



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Duty to Defend

Sample Language

ASA Recommends:

"Subcontractor does not have a duty to defend."

What You May See in the Wild:

"The Subcontractor shall defend and bear all costs of defending any actions or proceedings brought against the Contractor and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts or omissions, provided, however, that the Contractor and/or Owner shall have the right to approve counsel to conduct such defense."

Impact on the Subcontractor

- The subcontractor would have to hire a lawyer to handle any problems for its customer – whether or not the subcontractor is at fault.
- The subcontractor would have to defer to the Contractor, Owner and others about the selection of the attorney, regardless of that attorney's expertise or fee structure.
- Lawsuits, particularly injury claims, can be very expensive and it is not unusual for legal fees to approach six figures very quickly.
- Any legal expenses the subcontractor pays will come directly from its profits and cash flow.
- The subcontractor may be forced to settle the underlying claim in order to avoid skyrocketing legal fees.

Negotiating Tips

When the GC Says: "My subcontract requires you to defend me in the event of any claims or lawsuits."

The Sub Should Say: "I believe it is appropriate for us each to provide and pay for our own counsel. Certainly, you would prefer to use your own attorney."

When the GC Says: "Most of the cost of claims and law suits are attorney fees. This clause provides an incentive for you to avoid problems."

The Sub Should Say: "We will agree to pay attorney fees to the extent we are negligent."

When the GC Says: "Your insurance will cover these legal expenses."

The Sub Should Say: "We already agreed to provide you with OCP. That policy may kick in for your defense needs, provided you aren't actively negligent."

Additional Resources:

ASA Subcontract Addendum (2011), ¶ 13. Available to ASA members at www.ASAonline.com.

White Paper: Obligations to "Hold Harmless" and "Defend" (2009). Available to ASA members at www.ASAonline.com.

Risk Transfer: Frequently Asked Questions. Available to ASA members at www.ASAonline.com.

ConsensusDocs Form 750, Standard Agreement Between Constructor and Subcontractor (2012), ¶ 9.1. 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), ¶ 4.6. Available at www.aia.org/contractdocs/.