

# Contracts & Prompt Payment



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# Who is...?

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## MIKE



### **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

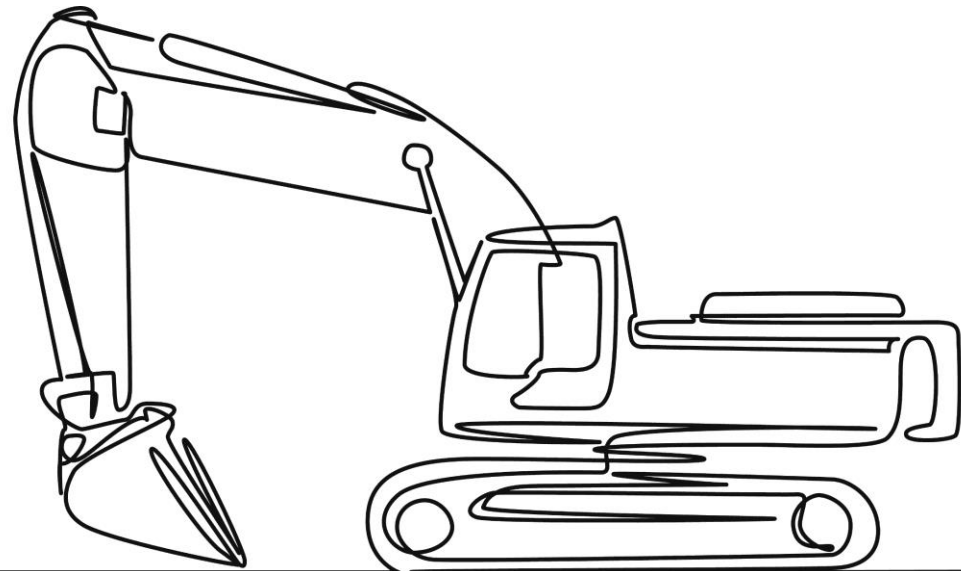
Attorney specializing in federal, state, tribal, and local government contracts and grants, with a focus on infrastructure.

**Fredrikson**

# Agenda

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



# Contracts 101

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QUICK FUNDAMENTAL CONCEPTS

# Purpose of written contract

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- 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

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## 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

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- ❖ 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)

#1 Rule of Contracts  
is to enforce the  
parties' intentions

# #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

National forms (arranged alphabetically)



# Form Contracts— big differences

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

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

# AGC-MN Contracts

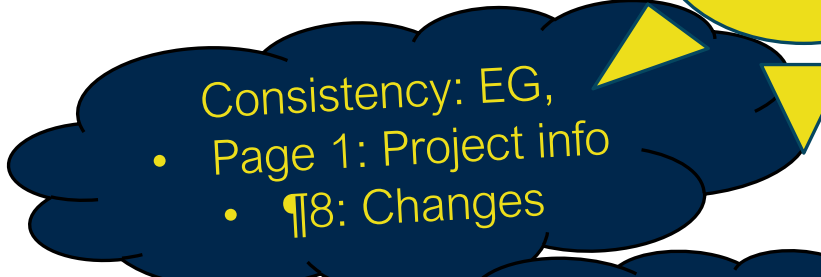
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Currently have 6:

1. 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)



Today special

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- Consistency: EG,
  - Page 1: Project info
  - ¶8: Changes



Protections against hidden changes



Flexibility through drop downs

\*\* Committee is considering Master Services Agreement

# A Few Key Differences

	<b>ConsensusDocs</b>	<b>AIA</b>	<b>AGC-MN</b>
<i>Ease</i>	Integrated documents	May need multiple contracts	Short form
<i>Integration</i>	Order of precedence	Does not address ambiguities	Prime then subcontract
<i>Communication</i>	Good faith, mutual duties	Include or go through architect	Good faith, open
<i>Change Orders</i>	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
<i>Indemnification</i>	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)
<i>Disputes</i>	Escalating steps to project neutral or dispute board	Architect decides, if protest then escalate	Escalating steps to arbitration or court.
<i>Wage theft</i>	Coming	??	Language for MN law

# Prompt Payment

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LAWS, POLICIES AND CONTRACT PROVISIONS

# Reasons for payment delays/prompt

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## 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

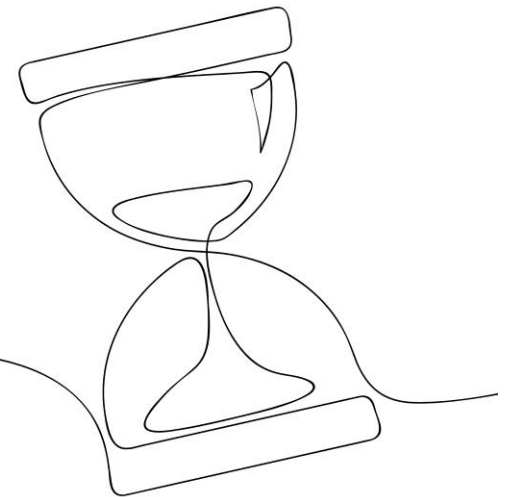
Owes labor

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

# Getting Paid

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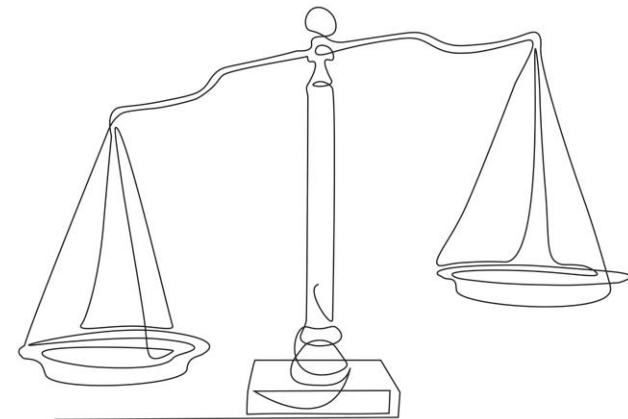
- ❖ Flow of funds on construction projects
- ❖ Payment delays = risks to small businesses
- ❖ Less capital (savings/lines of credit)
- ❖ Tighter cash flow (payroll/bills)
- ❖ Disrupted revenue flow, harder to compete



# Getting Paid

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

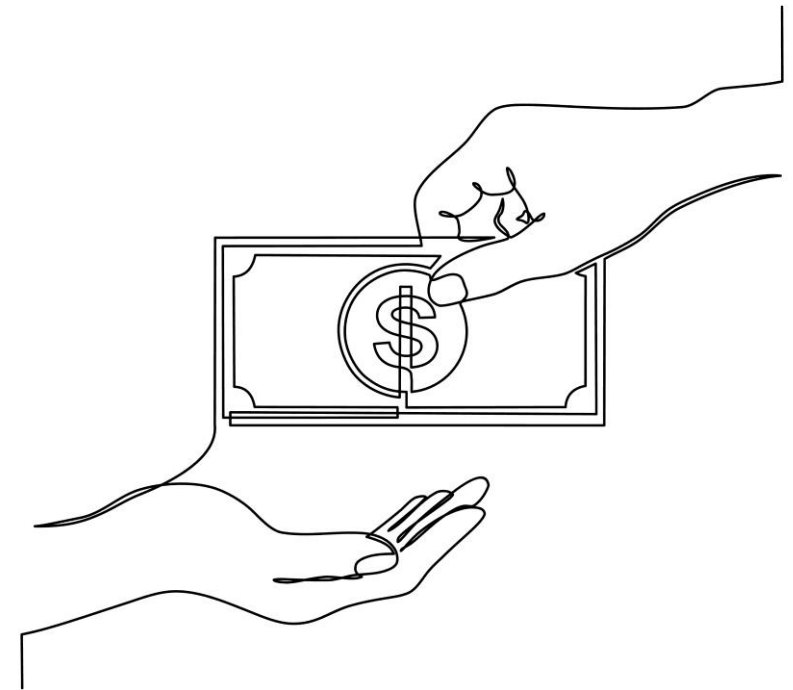


# Right to Payment

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## Prompt Payment laws, policies, provisions

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



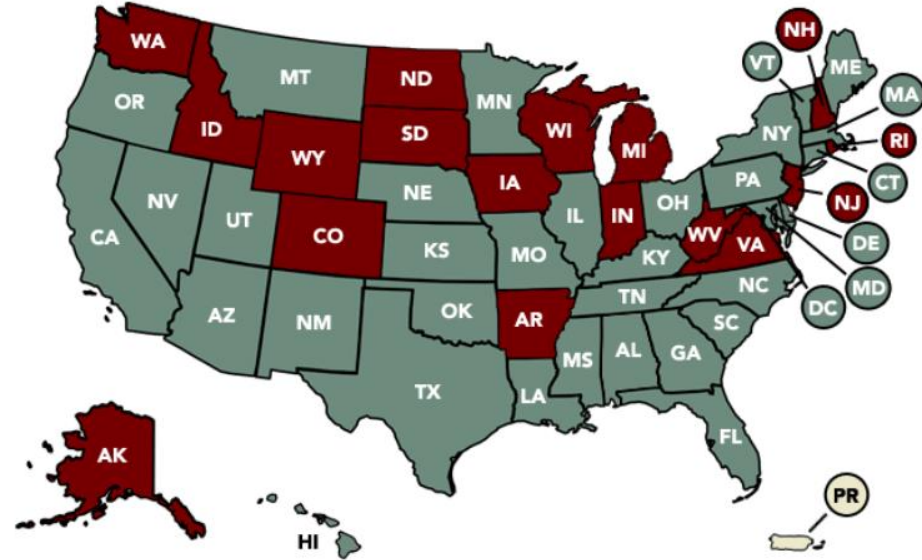
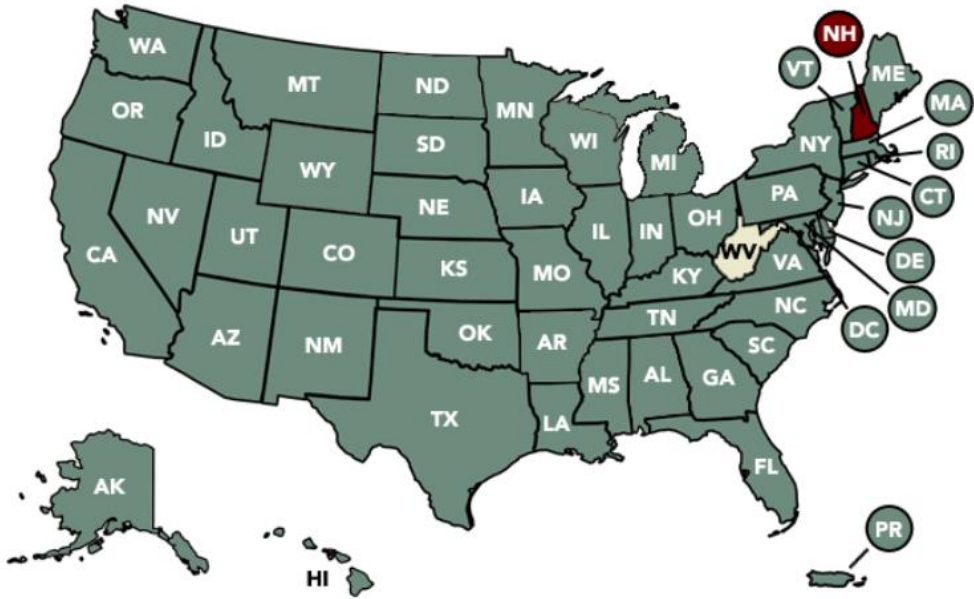


# State Prompt Payment Laws

Map Legend	
Green	Yes
Red	No
Tan	Not Definitive

Prompt Pay: Public

Prompt Pay: Private

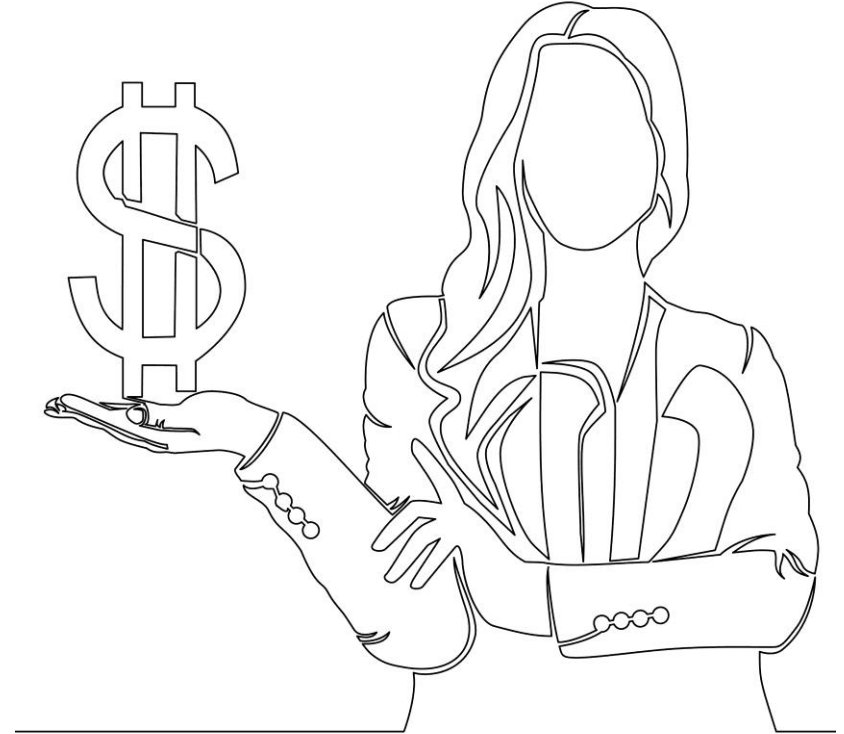


Source: [Prompt Payment State-by-State Map | Associated General Contractors of America \(agc.org\)](https://www.agc.org/prompt-payment-state-by-state-map)

# Retainage

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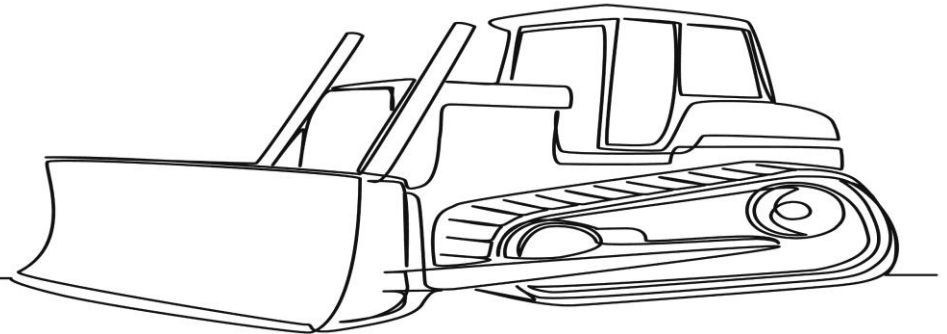
- ❖ A portion of the payment is **withheld** pending the satisfactory completion of the work.
- ❖ **Satisfactory completion**
  - ❖ tasks accomplished
  - ❖ tasks accepted
- ❖ Contractual right – limited by state law
  - ❖ state limits vary



# Minnesota Law: Building and Construction Contracts; Prohibited Provisions

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- ❖ 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

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- ❖ 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 <b>10 days</b> of receipt of payment for “undisputed services” and “undisputed amounts”	Public agency must pay within <b>30 days</b> 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 month <ul style="list-style-type: none"><li>• If &gt;\$100 in dispute, interest \$10+</li><li>• If &lt;\$100, actual % value</li></ul>	Same

# Minnesota Prompt Payment Laws

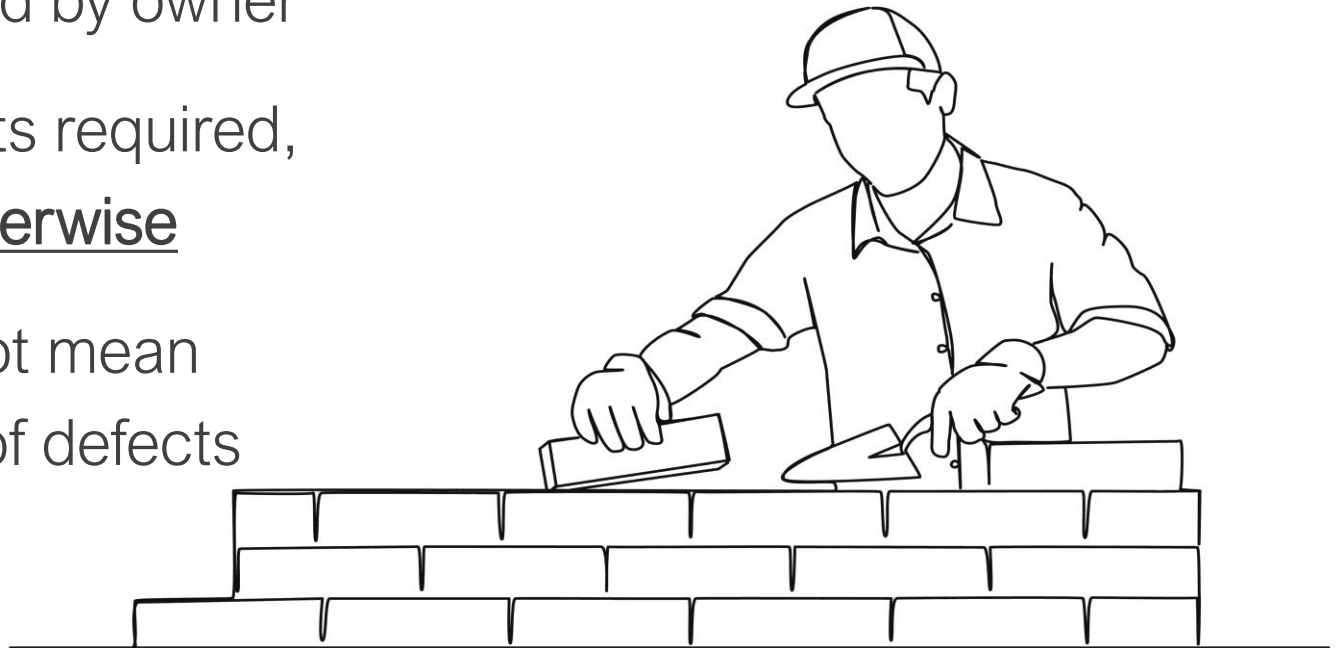
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	Private Contracts	Public Contracts
Penalty	Contractor must pay interest, costs/disbursements, and legal fees incurred in bringing the action – if you win in court	Same for contractors that don't pay Different if agency does not pay
Recourse	Subs can 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

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- ❖ 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



# Minnesota Release of Retainage

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- ❖ 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.



# Minnesota Release of Retainage

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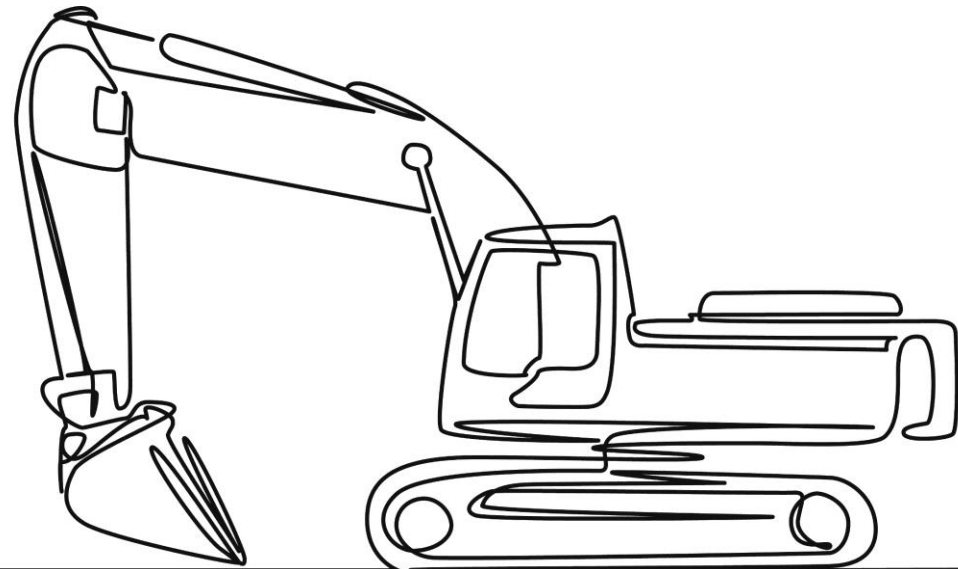
- ❖ Release no later than **60 days** after “**substantial completion**”
  - ❖ The date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose
- ❖ Must pay subs within **10 days** after receiving retainage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



# Minnesota Release of Retainage

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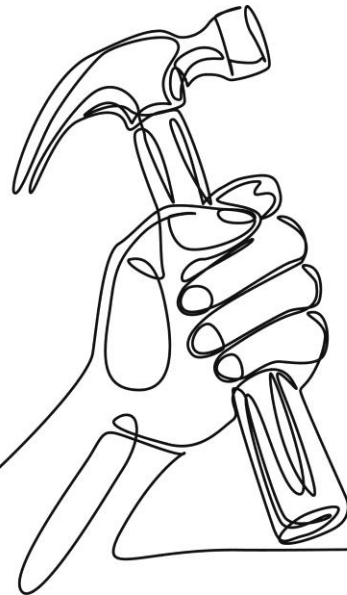
- ❖ If a contractor withholds retainage from a subcontractor, the contractor must provide **written statement** detailing the amount and reason for withholding it to the affected subcontractor.



# Minnesota Release of Retainage

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- ❖ 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

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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.

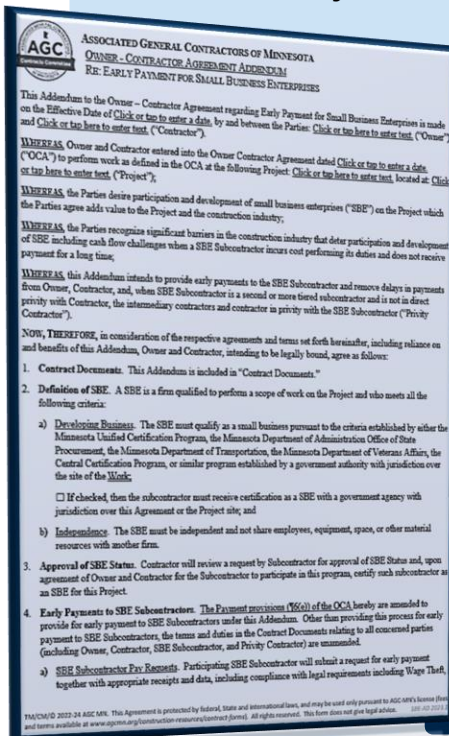
# Using Contracts to Get Paid Early

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AGC EARLY PAYMENT ADDENDUM

# Payment (contracts)

	ConsensusDocs	AIA	AGC-MN
Contract Payment terms	Owner pays 15 days after accepting payment request	Reviewed by architect (7 days) then goes to owner	Upstream contractor pays sub 10 days 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

# Practical Tips

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NEGOTIATION STRATEGIES

# Start with a Practical Assessment

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

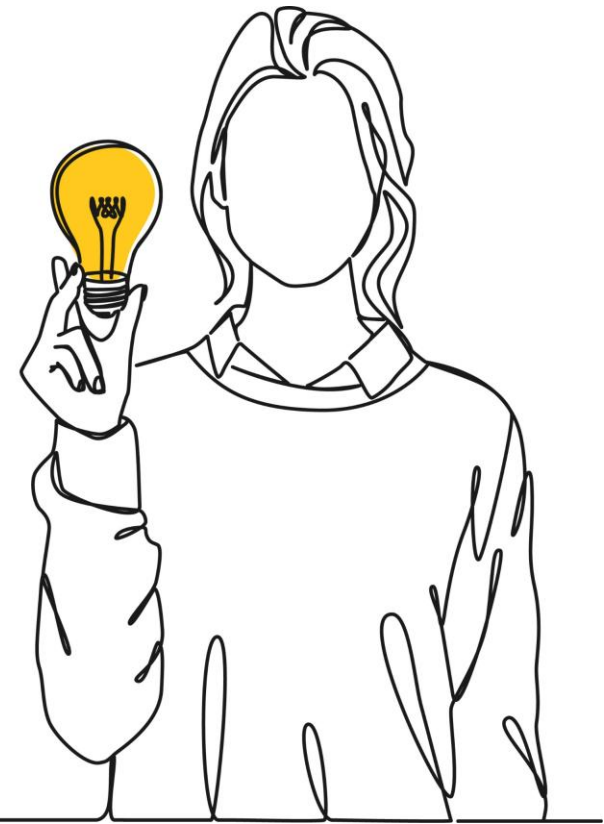




# Negotiating Tips

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- ❖ 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?

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# Thank you



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