



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Consequential Damages

Sample Language

ASA Recommends:

"Customer expressly waives all claims for special, incidental or consequential damages it may have against Subcontractor, including without limitation damages for principal office expenses, loss of financing, loss of business and reputation, and loss of use."

What You May See in the Wild:

Example #1: "Subcontractor is bound by any damages provisions in the Prime Contract, including any provisions concerning liquidated or consequential direct damages owing to Owner and/or Contractor."

Example #2: "Subcontractor shall be fully liable for, and shall defend, indemnify and hold Contractor harmless from all liability, costs, expenses and damages, including attorney fees, and consequential damages and any delay and disruption damages claimed against Contractor, attributable in whole or in part to the failure of Subcontractor to prosecute the Work consonant with the project schedule."

Impact on the Subcontractor

- The subcontractor can't be sure where its liability ends since "consequential damage" is not a clear term.
- The subcontractor could find itself responsible for loss of use, loss of sales, loss of revenue, or even loss of reputation by its customer or even a third party.
- The subcontractor could find itself responsible for an infinite risk open only to the imagination of trial attorneys.

Negotiating Tips

When the GC Says: "I have a damages clause in my agreement with the owner. I have to have it my agreement with you, too."

The Sub Should Say: "You don't need this language because the prime contract contains liquidated damages instead."

When the GC Says: "I need you to be financially responsible for damages caused by delays or other problems."

The Sub Should Say: "We can be responsible for any 'actual damages' to the extent we cause them."

When the GC Says: "This is standard industry practice."

The Sub Should Say: "The major industry documents, including ConsensusDocs and AIA, include a mutual waiver of consequential damages. Even the Federal Government doesn't require a consequential damages clause."

Additional Resources:

ASA *Subcontract Addendum* (2011), ¶ 25. Available to ASA members at www.ASAonline.com.

ConsensusDocs *Form 750, Standard Agreement Between Constructor and Subcontractor* (2012), ¶ 5.4. Available at www.ConsensusDocs.org; ASA members can get a 20 percent discount by entering ASA100.

American Institute of Architects *Form A401, Standard Form of Agreement Between Contractor and Subcontractor* (2007), ¶ 15.4. Available at www.aia.org/contractdocs/.