



American Subcontractors Association, Inc. Subcontractor's Negotiating Tip Sheet Legal Action by Subcontractor Against Owner

Sample Language

ASA Recommends:

Subcontractor should strike the clause.

What You May See in the Wild:

"In the event that the Owner fails to pay the amount certified as due the Subcontractor, the General Contractor does hereby appoint the Subcontractor as the General Contractor's authorized agent, to take action against the Owner appropriate to procuring payment, including any costs and claims connected thereto following a period of sixty (60) days after the work for which payment is delinquent has been performed."

Impact on the Subcontractor

- The subcontractor may have to fund any legal or claim actions even if the owner's decision to not make payment is for a reason not the fault of the subcontractor.
- The subcontractor may find that the provision's protections are illusory if the owner is insolvent.
- The subcontractor may find that some jurisdictions will not even allow direct action by a subcontractor unless there is explicit consent by the owner in the general contract – which is unlikely.

Negotiating Tips

When the GC Says: "This provision is beneficial to you."

The Sub Should Say: "This provision has very limited appeal. In fact, the purported protections could be illusory if the owner has claims against you or has its own financial problems."

When the GC Says: "The provision is industry practice."

The Sub Should Say: "I just want to strike the clause. There's no similar provision in either the ConsensusDocs or AIA documents."

Additional Resources:

White Paper: *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)*, ¶ 8.2.1 and ¶ 8.3.4. 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)*, ¶ 11.3 and ¶ 12.1. Available at www.aia.org/contractdocs/.