



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Mediation as Preferred Dispute Resolution Method

Sample Language

ASA Recommends:

"The parties shall endeavor to resolve all claims, disputes, and matters arising out of or relating to this Agreement, by mediation, as a condition precedent to any other dispute resolution procedure."

What You May See in the Wild:

"Disputes hereunder shall be resolved by litigation, unless the Contractor directs the Subcontractor in writing to arbitrate a specific dispute."

Impact on the Subcontractor

- The subcontractor and general contractor may be able to resolve disputes in a more collaborative, less confrontational manner.
- Studies have shown that mediation is inexpensive, quick and it works.
- Mediation encourages a realistic assessment of the likelihood of ultimate success before extensive discovery and preparation begin.

Negotiating Tips

When the GC Says: "I don't want to waste time working on a decision by which you're not bound."

The Sub Should Say: "Mediation will encourage us to work together more collaboratively toward a quick resolution, before turning to a more confrontational method. Any mechanism that encourages prompt resolution of a dispute will save us both time, money and aggravation."

When the GC Says: "I don't like the idea of showing my hand in a non-binding environment."

The Sub Should Say: "The American Arbitration Association's rules for mediation provide that all records and documents provided to the mediator are confidential."

When the GC Says: "It's not just documents. You'll get information that you wouldn't otherwise have."

The Sub Should Say: "AAA rules also prohibit either party from using statements made by the other in any future binding procedure."

When the GC Says: "The use of litigation is standard in the construction industry."

The Sub Should Say: "Both ConsensusDocs and AIA documents specify mediation as a mandatory condition precedent to litigation, arbitration, or any other, binding dispute resolution procedure. This is standard industry practice."

Additional Resources:

ASA Subcontract Addendum (2011), ¶ 24. Available to ASA members at www.ASAonline.com.

Dispute Resolution: The Procedure (2009). Available to ASA members at www.ASAonline.com.

ConsensusDOCS Form 750, Standard Agreement Between Constructor and Subcontractor (2012), Article 11. 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), Article 6. Available at www.aia.org/contractdocs/.