

## INTRODUCTION

**ASA Model Subcontracts Matrix.** The ASA Model Subcontracts Matrix compares form construction subcontracts according to issue categories developed in the ASA Addendum to Subcontract. The matrix also states Model Subcontracts Best Practices for each issue category. The contents of the matrix were developed by ASA's Task Force on Model Subcontracts (2002-2004) to serve as a tool and a guide for ASA task forces charged with providing input to industry organizations that publish form construction subcontracts, and any part of it is always subject to revision by those same task forces. Consequently, each page of the matrix is dated as of the last revision.

**Documents Reviewed.** Issues categories are treated alphabetically. The following documents are reviewed:

- **AIA A401-1997.** The *Standard Form of Agreement Between Contractor and Subcontractor* published by the American Institute of Architects (AIA) is designated the A401-1997.
- **AGC 650 (1998).** The 1998 edition of the *Standard Form of Agreement Between Contractor and Subcontractor (Where the Contractor Assumes the Risk of Owner Payment)* published by the Associated General Contractors of America (AGC) is designated the AGC 650.
- **DBIA 570 (2001).** The 2001 edition of the *Standard Form of Agreement Between Design-BUILDER and Subcontractor (Where Subcontractor Does Not Provide Design Services)* published by the Design Build Institute of America (DBIA) is designated the DBIA 570.
- **ASA Addendum to Subcontract (2004).** The 2004 edition of the *Addendum to Subcontract* published by the American Subcontractors Association (ASA) is licensed for use in whole or in part by current ASA members.

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**TOPICS ARE TREATED ALPHABETICALLY**

**ATTORNEYS' FEES AND COSTS** (§ 24 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> No provision.</p>	<p><b>AGC 650 (1998)</b> Sub must pay GC's fees for "any claim, obligation or lien ... that arises from the performance of the Subcontract Work." § 8.5. Sub must also pay GC's fees associated with a default. §§ 10.1.1.1, 10.1.2, 10.2.2. "Prevailing party" in any dispute resolved by Discussion or Mediation is entitled to fees and costs if "resolved by a dispute resolution procedure designated in the Subcontract Documents," arguably excludes lien enforcement proceedings. § 11.6.</p>	<p><b>DBIA 570 (2001)</b> "[P]revailing party in any arbitration or any other final, binding dispute proceeding upon which the parties may agree" entitled to attorneys fees and expenses. § 13.5.4 (presumably excludes costs of perfecting and enforcing liens). No right to litigation costs in claims against Owner. § 13.3.3.</p>	<p><b>ASA Addendum (2004)</b> "Prevailing party" in any dispute is entitled to fees and costs. § 24.</p>
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*ASA Model Subcontracts Best Practices for ATTORNEY'S FEES AND COSTS:* The prevailing party in any dispute arising out of a construction subcontract should be entitled to attorney's fees and costs. Terms only requiring payment of a contractor's attorney's fees in the event of a subcontractor's default are one-sided and must be avoided. Terms that permit fees only for designated dispute resolution procedures may exclude other lawful collection procedures and should also be avoided.

**BACKCHARGES** (§ 26 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> GC must give 3 days written notice, and if sub does not commence corrections, GC may commence after giving another 3 days notice. § 3.4.1. For other claims, GC must give 7 days prior notice, and must itemize the services and materials by the 15<sup>th</sup> of the following month. § 3.3.2.</p>	<p><b>AGC 650 (1998)</b> GC must give 3 days notice of defective work. Sub must commence corrections within 3 days or GC may commence and backcharge. § 10.1.1. 48 hours notice for clean-up backcharges. § 3.13.2. No notice required to remedy property damage caused by Subcontractor's operations. § 3.15. No notice for use of non-conforming materials supplied by others. § 3.23.</p>	<p><b>DBIA 570 (2001)</b> DBer must give 7 days notice of defective work. Sub must commence corrections within 7 days or DBer may commence and backcharge. § 2.14.2.</p>	<p><b>ASA Addendum (2004)</b> No backcharges without notice and opportunity to cure. Backcharges must be billed by 15<sup>th</sup> day of following month. § 26.</p>
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*ASA Model Subcontracts Best Practices for BACKCHARGES:* Expenses claimed as backcharges should not be incurred before notice, and reasonable opportunity to cure, are provided to a subcontractor. Backcharges must be billed within a reasonable time and not saved until the end of the project.

**BONDS: see LIEN RIGHTS, PERFORMANCE BOND REQUIREMENTS, WAIVERS**

**CHANGES: see CLAIMS**

**CLAIMS** (§ 8 of the ASA Addendum to Subcontract (2004)) *also see* **SCHEDULING, SITE INSPECTION**

<p><b>AIA 401-1997</b> Sub must make claims</p>	<p><b>AGC 650 (1998)</b> Notice of claim required within 7 days of</p>	<p><b>DBIA 570 (2001)</b> Claims must be made in sufficient time to allow</p>	<p><b>ASA Addendum (2004)</b></p>
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<p>“promptly ... in accordance with the Subcontract Documents,” and must make claims that “will affect or become part of” a GC claim “not less than two working days preceding the time by which the [GC]’s claim must be made.” ¶ 5.3.</p>	<p>sub’s “knowledge of the facts giving rise to the event for which the claim is made” or else claim is waived. ¶ 5.3.4. Claims must also be made in sufficient time to allow GC to timely notify Owner. ¶ 5.3.2. Adjustments for differing site conditions limited to amounts received from Owner, and are only available if (a) latent, concealed or subsurface, (b) differ materially from Subcontract Documents and (c) not “generally recognized as inherent in the kind of work” ¶ 7.3.</p>	<p>DBeR to notify Owner, or within 10 days after Sub “reasonably should have recognized the event or condition giving rise to the request,” whichever is earlier. ¶ 13.1.1. When Sub disagrees that Work is within original scope, Sub may require DBeR to issue a written order directing the work to be performed. ¶ 12.6.3. Adjustments for changes that “Owner issues” are limited to time and money that DBeR “actually receives” from Owner. ¶ 12.1.1. Adjustments for changes “issued” by DBeR are treated separately. ¶ 12.2.1. Sub limited to relief recovered from Owner for Owner-caused delays. ¶¶ 5.4.3., 13.3.2.</p>	<p>Sub adjustments not contingent on amounts received by GC from owner. Sub reserves right to payment for any extra work performed at GC’s direction, but must confirm source of verbal directions in writing before starting extra work. ¶ 8.</p>
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**ASA Model Subcontracts Best Practices for CLAIMS:** Deadlines for claims should be based on actual knowledge of facts giving rise to a claim (rather than constructive knowledge) and should permit a reasonable time for claims; time extensions should be required for all causes reasonably beyond the subcontractor’s control; price adjustments should include the entire cost of delays not caused by subcontractor (including overhead) and should include a reasonable amount of overhead and profit for extra work. A subcontractor’s time and price adjustments must not be tied to amounts received by the contractor from the owner. A subcontractor should have the right to payment for any extra work that is performed at the contractor’s direction, provided that the subcontractor confirms verbal instructions in writing before starting work.

**CLOSEOUT** (¶ 13 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> No provision.</p>	<p><b>AGC 650 (1998)</b> “With the assistance of the Owner’s maintenance personnel and the Contractor, the Subcontractor shall direct the check-out and operation of systems and equipment for readiness, and assist in their initial startup and the testing of the Subcontract Work.” ¶ 3.28. Also must provide “other data, if required by the Contractor or Owner” ¶ 8.3.2.5. Tests and inspections: ¶ 3.12.</p>	<p><b>DBIA 570 (2001)</b> Closeout documents and commissioning procedures as required by the Contract Documents or as part of the Work. ¶¶ 2.15.1., 7.5.2.4.</p>	<p><b>ASA Addendum (2004)</b> Any closeout procedures and documents must be specified before the subcontract is signed. ¶ 13.</p>
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**ASA Model Subcontract Best Practices for CLOSEOUT:** Any closeout procedures and documents must be specified in the contract documents.

**CONSEQUENTIAL AND DELAY DAMAGES** (¶ 25 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Liquidated damages may be</p>	<p><b>AGC 650 (1998)</b> Both GC and Sub waive consequential damages</p>	<p><b>DBIA 570 (2001)</b> Both DBeR and Sub waive</p>	<p><b>ASA Addendum (2004)</b> GC waives</p>
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<p>assessed against Sub to the extent caused by the Sub. ¶ 3.3.1. Mutual waiver of consequential damages “arising out of or relating to this Subcontract.” ¶ 15.4.</p>	<p>“to the extent” they are waived in the Owner-GC agreement. ¶¶ 5.4.1, 5.4.2. GC may assess share of liquidated or other delay damages against subcontractor in proportion to sub’s responsibility for the delay. ¶ 5.3.5.</p>	<p>consequential damages, however, Sub must pay “all costs, damages and expense” and Owner assessed liquidated or other damages. ¶¶ 5.4.4, 13.7.1, 13.7.2.</p>	<p>consequential damages, excluding liquidated damages to the extent paid by the GC and caused by the Sub. ¶ 25</p>
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**ASA Model Subcontracts Best Practices for CONSEQUENTIAL AND DELAY DAMAGES:** One-sided terms that deny a subcontractor any right to collect damages for delay, often called “no-damage-for-delay” clauses, are unacceptable. Mutual waivers of consequential damages such as extended home office overhead are beneficial and encouraged. A contractor may reserve the right to assess a subcontractor for a share of liquidated damages actually paid to the owner, but only to the extent such share is proportionate to the fault of the subcontractor in causing a delay.

**CONTRACT DOCUMENTS (FLOW-DOWN)** (¶ 2 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Flow-down clause also flows-up “to the extent that the provisions of the edition of AIA Document A201 current as of the date of this Agreement apply to this Agreement.” ¶ 2.1.</p>	<p><b>AGC 650 (1998)</b> Flow-down clause also flows-up. ¶ 3.1. Obligations in regards to hazardous substances flow down. ¶ 3.18. Confidentiality flow-down. ¶ 3.30.</p>	<p><b>DBIA 570 (2001)</b> Incorporation by reference, but no express flow-down – the form is intended for use with non-designing subcontractor. ¶¶ 1.6.1, 3.3.2. Subsubs must “be fully bound to Subcontractor in the same manner as Subcontractor is bound to Design-Builder....” ¶ 2.5.1.</p>	<p><b>ASA Addendum (2004)</b> Sub has same rights against GC as GC has against Owner. No document is incorporated by reference unless a copy has been provided. ¶ 2.</p>
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**ASA Model Subcontracts Best Practices for CONTRACT DOCUMENTS (FLOW-DOWN):** Any “flow-down” terms, i.e., terms which impose obligations on a subcontractor by reference to the contractual obligations of the contractor to the owner, must also “flow-up,” so that the subcontractor also has rights against the contractor by reference to the rights that the contractor has against the owner. The subcontractor must also be entitled to copies of any documents incorporated by reference before signing the agreement.

**DELAY DAMAGES: see CONSEQUENTIAL AND DELAY DAMAGES**

**DESIGN DELEGATION** (¶ 6 of the ASA Addendum to Subcontract (2004)) *also see SCOPE OF WORK, SITE INSPECTION and WARRANTY*

<p><b>AIA 401-1997</b> Sub arguably has same obligations to GC as GC has to owner “to the extent that the provisions of the ... A201 ... apply to this</p>	<p><b>AGC 650 (1998)</b> Design delegated if (1) specifically required and (2) all design and performance criteria are specified. ¶ 3.8.1. Sub must comply with</p>	<p><b>DBIA 570 (2001)</b> Sub responsible for all applicable “Legal Requirements”</p>	<p><b>ASA Addendum (2004)</b> Sub warrants designs that it</p>
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<p>agreement.” ¶ 2.1; cf. A201-1997 ¶ 3.2 (<i>site inspection and reporting discovered errors</i>) 3.12.10 (<i>performance specs</i>). Sub must “participate” in preparation of “coordinated drawings in areas of congestion...” ¶ 4.1.8. Sub must comply with all laws. ¶ 4.2.1, cf. A201-1997 ¶ 3.2.2 (<i>Codes not warranted</i>).</p>	<p>all laws “at its own costs ... including, but not limited to ... corrective measures”. ¶ 3.29, cf. ¶ 3.3, 3.4 (Sub must make inspections and comparisons and report discovered errors; sub responsible for building code violations if it “performs work knowing it to be contrary to any applicable laws...”).</p>	<p>enacted prior to the date of Agreement. ¶¶ 2.10.1-2.10.2.</p>	<p>provides only if design is specifically delegated in the contract documents and “all design criteria are furnished to the Sub...” ¶ 6.</p>
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**ASA Model Subcontracts Best Practices for DESIGN DELEGATION:** Subcontractors should not ordinarily accept responsibility for design. When design services are requested, the delegation must be specific and must include all design and performance criteria. Subcontractors should be responsible for promptly reporting defects they actually discover, but cannot be responsible for other design defects that it is claimed they “should have” recognized, or for design requirements that violate code standards. *See also* SCOPE OF WORK, SITE INSPECTION and WARRANTY.

**DISPUTE RESOLUTION** (¶ 22 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Mediation then arbitration. ¶¶ 6.1.1-6.1.2, 6.2.1. Architect cannot be joined as a party. ¶ 6.2.4. All known claims must be asserted at once. ¶ 6.2.5.</p>	<p><b>AGC 650 (1998)</b> Discussion then Mediation required. ¶ 11.1. “To the extent disputes between [GC] and [Sub] involve ... disputes between [GC] and Owner ...” then they must be decided by the same tribunal in the same forum. ¶ 11.4. If joinder is not permitted the dispute is “stayed.” ¶ 11.5.</p>	<p><b>DBIA 570 (2001)</b> Discussion, Mediation, and then Arbitration for disputes not involving owner. ¶ 13.4.1. For Owner-caused problems, dispute resolution clause of the DB agreement is incorporated by reference. ¶ 13.3.1.</p>	<p><b>ASA Addendum (2003)</b> Mediation required, followed by menu choice for either arbitration or litigation ¶ 22.</p>
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**ASA Model Subcontracts Best Practices for DISPUTE RESOLUTION:** Early mediation of disputes is beneficial and must be a condition precedent to the use of any other dispute resolution procedure. Should mediation not resolve a dispute, arbitration by an industry professional such as an architect, engineer, contractor or subcontractor is always preferable to litigation before a judge or jury. Arbitration must always be conducted subject to the terms of the written subcontract, so specific subcontract terms can assist subcontractors to ensure that arbitration will provide a quick and efficient mechanism for resolving disputes. For example, subcontract terms can expressly provide that “The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.” Drafting Dispute Resolution Clauses - A Practical Guide, AAA 12/7/2000. Or, subcontract terms may require direct participation by the parties (not merely through their representatives) for

- selection of the arbitrator (to ensure and industry professional is selected),
- any agreement or ruling to permit a continuance, and
- any agreement or ruling to permit any discovery (particularly depositions, which add considerable time and expense) beyond the discovery of information contemplated by RULE F-7 of the AAA’s CONSTRUCTION INDUSTRY ARBITRATION RULES, FAST TRACK PROCEDURES in fast track cases (no claim or counterclaim exceeds \$75,000), or RULE R-22 of the AAA’s CONSTRUCTION INDUSTRY ARBITRATION RULES, REGULAR TRACK

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**PROCEDURES** in regular track cases (\$75,001-\$500,000), or **RULE L-4** of the AAA's **CONSTRUCTION INDUSTRY ARBITRATION RULES, PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES.**

For best practices on recovery of attorneys fees and costs of dispute resolution, *see* **ATTORNEYS' FEES AND COSTS.** Subcontractor claims should not be tied to resolution of claims by the contractor against the owner.

**FINAL PAYMENT: see RETAINAGE**

**FINANCING DISCLOSURES** (¶ 3 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> No provision; sub arguably has access "to the extent that the provisions of the ... A201 ... apply to this agreement." ¶ 2.1; <i>cf.</i> A201-1997 ¶ 2.2.1.</p>	<p><b>AGC 650 (1998)</b> GC obligated to provide "such information as the [GC] has" including subsequent material variations. If Sub doesn't get all information "as required by the Contract documents" then Sub may make a direct "request" to Owner and Owner's lender. ¶¶ 4.3.1, 4.3.2.</p>	<p><b>DBIA 570 (2001)</b> DBer obligated to provide whatever information it has "regarding Owner's financial ability...." ¶ 3.3.3.</p>	<p><b>ASA Addendum (2004)</b> Sub need not "commence or continue" work without adequate assurances of payment. ¶ 3.</p>
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**ASA Model Subcontracts Best Practices for FINANCING DISCLOSURES:** A subcontractor must have access to complete project financing information, including change orders, in order to evaluate its risk of nonpayment. Disclosures that demonstrate adequate project financing are a necessary condition to a commencement or continuation of a subcontractor's performance.

**FLOW DOWN: see CONTRACT DOCUMENTS**

**HOLD HARMLESS** (¶ 15 of the ASA Addendum to Subcontract (2004)) *also see* **INSURANCE (Liability Insurance)**

<p><b>AIA 401-1997</b> Limited to bodily injury and property damage; Limited to proportion of claim caused by Sub; no express duty to defend. ¶ 4.6.1. GC holds Sub harmless from hazardous substance claims not caused by Sub's sole negligence. ¶ 4.3.4.</p>	<p><b>AGC 650 (1998)</b> Limited to bodily injury and property damage; Limited to proportion of claim caused by Sub; Duty to "defend" (¶ 9.1.1, <i>cf.</i> ¶ 8.5). Sub must also indemnify and defend for (a) Property damage not covered by property insurance to the extent of sub's own fault (¶ 3.14.5, ¶ 3.15); (b) any losses arising from use of GC's equipment "except to the extent that such loss or damage is caused by the negligence of the [GC]'s employees operating the [GC]'s equipment" (¶ 3.25) (reciprocal obligation for use of Sub's equipment by GC at ¶ 4.8); (c) claims that the Work is intellectual property infringement unless caused by the specs and sub did</p>	<p><b>DBIA 570 (2001)</b> Limited to bodily injury and property damage; Limited to proportion of claim caused by Subcontractor; Duty to "defend." ¶ 11.4.1. MUTUAL indemnity – DBer has similar obligation to defend and indemnify sub!! ¶ 11.5.1. Sub must also indemnify and defend for: (a) Hazardous Conditions it "introduced to the site" (¶ 2.16.1), (b) claims arising from use of any Work Product on another project (¶ 4.2.1), (c) lower tier liens (¶¶</p>	<p><b>ASA Addendum (2004)</b> Any hold harmless terms in the subcontract are limited to bodily injury and property damage, and to that proportion of</p>
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	<p>not have “reason to believe” specs were infringement (¶ 3.31); all costs, expenses and attorneys fees incurred by GC to defend against “any claim, obligation or lien ... that arises from the performance of the Subcontractor Work” (¶ 8.5).</p>	<p>7.10.1, 11.3.1), (d) claims that the Work or use thereof is intellectual property infringement, unless caused by the specs or by post-completion modifications for which Dber must indemnify the sub (¶¶ 11.1.1-11.1.3).</p>	<p>a claim caused by Subcontractor . Any duty to defend is expressly disclaimed. ¶ 15.</p>
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**ASA Model Subcontracts Best Practices for HOLD HARMLESS:** Hold harmless terms must be limited to bodily injury and property damage (other than the Work itself). Such terms must also be limited to provide indemnity only to the extent of the subcontractor’s negligence, and must provide for payment attorney’s fees rather than including a duty to “defend.” Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other party to the subcontract against the consequences of the indemnitor’s own negligence.

**INSURANCE**

- **LIABILITY INSURANCE** (¶ 16-17 of the ASA Addendum to Subcontract (2004)
- **“ALL-RISK” PROPERTY INSURANCE** (¶ 18 of the ASA Addendum to Subcontract (2004)

<p><b>AIA 401-1997</b> <b>Liability:</b> Additional Insured not referenced, but arguably barred by incorporation/flow-down of A201-1997 ¶ 11.3.3. See A401-1997 ¶ 2.1. No cancellation without 30 days notice. ¶ 13.3. Sub must give notice of any reduction in coverage. ¶ 13.3. No OCP option provided. <b>All-Risk:</b> If insurance not provided, sub “shall” purchase and “shall” be reimbursed. ¶ 13.7.2. GC and sub waive subrogation. ¶ 13.8.1.</p>	<p><b>AGC 650 (1998)</b> <b>Liability:</b> No express additional insured requirement, but other requirements may appear on an Exhibit. ¶ 9.2.2. No cancellation or modification without 30 days notice. ¶ 9.2.5. Requirement to “carry” so-called “Completed Operations Liability Insurance” for specified number of years following substantial completion. ¶ 9.2.6. No OCP option provided. <b>All-Risk:</b> If not provided by Owner or GC, then sub must purchase at its own expense. ¶ 9.2.7.1-9.2.7.3; Sub and GC waive subrogation rights. ¶ 9.2.8.1.</p>	<p><b>DBIA 570 (2001)</b> <b>Liability:</b> Additional Insured requirement. ¶ 10.1.5. Sub must “delete any design-build or similar exclusions that could compromise coverages....” ¶ 10.1.3. No cancellation or material change without 30 days notice. ¶ 10.1.4. No OCP option provided. <b>All-Risk:</b> Owner or Dber must procure property insurance; Sub and Dber waive subrogation rights. ¶¶ 10.2.1-10.3.1.</p>	<p><b>ASA Addendum (2003)</b> <b>Liability:</b> No additional insureds. No waivers of subrogation for claims covered by Sub’s workers comp or CGL. Sub-provided insurance limited to insurance shown on “attached certificate.” ¶ 16. Sub may be required to provide OCP, at GC’s expense, if available, with waiver of subrogation in favor of Sub. ¶ 17. <b>All-Risk:</b> Puts responsibility on GC to purchase all-risk if owner has not. ¶ 18.</p>
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**ASA Model Subcontracts Best Practices for INSURANCE:** Any requirements to name additional insureds on any of the subcontractor’s liability

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insurance policies, and any waivers of subrogation for claims covered by the subcontractor’s liability insurance policies (particularly workers compensation), are unacceptable. Requirements to provide special notices of policy cancellation or policy non-renewal often cause great difficulties and friction although they have never been shown to provide any benefits to anyone, and are also unacceptable. Requirements for continuation of coverage beyond the policy period, in the absence of a binding commitment from an insurer to provide that coverage, are also unacceptable. Separate liability insurance to cover the owner and the contractor for liability arising from “general supervision” of the project, such as Owners and Contractors Protective Liability Insurance (“OCP” - CG 00 09) may be required in lieu of any requirements to name additional insureds or to waive subrogation on the subcontractor’s liability insurance policies. The owner or contractor should be responsible to purchase all-risk property insurance including coverage for a subcontractor’s interest in installed work and in materials delivered, suitably stored or in transit. Coverage gaps required to be filled by a subcontractor should be reimbursed.

**LAW and VENUE** (¶ 23 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> No provision; Governing law arguably where Project located (A201-1997 ¶ 13.1) “to the extent that the provisions of the ... A201 ... apply to this agreement.” ¶ 2.1.</p>	<p><b>AGC 650 (1998)</b> Law – place of Project. ¶ 12.1.</p>	<p><b>DBIA 570 (2001)</b> Law is the place of the project; venue not mentioned. ¶ 14.3.1.</p>	<p><b>ASA Addendum (2003)</b> Governing law and appropriate venue are set where the project is located. ¶ 23.</p>
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*ASA Model Subcontracts Best Practices for LAW and VENUE:* Subcontracts should provide that the appropriate venue for dispute resolution procedures such as litigation or arbitration is the place where the project is located, and also that the law of the place where the project is located shall govern.

**LIEN RIGHTS** (¶ 21 of the ASA Addendum to Subcontract (2004)) *also see* **WAIVERS**

<p><b>AIA 401-1997</b> No express provision that rights not subject to dispute resolution provisions, ¶¶ 6.1.1-6.2.6.</p>	<p><b>AGC 650 (1998)</b> Sub may assert lien and bond claims “prior to the expiration of the reasonable time for payment...” ¶ 8.5. Lien and bond claims not affected by dispute resolution requirements. ¶ 11.3.</p>	<p><b>DBIA 570 (2001)</b>No express provision that rights not subject to dispute resolution provisions.</p>	<p><b>ASA Addendum (2003)</b> Sub may take all steps necessary to preserve lien and bond rights. ¶ 21.</p>
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*ASA Model Subcontracts Best Practices for LIEN RIGHTS:* Subcontracts should require contractors to provide copies of any payment bond to subcontractors on request, and should expressly exempt steps to preserve lien rights from any dispute resolution requirements.

**PAYMENT** (¶ 10 of the ASA Addendum to Subcontract (2004))

- DEADLINE
- STORED MATERIALS
- RIGHT TO SUSPEND WORK
- INTEREST
- TRUST

AIA 401-1997	AGC 650 (1998)	DBIA 570 (2001)	ASA Addendum
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**Deadline:** 3 “working days” after GC is paid. ¶ 11.3. If GC is not paid without fault of sub, sub entitled to payment “on demand.” ¶ 11.3. Sub also entitled to payment 30 days after its work is certified substantially complete by the Architect. ¶ 11.9.1. Sub entitled to final payment within 3 days of GCs receipt of funds for sub’s work, or if payment withheld for reasons not the fault of sub, “upon demand.” ¶ 12.1. **Stored Materials:** Sub entitled to payment for “suitably stored” equipment and materials. ¶ 11.7.2. **Right to Stop Work:** Yes, for GC failure to pay “through no fault of the Subcontractor,” 7 days after “payment should be made as provided in this Agreement,” on 7 days additional notice. Sub entitled to costs of demobilization, delay and remobilization. ¶ 4.7.1. **Interest:** Yes. Payments due and unpaid shall bear interest from the date payment is due at such rate as the parties may agree to pay in writing or the prevailing rate where the project is located. ¶ 15.2. **Trust:** GC holds funds for the sub unless it provides a payment bond, but in any case no “fiduciary liability” arises. ¶ 11.1.

**Deadline:** 7 days after GC is paid. ¶¶ 8.2.5, 8.3.3. If GC is not paid without fault of sub, payment due within a “reasonable time.” ¶ 8.2.6. Sub entitled, upon request, to copy of GC’s “most current” payment application.” ¶ 4.4. Cost of any sub-provided bonds paid with first progress payment. ¶ 3.27.3. Sub not permitted to “deal directly” with the owner. ¶ 3.26. **Stored Materials:** Sub may request payment for materials suitably stored; payment conditioned on insurance and title to owner. ¶ 8.2.4. **Right to Stop Work:** Yes, for either GC failure to pay after owner pays, or GC failure to pay within a “reasonable time,” on 7 days notice to GC. ¶ 8.2.6 (NOTE: pay-if-paid AGC 655 only has express right to stop work where GC fails to pay after owner pays). ¶ 8.2.6. Sub entitled to costs of shut-down, delay and startup. ¶ 8.2.6. **Interest:** Yes. Progress payments or final payment due or unpaid shall bear interest at the prime rate prevailing at the place of the project. ¶ 8.4. However, interest limited to proportionate share of interest paid by Owner where payment delay is due to Owner payment delay. **Trust:** No provision for GC-held funds; subcontractor must hold money for lower tier subs and suppliers but no “fiduciary duty” arises. ¶ 8.6. GC may contact sub’s own subs and suppliers (¶ 8.7) and may issue joint checks when it has a “reason” (¶ 8.9)

**Deadline:** 3 days after DBer is paid. ¶ 7.2.4. 10 days for final payment. ¶ 7.5.1. **Stored Materials:** Sub may request payment for materials suitably stored, insured, and titled to owner cleared of liens. ¶ 7.2.2. **Right to Stop Work:** Yes, for either owner failure to pay “not due to the fault of Subcontractor,” or DBer failure to pay “any amounts due,” on 7 days notice to DBer. Sub may get price and time adjustments. ¶ 8.4.1-8.4.2. **Interest:** For payments more than 5 days late, but an interest rate must be entered by the parties. ¶ 7.7.1. Sub agrees that no payment is “due” before it is paid to DBer. ¶ 7.6.1. **Trust:** No provision.

**(2003)**  
**Deadline:** 7 days after GC is paid or “should have been” paid. ¶ 10. **Stored Materials:** Sub entitled to payment for suitably stored materials. ¶ 10. **Right to Stop Work:** With 5 days notice to GC, based on either GC or Owner failure to pay. ¶ 10. Sub entitled to costs of shut-down and start-up. ¶ 19. **Interest:** For late payments, interest at three points above the prevailing prime interest rate at the largest national bank in the state where the project is located. ¶ 10. **Trust:** Provides that payments from Owner to GC are “held in trust and used solely for the benefit of Subcontractor.” ¶ 11. NOTE – May not be enforceable without Owner signature.

**ASA Model Subcontracts Best Practices for PAYMENT:** Payment must be passed through from the owner not more than 7 days after the contractor is paid, or within a reasonable time after the contractor would have been paid absent circumstances that are not the fault of the subcontractor. Past due

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payments should bear interest at a reasonable rate, so long as payment delay is not the fault of the subcontractor. A subcontractor should reserve an express right to stop work for non-payment whenever non-payment is not the sub's fault, upon reasonable notice and opportunity to cure, including costs of shut-down, delay and start-up. A subcontractor must be entitled to payment for suitably stored materials. A general contractor must hold payments for the benefit of subcontractors.

**PERFORMANCE BOND REQUIREMENTS** (¶ 28 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Space provided to "insert the specific requirements" for a performance bond. ¶ 13.6.</p>	<p><b>AGC 650 (1998)</b> Performance bond form must be "mutually agreeable." ¶ 3.27.2.</p>	<p><b>DBIA 570 (2001)</b> Space provided to insert "amount of bonds and any other conditions of the bonds...". ¶ 10.4.1.</p>	<p><b>ASA Addendum (2004)</b> Specifies use of the AIA form A312-1984 performance bond.</p>
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*ASA Model Subcontracts Best Practices for PERFORMANCE BOND REQUIREMENTS:* Performance bond forms must be specified, and must allow the surety to refuse coverage on grounds of wrongful contract termination.

**RETAINAGE** (¶ 9 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Retainage limited to amount retained by Owner (¶¶ 11.7.1, 11.7.2, 11.9.1). Amount of retainage, and reductions, to be specified in blank space provided at ¶ 15.3.</p>	<p><b>AGC 650 (1998)</b> Retainage limited to amount retained by the Owner, however, if retainage is reduced at specified percentage of completion, sub's retainage not reduced until sub reaches that same percentage of completion. ¶8.2.2.</p>	<p><b>DBIA 570 (2001)</b> Retainage withheld until final payment, or longer if Owner has not released it. ¶ 7.3.1. No express limit of retainage to amount withheld by Owner.</p>	<p><b>ASA Addendum (2004)</b> Retainage limited to amount withheld by owner. GC must "use best efforts to secure release of retainage as soon as possible" or "within 30 days after substantial completion of Sub's work." Amounts withheld for punch list items paid monthly as items are completed. ¶ 9.</p>
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*ASA Model Subcontracts Best Practices for RETAINAGE:* Retainage must be limited to the amount withheld by the owner, with any reductions or early release of retainage passed through immediately to subcontractors. The contractor must use best efforts to obtain release of retainage from the owner as soon as permitted under the general conditions.

**PUNCHLIST: see ASA Model General Conditions Matrix**

**SAFETY BARRIERS AND FINES** (¶ 27 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Sub must "take reasonable safety precautions" and "comply with safety measures initiated by</p>	<p><b>AGC 650 (1998)</b> Sub "shall implement appropriate safety measures..." including "erecting safety barriers..." ¶ 3.14.3. Mutual indemnification for fines or penalties "caused by ... failure to comply with applicable safety requirements."</p>	<p><b>DBIA 570 (2001)</b> Sub must "implement[] and monitor[] all safety precautions and programs related to the performance of the Work." ¶ 2.12.1.</p>	<p><b>ASA Addendum (2004)</b> Sub not responsible for safety barriers unless specifically agreed. Sub and GC responsible for their own fines. ¶ 27.</p>
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the [GC].” ¶ 4.3.1		¶¶ 3.14.9, 3.29.				
<p><i>ASA Model Subcontracts Best Practices for SAFETY BARRIERS AND FINES:</i> A subcontractor should not be responsible for safety barriers unless specifically agreed. OSHA penalties are partly based on past violations and are intended as punishment and must not be shifted to other parties to a construction subcontract.</p>						
<p><b>SCHEDULING</b> (¶ 7 of the ASA Addendum to Subcontract (2004))</p>						
<p><b>AIA 401-1997</b> Sub “shall” receive adjustment for “suspension, delay, or interruption” unless sub is responsible for sub fails to make timely claim. ¶¶ 7.3.1, 5.3, 9.5. GC must provide schedule for construction after agreement is executed and give prompt notice of changes ¶ 3.1.1.</p>		<p><b>AGC 650 (1998)</b> Copy of schedule attached as an exhibit, (¶ 5.1), but GC reserves right to change (¶ 5.2). Time extended for delays not the fault of the sub “to the extent obtained by the [GC]” (¶ 5.3.1), although sub’s right to “delay damages caused by [GC]” not precluded (¶ 5.3.3). Time not extended for sub’s failure to perform reviews and comparisons of site and plans. ¶ 3.5.</p>		<p><b>DBIA 570 (2001)</b> Sub entitled to have time “reasonably extended” for delays beyond its control, and may also be entitled to adjustment in price if delay is not also beyond control of Owner and DBer. ¶¶ 5.4.1, 5.4.2, cf. ¶ 8.1.2 (DBer suspension of work).</p>		<p><b>ASA Addendum (2004)</b> Sub “shall” have a “reasonable time” for performance and “shall” be entitled to equitable adjustments for schedule changes, acceleration, delays. ¶ 7.</p>
<p><i>ASA Model Subcontracts Best Practices for SCHEDULING:</i> A subcontractor must be afforded a reasonable time for performance, and must be entitled to equitable adjustments for schedule changes, acceleration, and delays. A subcontractor cannot be responsible for schedule changes it has not reviewed and agreed in writing.</p>						
<p><b>SCOPE OF WORK</b> (¶ 1 of the ASA Addendum to Subcontract (2004))</p>						
<p><b>AIA 401-1997</b> Incorporates A201(A201 ¶ 1.2.1 – “reasonably inferable ... as necessary to produce the indicated results”). Sub to provide “all labor, materials, equipment, services and other items required to complete” the “portion of the Work” described. ¶ 8.1.</p>		<p><b>AGC 650 (1998)</b> Sub “to provide all labor, material, equipment and services necessary or incidental to complete the work ... in accordance with, and reasonably inferable from ... the Subcontract Documents.” ¶ 2.1. Sub shall “furnish all of the labor, materials, equipment and services ... as are necessary for ... proper performance...” ¶</p>		<p><b>DBIA 570 (2001)</b> Sub “agrees to provide all construction and other aspects of the Work consistent with the Contract Documents.” ¶ 1.1.1. “Work” defined as “items and services reasonably inferable ... to complete the portion of the Project described in Exhibit _____.” ¶ 1.2.1.12.</p>		<p><b>ASA Addendum (2003)</b> Scope limited to bid (copy must be attached). ¶ 1.</p>
				<p>Sub required to produce the results indicated on the plans and specs as they appeared at bid time, as well as results “reasonably inferable” from the plans and specs.</p>		

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<p>Architect may reject work for “aesthetic effect” if “consistent with the intent expressed in the Prime Contract.” ¶ 4.1.5.</p>	<p>3.2. Sub shall perform all work “reasonably inferable” from the Contract Documents “as being necessary to produce the indicated results. ¶ 13.2.2.</p>			
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**ASA Model Subcontracts Best Practices for SCOPE OF WORK:** The scope of work must be limited to all work actually indicated in the plans and specifications which was the subject of the subcontractor’s bid.

**SITE INSPECTION, PLAN DEFECTS and HAZARDOUS MATERIALS** (¶ 5 of the ASA Addendum to Subcontract (2004)) *see also* **DESIGN DELEGATION**

<p><b>AIA 401-1997</b> No site inspection provision, but sub arguably has same obligations to GC as GC has to owner “to the extent that the provisions of the ... A201 ... apply to this agreement.” ¶ 2.1; cf. A201-1997 (Site visit and observations required. ¶¶ 1.5.2, 3.2.1. Contractor may rely on owner-furnished survey. ¶ 2.2.3. Specific claims procedure. ¶ 4.3.4 Must report known plan defects. See ¶¶ 3.2.1, 3.2.2, 3.2.3, 3.7.3, 3.7.4, 3.12.10). Sub “shall participate in the preparation of coordinated drawings in areas of congestion ... specifically noting and advising ... of potential conflicts....” ¶ 4.1.8.</p>	<p><b>AGC 650 (1998)</b> Sub “responsible for taking field dimensions, providing tests, obtaining required permits...” ¶ 3.2. Sub must “make a careful analysis and comparison of the drawings, specifications, other Subcontract Documents and information furnished by the Owner...,” and must visit the site. ¶¶ 3.3, 3.4. Sub must report any errors it “discover[s]” ¶¶ 3.3, 3.4. Sub responsible for undiscovered defects if it fails to perform all reviews and comparisons required. ¶ 3.5. GC disclaims accuracy of information provided by owner, ¶ 4.5, but Sub entitled to equitable adjustments for differing site conditions. ¶ 7.3</p>	<p><b>DBIA 570 (2001)</b> Sub must inspect other work on which Sub’s work “depends” and notify DBer of “discovered discrepancies or defects...” ¶ 2.6.2.</p>	<p><b>ASA Addendum (2003)</b> Sub responsible for defects or deficiencies “that a person in the trade of the Sub would discover by reasonable visual inspection” only. GC warrants plans. ¶ 5.</p>
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**ASA Model General Conditions Best Practices for SITE INSPECTION, PLAN DEFECTS AND HAZARDOUS MATERIALS:** A subcontractor may be required to conduct a site visit, make observations, and report discovered discrepancies, but must not have an affirmative duty to discovery problems in the site conditions or design that a person in the subcontractor’s trade would not ascertain by a reasonable, visual inspection. Subcontractors must be entitled to rely on the accuracy and completeness of the plans and specifications, and on the accuracy of reports of conditions furnished by the contractor. *See also* DESIGN DELEGATION.

**SUBMITTALS: see ASA Model General Conditions Matrix**

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**SUBSTANTIAL COMPLETION: see ASA Model General Conditions Matrix**

**SUSPENSION OF WORK** (¶ 19 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> If GC suspends then sub entitled to “equitable adjustment” of time and price (¶ 7.3.1) subject to timely assertion of claims (¶¶ 7.3.2.2, 5.3). No adjustment if work “would have been” suspended anyway due to sub’s fault, or if adjustment could be denied under another provision. ¶ 7.3.2.</p>	<p><b>AGC 650 (1998)</b> In event of Owner suspension, GC’s liability limited to amounts recovered from Owner. ¶ 10.3. Sub may submit claim for GC’s suspension for convenience if provided in sufficient time for GC to pass-on to Owner. ¶ 10.6. No adjustment if work “would have been” suspended anyway due to sub’s fault, or if adjustment could be denied under another provision. ¶¶ 10.3, 10.6.</p>	<p><b>DBIA 570 (2001)</b> DBer may suspend work for up to 60 days (90 days project aggregate), Sub entitled to adjustments of time and price or, if due to Owner suspension, whatever is recovered from owner. ¶ 8.1.2.</p>	<p><b>ASA Addendum (2003)</b> In the event of any suspension by Owner, GC, or Sub (for non-payment), Sub entitled to costs of demobilization and remobilization. ¶ 19.</p>
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*ASA Model Subcontracts Best Practices for SUSPENSION OF WORK:* The subcontractor should be entitled to claim time and price adjustments for any suspension of work which is not the fault of the subcontractor. The subcontractor should be able to terminate the contract for unreasonably long suspensions measured in the aggregate, and not by consecutive days. Terms restricting recovery where work “would have been” suspended anyway due to subcontractor’s fault merely restate common law requirement for causation.

**TEMPORARY SITE FACILITIES** (¶ 12 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Sub responsible for temporary services unless listed as GC’s responsibility in blank provided at ¶ 14.1.</p>	<p><b>AGC 650 (1998)</b> Sub responsible for any temporary services listed in exhibit to subcontract. ¶ 3.9. Sub provides scaffolding: ¶ 3.2. No provision for GC’s responsibilities.</p>	<p><b>DBIA 570 (2001)</b> Sub’s “Work” defined to include “temporary facilities and all other items and services reasonably inferable from this Agreement...” ¶ 1.2.1.12.</p>	<p><b>ASA Addendum (2003)</b> Sub may use all temporary site facilities and utilities without cost unless otherwise specifically agreed. ¶ 12.</p>
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*ASA Model Subcontracts Best Practices for TEMPORARY SITE FACILITIES:* Contractors should provide for temporary site facilities and utilities without cost to subcontractors unless otherwise specifically agreed.

**TERMINATION FOR CONVENIENCE** (¶ 20 of the ASA Addendum to Subcontract (2004))

<p><b>AIA 401-1997</b> Where sub terminates: Sub entitled to payment for Work executed and proven costs. ¶</p>	<p><b>AGC 650 (1998)</b> Sub entitled to value of work performed including overhead and profit, overhead and profit on work not executed, and</p>	<p><b>DBIA 570 (2001)</b> Unjustified termination is a “termination for convenience”; Sub gets costs of completed work and termination;</p>	<p><b>ASA Addendum (2003)</b> Sub gets costs, attorneys fees, and profit on uncompleted work for unjustified</p>	<p>Sub entitled to full contract expectancy, including profit on uncompleted work, as well as termination costs.</p>
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7.1.1. Where Owner terminates for convenience: Sub entitled to payment for Work executed, proven costs, and overhead and profit on Work not executed. ¶ 7.2.4.	costs, for wrongful termination. Sub's recovery limited to amounts recovered by GC for Owner termination. ¶ 10.4.	menu permits overhead and profit (on completed work) if agreed. ¶ 8.2.1.	termination. ¶ 20.	
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*ASA Model Subcontracts Best Practices for TERMINATION FOR CONVENIENCE:* Where termination is not due to the subcontractor's default, then the subcontractor must be entitled to its expectancy contract damages, i.e., profit and overhead on uncompleted work, plus all expenses related to termination (such as termination of subcontracts and attorneys fees), plus payment for work completed and expenses for labor and materials to the date of termination.

**VENUE: see LAW AND VENUE**

**WAIVERS** (¶ 14 of the ASA Addendum to Subcontract (2004))

<b>AIA 401-1997</b> Sub required to pay for materials and labor through date covered by last progress payment. ¶ 4.1.6.	<b>AGC 650 (1998)</b> Sub waivers may be conditional on payment. ¶ 8.8.	<b>DBIA 570 (2001)</b> Sub must provide any documents "required by the Contract Documents and/or established at the meeting" with DBer, which occurs within 7 days of signing the agreement. ¶ 7.2.1.	<b>ASA Addendum (2003)</b> All waivers must be limited to work for which Sub has been paid, excluding retainage, and excluding unbilled changes and unresolved claims. All waivers "conditional upon receipt of funds." ¶ 14.	Waiver form must be specified in the contract documents, and must either be limited to work for which Sub has been paid or conditional on receipt of funds. Waivers should also exclude retainage and unbilled changes and unresolved claims.
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*ASA Model Subcontracts Best Practices for WAIVERS:* Language requiring one party to sign waivers in whatever form is considered suitable by the other party is generally unacceptable. Any waiver form must be specified before the contract is signed, must be conditional on payment (except for payments already received), must not apply to funds still held as retainage, and must not apply to claims unrelated to the payment security rights of the contractor.

**WARRANTY** (¶ 4 of the ASA Addendum to Subcontract (2004))

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<p><b>AIA 401-1997</b>          Materials “of good quality and new...”;          Work “free of defects not inherent in the quality required or permitted...”;          Sub expressly disclaims damage from abuse, improper maintenance or operation, and normal wear and tear. ¶ 4.5.1.</p>	<p><b>AGC 650 (1998)</b>          “Subcontractor agrees to furnish its best skill and judgment...” ¶ 3.2. Sub is “strictly responsible for the accuracy of the Subcontract Work and for any loss or damage to the Contractor or others by reason of the Subcontractor’s failure to lay out or perform Subcontract Work correctly. The Subcontractor shall exercise prudence so that the actual final conditions and details shall result in alignment of finish surfaces.” ¶ 3.20. Materials will be new and of good quality; Work “free from defective workmanship and materials.” ¶ 3.21. Mandatory one year correction period – sub has right to cure, but only for the first year of the warranty. ¶ 3.22.2.2.</p>	<p><b>DBIA 570 (2001)</b>          Sub must perform “with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents....” ¶ 2.3.1. Sub warrants construction is new unless otherwise specified, of good quality, and free of defects in materials and workmanship; expressly excluding damage caused by others. ¶ 2.13.1. One year correction period. ¶¶ 2.14.1, 2.14.3.</p>	<p><b>ASA Addendum (2003)</b>          One year warranty, starting at substantial completion, that work was performed in a “good and workmanlike manner [as reflected in the following industry quality standard, if inserted: _____] and free of defect not inherent in the type of work.” Implied warranties expressly disclaimed. Notice and opportunity to cure must be provided to a subcontractor or breach of warranty claim is waived. ¶ 4.</p>
<p><b>ASA Model Subcontracts Best Practices for WARRANTY:</b> A subcontractor’s warranty should provide that work is free of defects and performed in workmanlike manner, but must exclude defects inherent in the design or specified materials, ordinary wear and tear, improper maintenance, abuse, modifications, and implied warranties. A subcontractor’s warranty must have a time limit which should run from either substantial completion or issuance of a certificate of occupancy to the owner, whichever is earlier. A subcontractor’s warranty must reserve the right of the subcontractor to notice and an opportunity to cure any claimed breach of the warranty, by providing for waiver of any warranty claims where the subcontractor is not provided an opportunity to cure.</p>			

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