



Negotiating Difficult Subcontract Terms

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- 1. Pay-if-paid:** These clauses shift the risk of non-payment by the owner from the contractor to the subcontractor. Previously unenforceable, these provisions have gained favor by the courts as courts are reluctant to renegotiate the terms of the contract that were already agreed to by the parties.

Ideally, it's best to negotiate away the risk of the owner's failure to make payment for any reason other than your failure to perform the work properly. Alternative language that might accomplish this in your state may look like this:

Notwithstanding the foregoing, Contractor shall not withhold payment from Subcontractor if non-payment by Owner is caused by acts or omissions of Contractor, another Subcontractor, or a third party over which Subcontractor has no control. Contractor may only withhold payment from Subcontractor in the amount Owner withholds from Contractor due to Subcontractor's failure to meet the requirements of the Subcontract.

At a minimum the subcontractor should ask to have the risk of non-payment resulting from the poor or defective work of other subcontractors excluded as the basis for withholding payment from your subcontract. The following language would accomplish this:

Notwithstanding the foregoing, Contractor shall not withhold payment from Subcontractor if non-payment by Owner is caused by acts or omissions of another Subcontractor over which Subcontractor has no control. Contractor may only withhold payment from Subcontractor in the amount Owner withholds from Contractor due to Subcontractor's failure to meet the requirements of the Subcontract.

Alternatively, ask for payment terms that reflect the market. For example: if the manufacturer requires payment at the time of the order, request permission to submit your pay app for materials upon ordering rather than upon delivery to the jobsite or installation. Sometimes this can remove the risk of price escalation which is a benefit to the owner *and* contractor!

Remember: The GC may already have favorable payment terms built into the Owner/GC Contract and if the flow-down clause (the part of the contract that says the terms of the Owner/GC contract are made a part of the subcontract) then you should ask for the same protective terms that the GC has negotiated with the owner!

- 2. Indemnification.** Typically, one party will indemnify another party from damages caused by the first party to 3rd persons that result in a lawsuit against the second party. For example, if a GC fails to maintain a safe construction site, and a pedestrian walking past the site is injured, the pedestrian will sue the Owner. The indemnification clause states that the GC is liable to the Owner for all damages incurred by the Owner in the defense of the pedestrian's lawsuit, including attorneys' fees costs and any damages that are awarded or paid to the pedestrian.

Parties with greater negotiating power have attempted to expand the scope of indemnification to include damages incurred regardless of who caused the damages. It has become commonplace for GC's to require subcontractors to indemnify the GC for any and all claims asserted by any third party regardless of whether the subcontractor caused those damages or the damages were caused by a different entity. Some states have passed laws limiting the scope of indemnification, but that has not stopped GCs from slipping these terms into subcontracts.

Make sure the indemnification provision in your subcontract includes language such as:

The Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder.*



The above language is taken directly from an AIA Standard Form Contract. While it limits the scope of indemnification, we further recommend removal of the last clause which is shown with strikethrough text.

Florida requires a monetary limit on indemnification to an amount that is commercially reasonable to the amount of the contract. We typically tie the monetary limit to the amount of insurance coverage provided as that can often be a basis for determining a reasonable monetary limit.

- 3. Additional Insured Requirement.** It is common for GC's to require each subcontractor to have the GC named as an additional insured under subcontractors general liability as well as other insurance policies. This is more than just naming the GC as a certificate holder as certificate holders are not covered under the policy, they are simply being provided with a certificate that tells them what coverages exist under the policy.

The GC is simply asking every subcontractor to provide insurance coverage for the benefit of the GC without the GC having to pay for that coverage. This is a tremendous benefit to the GC! You will frequently see subcontract language that states:

All policies, except for worker's compensation policies, shall name Contractor as an additional insured and shall be written as primary coverage with any other third-party coverage provided by Contractor to be deemed as excess only. All insurance shall expressly provide that all rights of subrogation against Contractor and the Owner are waived.

- Ask to limit coverage to damage caused by *your defective work* – not for *all* claims brought against the GC or Owner.
- Confirm in writing with your insurance broker that you have the insurance coverage required by your Subcontract!

Remember!! Laws vary from state to state, and many states have laws addressing these contract terms. Be sure to contact your trusted construction lawyer to make sure the laws applicable to the project you are working on are compatible with the terms of your subcontract!

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Chip Bachara grew up in the construction industry working for his father's construction company from the time he was 11 years old, later graduating from the University of Florida with a degree in Building Construction. After working for two design/build construction companies Chip graduated from Mercer University Law School and has devoted his entire 38 years of legal practice to construction law. In 2007, Chip left the national law firm at which he was a partner to start Bachara Construction Law Group.

Chip is routinely recognized by Best Lawyers in America, Florida Trend's Legal Elite, among others. Bachara Construction Law Group is recognized as a Tier 1 Regional Construction Law Firm by Best Law Firms.

Bachara Construction Law Group represents governmental entities, private owners and developers, general contractors and nearly every type of trade contractor in almost every type of construction dispute. Chips firm maintains offices in Jacksonville and St. Petersburg, Florida.