



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Legal Action Against the Owner by the Contractor on Behalf of the Subcontractor

Sample Language

ASA Recommends:

Subcontractor should strike the clause.

What You May See in the Wild:

"If the Owner or its designated agent does not issue a certificate for Final Payment or the Contractor does not receive such payment for any cause that is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of the Subcontractor, the prompt release by the Owner of the final payment due for the Subcontractor's Work. At the Subcontractor's request and expense, to the extent agreed upon in writing, the Contractor shall institute reasonable legal remedies to mitigate the damages and pursue payment of the Subcontractor's final payment including interest thereon."

Additional Resources:

White Paper: *Payment Terms: Adequate Assurances of Payment (2009)*. Available to ASA members at www.ASAonline.com.

ConsensusDocs *Form 750, Standard Agreement Between Constructor and Subcontractor (2012)*, ¶ 8.2.1 and ¶ 8.3.4. 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)*, ¶ 11.3 and ¶ 12.1. Available at www.aia.org/contractdocs/.

Impact on the Subcontractor

- The subcontractor may have to fund any legal or claim actions by the general contractor, on the subcontractor's behalf, even if the owner's decision to not make payment is for a reason not the fault of the subcontractor.
- The subcontractor may find that the provision's protections are illusory if the owner is insolvent.
- The subcontractor may find that the provision's protections are illusory if the owner has large enough claims against the general contractor to effectively shield the owner from any subcontractor demands.

Negotiating Tips

When the GC Says: "This provision is beneficial to you."

The Sub Should Say: "This provision has very limited appeal. In fact, the purported protections could be illusory if the owner has claims against you or has its own financial problems."

When the GC Says: "The provision is industry practice."

The Sub Should Say: "I just want to strike the clause. There's no similar provision in either the ConsensusDocs or AIA documents."