



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Concealed or Unknown Conditions

Sample Language

ASA Recommends:

"Subcontractor's obligation to examine documents, the project site, and materials and work furnished by others is limited to notification of Customer of any defects or deficiencies that a person in the trade of Subcontractor would discover by reasonable visual inspection. No testing beyond reasonable visual inspection shall be required. Subcontractor is entitled to rely on the accuracy and completeness of plans, specifications, and reports of site conditions provided to Subcontractor."

What You May See in the Wild:

Note: These clauses usually are located in the general contract documents and incorporated by reference into the subcontract.

Impact on the Subcontractor

- Subcontractor could assume the risk for unknown concealed or subsurface conditions.

Negotiating Tips

When the GC Says: "The owner wants to make sure that he doesn't have any surprises that will increase his costs."

The Sub Should Say: "My bid proposal made clear that I would need more time and money if we found unforeseen physical conditions on the site. Without this assurance, I need to include a contingency fee in my price."

When the GC Says: "You said that you visited the job site. You should have seen anything that would cause a problem."

The Sub Should Say: "I did visit the site. And I'm willing to be responsible for any conditions that are in plain sight. But I can't be responsible for any hidden problems."

When the GC Says: "You and your employees will be on the jobsite and see problems before I will. You need to take responsibility for what you find."

The Sub Should Say: "I certainly can and am willing to agree to notify you promptly of any problems that we identify. Then we can collaborate to resolve them. But I need to be paid for additional costs and get appropriate time extensions to take care of the problem."

When the GC Says: "This isn't industry practice."

The Sub Should Say: "Most contract documents today relieve both the prime contractor and the subcontractors from the risks for concealed conditions. Indeed, what I'm asking is in line with what both ConsensusDocs and AIA documents say is fair."

Additional Resources:

ASA *Subcontract Addendum* (2011), ¶ 2. Available to ASA members at www.ASAonline.com.

Negotiating Tip Sheet: *Copies of Contract Documents* (2013). Available to ASA members at www.ASAonline.com.

ConsensusDocs *Form 200, Standard Agreement and General Conditions Between Owner and Constructor* (2012), ¶ 6.3. Available at www.ConsensusDocs.org; ASA members can get a 20 percent discount by entering ASA100.

American Institute of Architects *Form A201, General Conditions of the Contract for Construction* (2007), ¶ 3.7.4. Available at www.aia.org/contractdocs/.