Contracts & Prompt Payment





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Who is...?

MIKE



AGC 1919

Recovering lawyer with AGC.

AGC is 50-50 general and specialty contractor, including large and small of both

Dir. Labor & Legal– Negotiates with trade unions & helps with employment issues

General Counsel– AGC's form construction contracts, amicus briefs, etc.

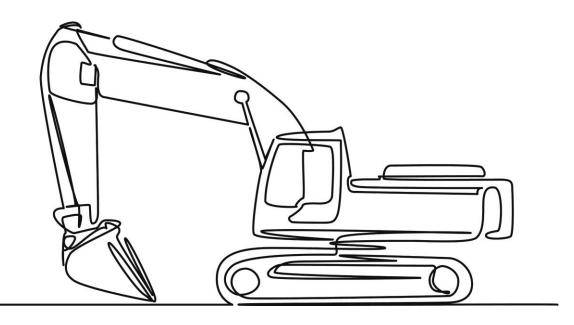
NENA

Attorney specializing in federal, state, tribal, and local government contracts and grants, with a focus on infrastructure.



Agenda

- ➤ Contracts 101... quick overview
- Prompt Payment: Rights & Duties
- > AGC Early Payment Addendum
- Practical Tips
- > Q&A



Contracts 101

QUICK FUNDAMENTAL CONCEPTS

Purpose of written contract

- > Clarity (hopefully) re: roles, terms, responsibilities, risks
- Memorializes processes & understandings for later questions or disputes

... unless required by statute (e.g. sale of land or service that cannot be performed within a year), then you don't need a written contract.



#1– Form Contract vs Custom

FORM

- ❖ Terms generally known—less to review
- Not all terms are best for you or your project. Some forms are complicated.
- * **Beware**: Some parties may change the form contract without showing the changes, which basically makes it a Custom Contract.

CUSTOM

- Get the exact terms you want
- Other party needs to read it closely
 - ❖Takes time... time... time
- May cause more negotiations
 - ❖ More time... time... time
- May breed distrust

#2 – All (almost) contracts are negotiable

- How to review a contract
 - Legal Terms
 - Business terms
 - Assigns risk & responsibilities/rewards
 - Expectations, Culture
- How to broach negotiating
- How to draft the language
- When to call your lawyer (besides always)



#3– Forms

Top forms to know



AIA

Created by architects
Commonly used
Long, complicated



ConsensusDocs

Created by over 40 construction industry associations including AGC America & Nat'l Assn of Women in Construction



Engineers Joint Contract Documents Committee



AGC-MN

Reviewed by general/subcontractors in MN, in-house and outside attorneys, and business folk

Includes provisions specific to MN law

Form Contracts—big differences

+ personal preference— what you're used to, what resonates to you

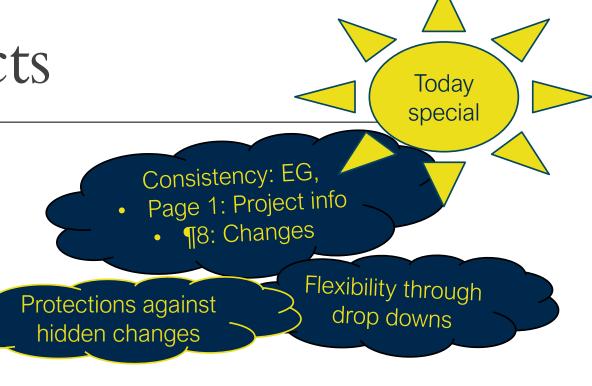
	Custom	ConsensusDocs	AIA	AGC-MN
Created by	Per company	Consensus of a bunch of associations including AGC America	Architects	Committee of general and subcontractors and lawyers and business folk in Minnesota
Centric	Company	Contractors	Architect	Project
Key advantage	Perfect for company	Recognized nationally	Recognized nationally	Recognized in Minnesota
Disadvantage	Lacks benefit of a form– needs careful review	Long	Very long, disorganized	Short forms only
Updated	?	As needed & standing committee to review	10 years	Annually and mid-year when MN law changes
Cost	\$\$\$\$\$	\$\$\$	\$\$\$	\$

AGC-MN Contracts

Currently have 6:

- Owner-Contractor (OCA)
- 2. Contractor-Subcontractor (CSA)
- 3. Materials/Supplies (MPA)
- 4. Independent Trucker Owner/Operator (ITO)
- 5. Residential (ROCA)
- 6. Early Payment for Small Business Enterprises (EPA-SBE)

** Committee is considering Master Services Agreement



A Few Key Differences

	ConsensusDocs	AIA	AGC-MN
Ease	Integrated documents	May need multiple contracts	Short form
Integration	Order of precedence	Does not address ambiguities	Prime then subcontract
Communication	Good faith, mutual duties	Include or go through architect	Good faith, open
Change Orders	Owner-contractor negotiate. If dispute, then share cost until resolved.	Architect directs. Must work under protest. Contractor must preserve rights	Protects contractor or sub from working before receiving written approval
Indemnification	Mutual. No duty to defend	One way. No duty to defend	Indemnify for damages caused & vicarious claims (to reduce litigation). Pay proportionate duty to defend. (MN Law)
Disputes	Escalating steps to project neutral or dispute board	Architect decides, if protest then escalate	Escalating steps to arbitration or court.
Wage theft	Coming	??	Language for MN law

Prompt Payment

LAWS, POLICIES AND CONTRACT PROVISIONS

Reasons for payment delays/prompt

OWNER (DELAY)

Risk of noncompletion

Risk of faulty work

Risk of other liability

Ease of inspection (milestones)

Receives funding from bank as value becomes real

UPSTREAM CONTRACTOR

In the middle:

- Can become liable to owner for noncompletion, faulty work, other liabilities
- Isn't paid by owner until Owner approves work, so becomes the bank to Owner
- Ease of inspections may be an issue & wants to make owner (its client) happy
- Locked into Owner's contract & terms
- Typically wants to pay Subcontractor (needs good partners)

SUBCONTRACTOR (PROMPT)

Cashflow

Owes material suppliers

Owes labor

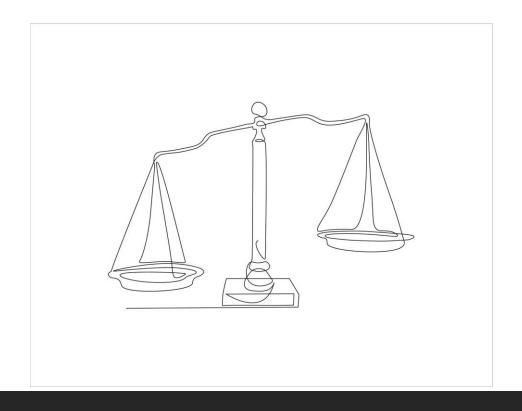
Becomes the bank to upstream contractor(s) and ultimately owner

Getting Paid

- Flow of funds on construction projects
- Payment delays = risks to small businesses
- Less capital (savings/lines of credit)
- Tighter cash flow (payroll/bills)
- Disrupted revenue flow, harder to compete

Getting Paid

- ❖ Before prompt payment laws
- Little to no recourse to seek payment
- File lien v. customer = risk
- Can't file a lien v. public works



Right to Payment

Prompt Payment laws, policies, provisions

- require owners/higher-tier contractors to pay subcontractors
- progress payments and retainage
- per statutory deadlines / contract deadlines

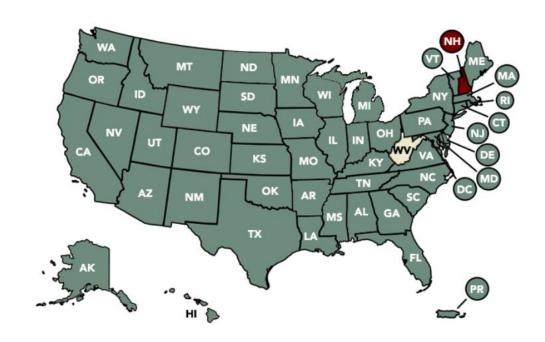


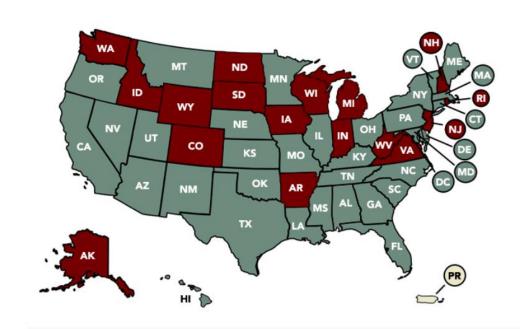
State Prompt Payment Laws



Prompt Pay: Public

Prompt Pay: Private



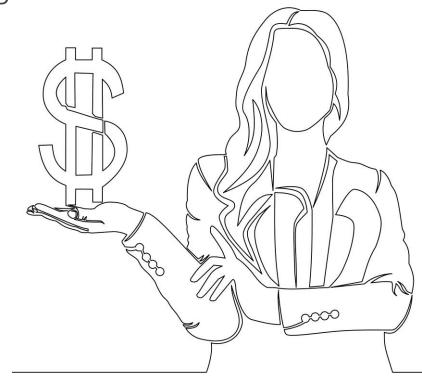


Source: Prompt Payment State-by-State Map | Associated General Contractors of America (agc.org)

Retainage

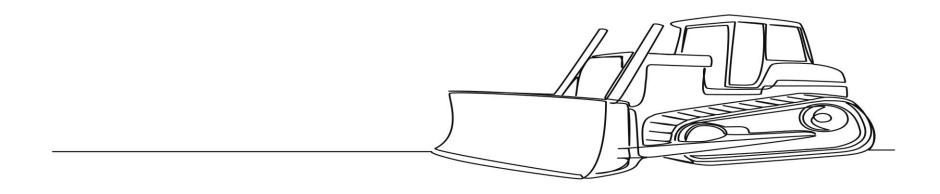
A portion of the payment is withheld pending the satisfactory completion of the work.

- Satisfactory completion
 - * tasks accomplished
 - tasks accepted
- Contractual right limited by state law
 - state limits vary



Minnesota Law: Building and Construction Contracts; Prohibited Provisions

- Minnesota Statutes, Section 337.10
- Applies to Building and construction contracts contracts for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges.



Minnesota Law: Building and Construction Contracts; Prohibited Provisions

- Mandates that MN laws/courts to MN-based projects
- Provisions that waive the right to...
 - file a mechanics lien or
 - claims against payment bond

...before getting paid are void and unenforceable



Minnesota Prompt Payment Laws

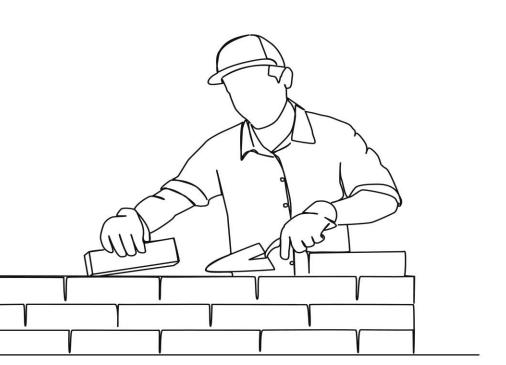
	Private Contracts	Public Contracts
Deadline	Pay lower-tier subcontractor invoices within 10 days of receipt of payment for "undisputed services" and "undisputed amounts"	Public agency must pay within 30 days of invoice for completed services; pay at least monthly for progress billings Local government (per contract, or 35 days (reg mtg) or 45 days). Prime contractors to pay first-tier subcontractors, within 10 days
Interest	1.5% per monthIf >\$100 in dispute, interest \$10+If <\$100, actual % value	Same

Minnesota Prompt Payment Laws

	Private Contracts	Public Contracts	
Penalty	Contractor must pay interest, costs/disbursements, and legal fees incurred in bringing the action – if you win in court	Same for contractors that don't pay Different if agency does not pay	
Recourse	Subs can suspend work under the contract until payment is received	Same for contractors that don't pay Different if agency does not pay	
Authority	Minn. Statutes 337.10	Minn. Statutes 15.71, 16A.124, 16A.1245, 471.425, 137.36	

Minnesota Law: Progress Payments

- Payments based on estimates of work completed, as approved by owner
- Monthly progress payments required,
 unless contract provides otherwise
- Progress payment does not mean acceptance of work/waiver of defects

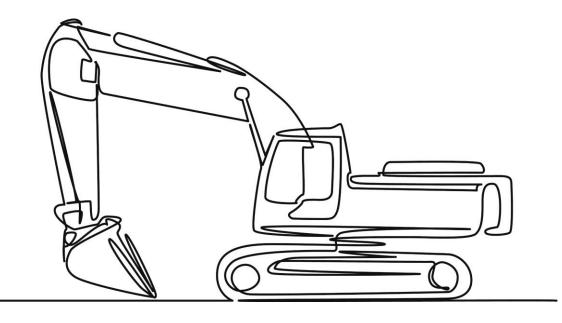


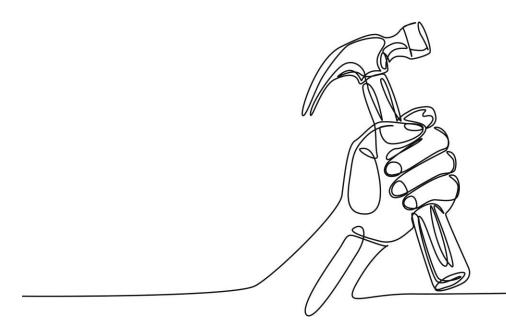
- Retainage capped at 5%, optional and defined by contract
 - ❖ If owner reduces retainage, all subcontracts reduced
 - ❖ No retainage allowed on warranty work
 - Retainage law n/a contracts for professional services (architect, engineer, land surveyor, landscape architect, geoscientist, or certified interior designer),
 - N/a to portions of contract that are not complete or for which no invoice submitted, yet.

- Release no later than 60 days after "substantial completion"
 - The date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose
- Must pay subs within 10 days after receiving retainage unless there is a dispute under a subcontract (all subs not involved dispute must be paid)



If a contractor withholds retainage from a subcontractor, the contractor must provide written statement detailing the amount and reason for withholding it to the affected subcontractor.





If owner withholds retainage, the owner must provide written statement detailing the amount and reason for withholding to the prime contractor and a copy to each sub that requests it.

Minnesota Prompt Payment Laws

After substantial completion...

- ❖ owner cannot withhold >250% of cost to correct/complete the work known at the time of substantial completion. Must pay within 60 days of completion of work.
- ❖ owner cannot withhold >1% value of the contract (or \$500, whichever is greater), pending completion of submission of final paperwork. Must pay within 60 days of all final paperwork submission.
 - * "final paperwork" means documents required to fulfill contractual obligations, including, but not limited to, operation manuals, payroll documents for projects subject to prevailing wage requirements, etc.

Using Contracts to Get Paid Early

AGC EARLY PAYMENT ADDENDUM

Payment (contracts)

		ConsensusDocs	AlA	AGC-MN
	Contract Payment terms	Owner pays 15 days	Reviewed by architect	Upstream contractor
ASSOCIATED GENERAL CONTRACTORS OWNER-CONTRACTOR APPROX	ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA ONNER - CONTRACTOR AGREEMENT ADDREVEN RE: EARLY PAINGENT FOR SAULI DURINGS ENTREPRIES	after accepting	(7 days) then goes to	pays sub 10 days
Addenda Effect	RE: EARLY PARAMETER FOR SMALL SUGMESS EXTERPRISES Ann to the Owner - Contractor Appendix regarding Early Paramet for Small In.	payment request	owner	after receipt of money

AGC's Early Payment Addendum for Small Business Enterprise

- History
- Owner & General Contractor agree to pay developing businesses early
 - Take on added risks to help develop SBE
- Payment terms:
 - Materials & supplies: Pay 50% of value when ordered
 - Labor: Pay all labor performed
 - Cost only, not overhead/profit
- Keep records

on the Effective Date of Click or too to enter a date, by and between the Parties: Click or too here to enter test, ("Contractor").

and Click or too here to enter test, ("Contractor").

WEFFEAS, Owner and Contractor entered into the Owner Contractor Agreement dated <u>Click or top to enter a date.</u>

COCA') to perform work as defined in the OCA at the following Project: <u>Click or top here to enter the located at Click</u>.

WHEREAS, the Parties desire participation and development of small business enterprises ("SBE") on the Project which the Parties agree adds value to the Project and the construction industry,

Where As, the Parties recognize significant barriers in the construction industry that deter participation and development of SSE including cash flow challenges when a SSE Subcontractor incurs cost performing its duties and does not receive

WHEREAS, this Addentum intends to provide early payments to the SBE Subcentractor and remove delays in payments from Owner, Contractor, and, when SBE Subcentractor is a second or more brief subcentractor and is not in direct privity with Contractor, the intermediary contractors and contractor in privity with the SBE Subcontractor ("Privity

NOW, THEREFORE, in consideration of the respective agreements and terms set forth hereinafter, including reliance of and benefits of this Addendum, Owner and Contractor, intending to be legally bound, agree as follows:

- Contract Documents. This Addendum is included in "Contract Documents."
- Definition of SBE. A SBE is a firm qualified to perform a scope of work on the Project and who meets all the
- a) <u>Developing Business</u>. The SBE must qualify as a small business pursuant to the criteria established by either th Minnesota Unified Certification Program, the Minnesota Department of Administration Office of State Procurement, the Minnesota Department of Tramportation, the Minnesota Department of Viotenza Affairs, the Central Certification Program, or similar program established by a government arthority with junctions over the Central Certification Program, or similar program established by a government arthority with junctions over the Central Certification Program, or similar program established by a government.

☐ If checked, then the subcontractor must receive certification as a SBE with a government agency with jurisdiction over this Agreement or the Project site; and

- b) Independence. The SBE must be independent and not share employees, equipment, space, or other material
- Approval of SBE Status. Contractor will review a request by Subcontractor for approval of SBE Status and, upon nent of Owner and Contractor for the Subcontractor to participate in this program, certify such subcontractor
- Early Payment to SHE Subouttractors. <u>The Priment provisions (Well) of the OCA</u> hereby are amounded to provide for early payment to SSE Subouttractors under this Addendum. Other than providing this process for early payment to SSE Subouttractors, the terms and drains in the Control Domenset Institute is all concerned parties (including Downs, Contractor, SSE Subouttractors, and Privity Contractor) are unamended.
- a) SBE Subcontractor Pay Requests. Participating SBE Subcontractor will solunit a request for early payment together with appropriate receipts and data, including compliance with legal requirements including Wage Their

Practical Tips

NEGOTIATION STRATEGIES

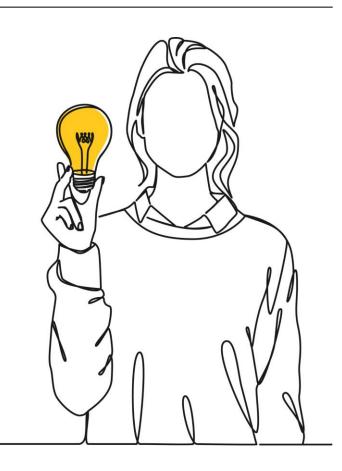
Start with a Practical Assessment

- Consider the motivation of your customer/GC/owner/funder
- Why are they hiring small businesses? Why WOSB?
 - mandates/preferences/policies
- Find the alignment, identify they risk points



Negotiating Tips

- Get to know the form contracts
 - ❖ What is negotiable? What is not?
 - What is important to your business?
- Value of getting a copy of the entire contract
 - Redacted if necessary
- Understand who has authority
- Get it in writing



Questions?



Thank you



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