Celebrating 50 years of education, advocacy and support of subcontractors in the construction industry, the American Subcontractors Association (ASA) has played a pivotal role protecting subcontractors’ best interests while improving the climate in which the industry operates.
Since 1966, the ASA has provided a strong unified voice representing subcontractors and suppliers in the industry. It’s no surprise that the ASA’s membership grew from one chapter to 25 in its first year alone. Today, the ASA represents over 2100 member companies and more than 4200 individuals.

The ASA represents its members on a national level by providing a unified voice, serving as a steward for its community and for the industry as a whole. ASA members are representative of virtually every trade and are represented on nearly every construction project that takes place, both public and private.

Efforts of the ASA are focused on achieving ethical and equitable business practices industry-wide. The organization also maintains a focus on upholding quality construction standards that take into consideration the best interests of the safety, health and wellbeing of its diverse membership.

“For more than 50 years, ASA has represented construction subcontractors before all branches of government and within the construction industry,” explained E. Colette Nelson, ASA’s Chief Advocacy Officer. “ASA has taken the approach that what is good for construction subcontractors, who hire most employees and perform most of the actual construction, is good for the construction industry.”

As such, the construction industry as a whole benefits from the advocacy, education, representation and action of the ASA. Nelson provided two examples of the organization’s successful efforts to produce beneficial changes for both its members and the industry. One example highlights the ASA’s advocacy work to ensure prompt payment of contracts at all levels of the construction industry. By advocating for the prompt payment of its membership, ASA is helping to create a more efficient and equitable payment scheme that benefits all layers of the industry.

As Nelson explained, “Construction owners must pay their prime contractors in full and on time for properly performed work. Prime contractors, in turn, must pay their subcontractors timely. And, of course, subcontractors also must pay their subcontractors and suppliers timely.” Late payment could have a
A serious ripple effect that impacts every layer of the industry.

The second example Nelson offered emphasized the ASA’s role as founder and supporter of ConsensusDocs. ConsensusDocs is a coalition of 40 leading industry associations who believe that “construction risk should be borne by the entity best able to manage and insure the risk and that decisions should protect the best interests of the project, rather than a single party on the project.”

For Nelson, addressing these problems requires a systematic look at the industry as a whole. “Construction leaders often quip that the industry has an image problem. I respond that the industry doesn’t have an image problem, it has a reality problem.”

Not only is there a perception that dangerous work conditions persist, despite changes to legislation, many individuals are subject to conditions of the informal economy where they are paid in cash and receive no benefits or protections as a result. These conditions lead to low levels of productivity, quality and efficiency and can impact industry-wide risk, performance and output.

“These are the current realities in the construction industry,” noted Nelson. “At the same time, a drive through any city in America shows the industry’s importance and successes – the houses we live in, the schools in which our children are educated, and the office buildings in which we work.”

Subcontractors are responsible for completing three-quarters of the construction that takes place in the United States. Their work is subject to general laws and regulations and construction-specific laws and regulations, as well as what is referred to as the “private law” of subcontractors which includes issues of performance, quality and the assumption of risk.

The ASA offers its members representation with all branches and levels of government, the media, and on an indus-
try-wide basis, as well as contract and project management support through the promotion of industry best practices. The ASA has established model contract language that will foster more fair and equitable business practices for the benefit of its members and the industry.

There are many benefits to membership with the ASA: government advocacy, legal representation, a strong, unified industry voice that represents members, education, training, industry news and information, as well as a membership directory and human resources supports. The organization has a knowledgeable and experienced staff that supports its members with subcontractor-specific issues that cannot be addressed by any industry body. The ASA supports industry-wide initiatives and partners with other industry bodies on broader industry issues where needed. ASA will also support business-specific issues that are relevant to its membership.

“I firmly believe that there would have been little if any action on subcontractor issues, particularly payment issues, during the last 50 years if not for ASA’s leadership through education and advocacy,” Nelson stated. Even in instances where the ASA has not served as a primary actor in legislative or regulatory action, many advocacy efforts rely on the ASA’s exemplary model legislation and resources.

Over the past few years, in addition to pursuing traditional issues of interest related to payments (timing, retainage, mechanics lien, bond rights, etc.) and the allocation of risk, a principal subcontractor issue has emerged at the forefront of the ASA’s efforts: payment assurances for subcontractors in Public Private Partnerships (P3).

“ASA supports extending the tenets of the federal Miller Act and state Little Miller Acts (i.e., requiring the prime construction contractor to provide a payment bond) to P3s. During the last six years, most states that have enacted legislation authorizing the use of P3s, have included such a bonding requirement,” shared Nelson. Those states include Connecticut (2010), West Virginia (2010), North Carolina (2013), Maine (2013), Maryland (2013), District of Columbia (2015), Georgia (2015), Kentucky (2016), Louisiana (2016), New Hampshire (2016) and Tennessee (2016), while

The ASA also undertakes efforts to require federal and state governments that contract subcontractors to process and pay change orders in an efficient manner, instead of delaying until, or after, project completion, where subcontractors and contractors have already footed the bill for the completed work and no longer have a bargaining chip with the contracting entity.

ASA advocates for fair and transparent payment practices on behalf of governments and states in P3 arrangements and these issues will continue to drive the advocacy efforts of ASA for the foreseeable future, given the increasing predominance of P3 arrangements in the industry.

“Governments are turning to P3s because infrastructure needs far exceed the funding available in the budgets raised through taxes, or that could be accessed with revenue bonds or borrowing,” Nelson explained, especially since P3s have expanded to include vertical projects with municipalities, districts, school districts, etc.

As Nelson addressed, “Typically, the public entity will authorize the private entity to design and build, and frequently, to operate and maintain the resulting public work. P3 agreements attract the private capital for needed projects now, and the private party is paid back through some stream of public revenue that the public entity grants, such as the right to collect tolls.”

Historically, P3s have been used primarily for transportation and infrastructure projects, and horizontal projects such as highways and bridges. These, referred to as “big ticket” projects, were the main focus of early legislation related to P3s. “Under a P3, however, the private partner, frequently called a concessionaire, contracts with the public entity, and the private partner then retains the construction contractor to complete the construction phase of the P3,” explained Nelson. “Under normal circumstances the concessionaire would be required to follow all procurement laws, including providing payment and performance bonds, but legislation is being enacted specifically for these projects.”

As the work takes place on public property, subcontractors no longer gain the benefit of payment protections under mechanic’s lien rights. As construction is not taking place on private property, unless authorized by law, a payment bond may not be required, thus removing all payment protections.

As Nelson acknowledged, “Mechanic’s lien laws generally do not apply to construction on public land, and federal, state or local governments most often own the land on which P3 projects are built. Statutory payment bonds are required in all states for contracts awarded by public owners based on a public design and with public funding.”
The ASA has asserted itself as a very important industry player.

To mitigate uncertainties related to payment protections, the ASA provides statutory and contractual protections to ensure that subcontractors and suppliers are equipped with the very best protective measures. The organization offers a number of resources and supports to ensure the protection of its members in this regard. “If a prime contractor has not provided a payment bond, the subcontractor should determine whether other subcontractor assurances are in place,” explained Nelson.

Nelson added, “Has the concessionaire or prime contractor provided a letter of credit or parental guarantee? If so, are they structured in a way to provide payment assurances for subcontractors and suppliers on the project or are they only for protection of a government owner? Are the procedures for filing a claim for payment clear and attainable?”

Subcontractors can take a number of steps to proactively protect their own interests by evaluating the source and quality of payment assurances on all projects undertaken. Subcontractors can request and obtain copies of payment bonds, as Nelson notes, “preferably before signing the subcontract.” Subcontractors can, and should, verify a bond’s authenticity.

When surveyed, 98 percent of subcontractors responded that they value the ASA’s legislative and regulatory government advocacy initiatives; 96 percent say they value the ASA’s advocacy initiatives in the courts through the ASA Subcontractors Legal Defense Fund; 91 percent value ASA membership for their business; and 88 percent value efforts made to improve industry model contract documents.

From establishing a model contract to the multiple legislative changes that have resulted from the ASA’s advocacy at every level and branch of government, the association has asserted itself as a very important industry player, imparting change in a very effective way.

The ASA has proven its relevance and throughout history has established an exceptional rate of success fulfilling its mission and vision to improve the business environment of the construction industry for its members and for the industry as a whole – and it will continue to do so long into the future.