

**American Subcontractors Association, Inc.**

**Subcontractor’s Negotiating Tip Sheet**

**Prospective Waiver of Rights**

**Sample Language**

**ASA Recommends:**

“Notwithstanding any provision to the contrary, Subcontractor may take all steps reasonably necessary to preserve its lien and bond rights.”

**ASA Alternative:**

“Irrespective of any subcontract language to the contrary, the Subcontractor does not agree to the waiver or diminution of any of its lien rights (except to the extent exchanged for payments), the right to assert payment bond claims, the right to assert claims for demonstrated additional costs or such other rights a Subcontractor has under laws prevailing at the location of the project.”

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

“Subcontractor agrees to forgo actions under <citation for state’s mechanic’s lien law> or <citation for state’s “little Miller Act.”>

“Subcontractor waives any claims for delays, interference and unanticipated jobsite conditions.”

**Impact on the Subcontractor**

* The subcontractor may not have any protection against late or nonpayment.
* The subcontractor may give up rights and interests that have been provided by the legislature or the courts.
* The subcontractor may be forced to absorb all costs for owner and/or contractor delays.
* The subcontractor may have to absorb the cost for unknown and unanticipated jobsite conditions for which it had no way of preparing.

**Negotiating Tips**

**When the GC Says:** “I’m not asking you to do anything I’m not asked to do.”

**The Sub Should Say:** “I don’t expect you to waive any of your legal rights, and there’s no justification for me to waive any of mine.”

**When the GC Says:** “This is just standard industry practice.”

**The Sub Should Say:** “Waiving lien rights before one is paid is against public policy in many states. And, certainly, neither ConsensusDocs nor AIA include the practice in their standard industry documents.”

**When the GC Says:** “I need to protect my client and myself against lien and bond claims.”

**The Sub Should Say:** “This should not be a problem. As long as you pay on time, my lien and bond rights don’t even come into play.”

**When the GC Says:** “Lien waivers are standard in return for payment.”

**The Sub Should Say:** “But your subcontract says that I’m waiving my lien rights in advance of any payments. I can agree to partial waivers for the amount I’ve been paid, but I can’t give an advance waiver. I need to protect my interests, just as you protect your interests with the owner.”

**When the GC Says:** “The owner insists on advance lien waivers.”

**The Sub Should Say:** “If the owner insists on lien waivers in advance, then I’ll need a direct payment system, so that I can get my money straight from the owner.”

**Additional Resources:**

*ASA Subcontract Addendum (2011), ¶ 22.* Available to ASA members at [www.ASAonline.com](http://www.ASAonline.com).

Lien and Bond Claims in the 50 States. Available through the Foundation of ASA’s Contractors’ Knowledge Depot at [www.contractorsknowledgedepot.com](http://www.contractorsknowledgedepot.com/) or call toll-free 1-888-374-3133.