Make Your Contract Work for You

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Make Your Contract Work for You

Learning Objectives:

1. Identify the recurring risks in electrical subcontracts and how to manage them.
2. Manage these risks in subcontract negotiation and, once the subcontract is signed, during project performance.
3. Be prepared for the risk of non-payment by being diligent before the subcontract is signed.

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• Condition Precedent Payment—The single greatest risk to subcontractors today.
• Just say no.
• Offer modified payment language which gives the GC time to resolve Owner payment problems, without giving up your right to be paid.
• Understand prevailing payment law-condition precedent payment may be unenforceable where your job is located, and you need to know this when you negotiate.
• Is there a payment bond—if so, this could significantly reduce the risk of condition precedent payment.
• If you must accept condition precedent payment, do you have any other payment remedy?
• Don’t destroy your lien rights by accepting condition precedent payment.
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• “No Damage for Delay” clauses—These present a manageable risk if you understand how they work and their limitations.
• Know the exceptions to these clauses which are recognized in your jurisdiction or where the project is located.
• Exploit the exceptions when you experience a costly delay.
• Don’t lose the benefit of an exception by failing to ask for a time extension when you give notice of delay.

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• Notice Requirements—The easiest and most frequent way subcontractors lose their rights.
• Understand your contract’s notice requirements for claims for time and money.
• Try to negotiate more liberal notice requirements.
• Follow agreed requirements religiously.
• Don’t be afraid or embarrassed to give notice of a claim for delay or additional compensation.
• What does the contract say about how notice is to be given—Do what it says and do not rely on email!
• Never rely on verbal notice or “we’ll work it out when the job is finished”. That won’t happen.
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- Indemnity Clauses
- Learn how to recognize bad indemnity clauses as opposed to fair clauses.
- Negotiate a “comparative indemnity” clause if you can.
- Be aware of state law where the project is being performed—local law might eliminate this risk for you.
- If you have lower tiers of your own, pass the risk on to them.
- Don’t allow a lower tier on the site without first having a signed agreement with an indemnity clause that protects you. No signed contract = no enforceable indemnity clause.

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- Lien Waivers and Releases
- Review and negotiate these BEFORE you sign the subcontract. You have much less leverage to revise bad lien waivers after the subcontract is signed.
- Be familiar with the several basic types of lien waiver language used in the industry so you can avoid those lien waivers which eliminate all of your remedies in the event of non-payment.
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• Differing site (changed) conditions
• This is an important contract provision if your scope includes significant excavation or the project is a renovation or addition.
• The clause you will need to preserve your remedies is not in your subcontract, so examine the prime contract before you sign-on.

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• Changes and Extras
• Look for notice requirements and the “waiver” word when you review the subcontract.
• Attempt to negotiate “waiver” out of the subcontract.
• If the waiver word remains, project management must ensure that proper timely notice of a change or extra is given to avoid the waiver trap.
• If you must proceed with a change or extra work which the GC does not recognize as such, be sure to give notice stating that you are doing so “under protest and with a full reservation of your rights”.

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• Choice of law and forum clauses
• Look for contract provisions which specify whose law applies to disputes and where you must go to arbitrate or litigate.
• Try to reach agreement that the place of the project will determine whose law and forum applies to disputes.
• Be aware of state laws where you are headquartered which may nullify the subcontract’s choice of forum clause to your benefit.

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• How to prepare for the risk of non-payment.
• The time to prepare for this major risk is before you sign the subcontract, not when the receivable is 90 days old.
• What payment remedies do you have on the project? Liens, a payment bond, joint check agreement?
• What payment remedies are you giving up if you accept the subcontract without changes?
• If the GC insists on condition precedent payment, how will that effect your payment remedies? Will lien rights and/or a payment bond claim still be available?
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- What have we learned this morning?
- Your subcontract presents many risks to the collection of progress payments, payment for changes and extras and payment of claims for delay and/or disruption.
- Your job is to understand these risks so that you can (1) look for them when you review the subcontract; (2) once you have identified the risks, negotiate more favorable language; (3) recognize those risks which are adequately managed for you by local law; and (4) during performance, manage those risks which remain despite your negotiation efforts or because local law is not helpful.
- The time to prepare for the risk of non-payment is now, before you sign the subcontract. Ask yourself “What are my options if it all goes south” to be sure you will have some in that event.

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