



## American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Evidence of Owner Financing

### Sample Language

#### ASA Recommends:

"The subcontract is subject to credit approval by Subcontractor, and Subcontractor shall be provided with the legal description of the property, the name, address and representative of the project owner, evidence of adequate owner financing, and a copy of the Customer's payment bond for the project, if any. Customer shall promptly notify Subcontractor of material changes in the project owner's identity or financial arrangements. Subcontractor shall not be obligated to commence or continue Subcontract Work absence adequate assurances of payment."

#### What You May See in the Wild:

**Note:** Many GC proprietary subcontracts are silent on evidence of owner financing.

### Impact on the Subcontractor

- The subcontractor relies, at least in part, on the credit of the owner. If the subcontract has a pay-when-paid or a pay-if-paid clause, payment by the owner is a crucial event that determines when the subcontractor will get paid.
- The subcontractor may need detailed information about the owner in order to exercise its lien rights.
- An owner's financial status can change dramatically during the course of a project, endangering the subcontractor's cash flow.
- In today's political environment, even public construction may not be fully-funded.

**Note:** The subcontractor needs to consider what kind of owner financial information it will accept as "adequate" (i.e., audited financial statement, loan agreement, letter of credit).

### Negotiating Tips

**When the GC Says:** "The owner is my customer. If I'm comfortable with his wherewithal, you should be, too."

**The Sub Should Say:** "Your subcontract refers directly to payment by the owner as the trigger for when I get paid. You're asking me to rely on the credit of your customer. How can I rely on the credit of the owner without investigating it?"

**When the GC Says:** "I've already agreed to eliminate the pay-if-paid clause in my subcontract, so I'm ultimately on-the-line for payment to you."

**The Sub Should Say:** "And I appreciate your working with me. But even with the pay-when-paid clause to which we've agreed, the timing of my payment is dependent on the credit of the owner. If the owner pays late, everyone gets paid late, which puts pressure on my cash flow. If you want me to base my payment on the owner's cash flow, then the owner's financial status is very much my business."

**When the GC Says:** "How do you expect me to convince the owner to provide me with this information?"

**The Sub Should Say:** "It's standard practice in the construction industry for the owner to provide financial information to its GC. After all, you're extending credit to him. Both the ConsensusDocs and AIA general conditions require the owner to provide you with reasonable evidence that it can meet its financial obligations. I'm confident that you're enough on your toes to negotiate for this important right with your customer."

### Additional Resources:

ASA Subcontract Addendum (2011), ¶ 4. Available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

ConsensusDocs Form 200, Standard Agreement and General Conditions Between Owner and Constructor (2012), § 4.2. Available at [www.ConsensusDocs.org](http://www.ConsensusDocs.org); ASA members can get a 20 percent discount by entering ASA100.

American Institute of Architects A201, General Conditions of the Contract for Construction (2007). § 2.2.1. Available at [www.aia.org/contractdocs/](http://www.aia.org/contractdocs/).

Guidelines for a Successful Construction Project (2008), "Owner's Ability to Pay." Available at [www.ConstructionGuidelines.org](http://www.ConstructionGuidelines.org).