Insurance Carrier be notified of whatever Insurance requirements are ultimately agreed to for the particular Project.

If you have had the patience to read through this Article and the “Proposal” and have any questions, you may call or Email our office. We are willing to further clarify any issues.

Mel Nash & Ross Wecker  
Nash & Wecker, LLC  
1330 Beacon Street, Suite 241  
Brookline, MA 02446