



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Inability to Stop Work for Nonpayment

Sample Language

ASA Recommends:

"Should Subcontractor's payment be delayed because (a) Customer fails to receive timely payment of amounts certified and approved, or (b) Customer fails to make timely payment after receiving payment for Subcontractor's work, then Subcontractor may suspend work after giving at least seven (7) days written notice to Customer of the intent to suspend and the date of intended suspension. Should Subcontractor's work be thereafter suspended for at least twenty-one (21) days, Subcontractor may terminate this subcontract upon written notice of termination to Customer."

What You May See in the Wild:

Note: Many GC proprietary subcontracts are likely to be silent on a subcontractor's ability to stop work for nonpayment.

Additional Resources:

ASA *Subcontract Addendum* (2011), ¶ 5. Available to ASA members at www.ASAonline.com.

Payment Terms: Adequate Assurances of Payment (2009). Available to ASA members at www.ASAonline.com.

ConsensusDOCS *Form 750, Standard Agreement Between Constructor and Subcontractor* (2012), ¶ 8.2.6. 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), ¶ 4.7. Available at www.aia.org/contractdocs/.

Impact on the Subcontractor

- Subcontractor is left with ambiguous and unpredictable "common law" right to stop work and only if nonpayment constitutes a material breach by the contractor.
- Stopping work can be extremely risky without specific language because of courts' wide-ranging views.
- Stopping work can be risky if the subcontract prescribes liquidated damages for unexcused delays.

Negotiating Tips

When the GC Says: "I can't worry about you stopping work."

The Sub Should Say: "Why worry that I have the right to stop my work for nonpayment? If you pay on time, this becomes academic anyway."

When the GC Says: "This is an unreasonable request."

The Sub Should Say: "I've agreed to give you all sorts of rights if I foul up. I need the same right if you default."

When the GC Says: "I just don't get why you think you need this."

The Sub Should Say: "I don't have enough money to throw 'good money after bad' if payments dry up or if the job shuts down."

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

The Sub Should Say: "What I'm asking is in line with what both ConsensusDocs and AIA documents say is fair, and these forms reflect current industry practice."