



## American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet "Pay-if-Paid" Clause

### Sample Language

#### ASA Recommends:

"Subcontractor does not accept the risk of Customer's receipt of payments from any source, and in no event will payments to Subcontractor be based upon or subject to, Customer's receipt of payment for Subcontractor's work."

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

**Example #1:** "Payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipt by the General Contractor of its payment from the Owner."

**Example #2:** "The General Contractor will pay the Subcontractor only if the General Contractor has been paid by the Owner."

**Example #3:** "Receipt of payment from the Owner by the General Contractor for the Subcontractor's work is an absolute condition precedent to the Subcontractor's right to payment."

### Impact on the Subcontractor

- The subcontractor bears the credit risk for the owner.
- The subcontractor may not be able to take legal steps against the owner, because it has no contractual relationship with the owner.
- The subcontractor has no control over or responsibility for owner payment delays.
- The subcontractor's right to sue for payment, assert a claim against a general contractor's bond or file a lien are jeopardized, because payment theoretically is not due to the subcontractor until the owner pays the GC.
- There is not a specific time limit on how long a subcontractor can be denied its money, even assuming the owner is solvent.

### Negotiating Tips

**When the GC Says:** "The subcontractor should share in the risk of owner insolvency."

**The Sub Should Say:** "My credit risk is with you. There's no justification for me to also extend credit to the owner. I don't have a contractual relationship with the owner. You did the credit check on the owner and your decision to go forward is strictly your responsibility."

**When the GC Says:** "A subcontractor's lien rights and the job's payment bond will offer payment protection."

**The Sub Should Say:** "Bonding companies routinely deny claims on pay-if-paid terms, reasoning that no money is owed when an owner fails to pay. Liens also are often challenged using the same logic."

**When the GC Says:** "You should always be willing to wait for your money until I'm paid."

**The Sub Should Say:** "I can't wait until you pay me to issue checks to my jobsite workers, office staff, utility companies and suppliers. If I'm supposed to finance you, I've become a banker, not a builder."

**When the GC Says:** "Pay-if-paid is a valid concept."

**The Sub Should Say:** "Contingent payment terms are void in some states as being against the public interest and fair contracting practice. Even widely-endorsed model documents, such as ConsensusDocs and AIA, do not include a pay-if-paid clause. I would have to be a pretty lousy business person to agree to such a questionable concept as pay-if-paid."

### Additional Resources:

*ASA Subcontract Addendum (2011)*, ¶ 5. Available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

*Contingent Payment Clauses in the 50 States (2012)*. Available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

*Protecting Against Payment Default (2009)*. Available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

*ConsensusDocs Form 750, Standard Agreement Between Constructor and Subcontractor (2012)*, ¶ 8.2.5. Available at [www.ConsensusDocs.org](http://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. Available at [www.aia.org/contractdocs/](http://www.aia.org/contractdocs/).