

# CONTRACT LANGUAGE TO PROTECT THE CONTRACTOR

OR

“MAKING A PROFIT DESPITE  
THE ODDS”

PRESENTED TO: LIGHTING PROTECTION INSTITUTE and  
UNITED LIGHTING PROTECTION ASSOC.

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# PRACTICAL TIPS FOR SUCCESS

## 1. CONDITION YOUR BIDS

- What does that mean in legal terms?
- BID=OFFER (GC CAN ACCEPT OFFER)
- CONTRACT=OFFER + ACCEPTANCE
  - You typically bid per plans and specs.
  - Specs. Incorporate GC's boilerplate form

GC ACCEPTS YOUR BID=CONTRACT

“BAD THINGS HAPPEN TO GOOD PEOPLE”

## Scenario #1:

- You begin work without signing your contract
- By second pay application you are owed significant sum of money
- Ask to be paid and GC refuses, must have signed contract
- No pay, must file lawsuit based on quantum meruit (reasonable value)

## Scenario #2:

- You propose changes to Subcontract
- GC refuses, insists you sign his boilerplate
- Threat to “terminate” you and hire replacement
- Hires new sub at higher price, sues for difference, i.e., “promissory estoppel”

# THE CURE:

## CONDITION YOUR BIDS

### Example:

“This bid is expressly conditioned upon use of the Consensus DOCS 750 subcontract or other mutually agreeable terms and conditions.”

### EFFECT:

- (a) Creates defenses to contract formation
- (b) No “detrimental reliance” or “promissory estoppel”
- (c) Puts you in position to bargain over terms

# LETTERS OF INTENT

Careful of exculpatory language relieving GC of liability in event does not result in contract

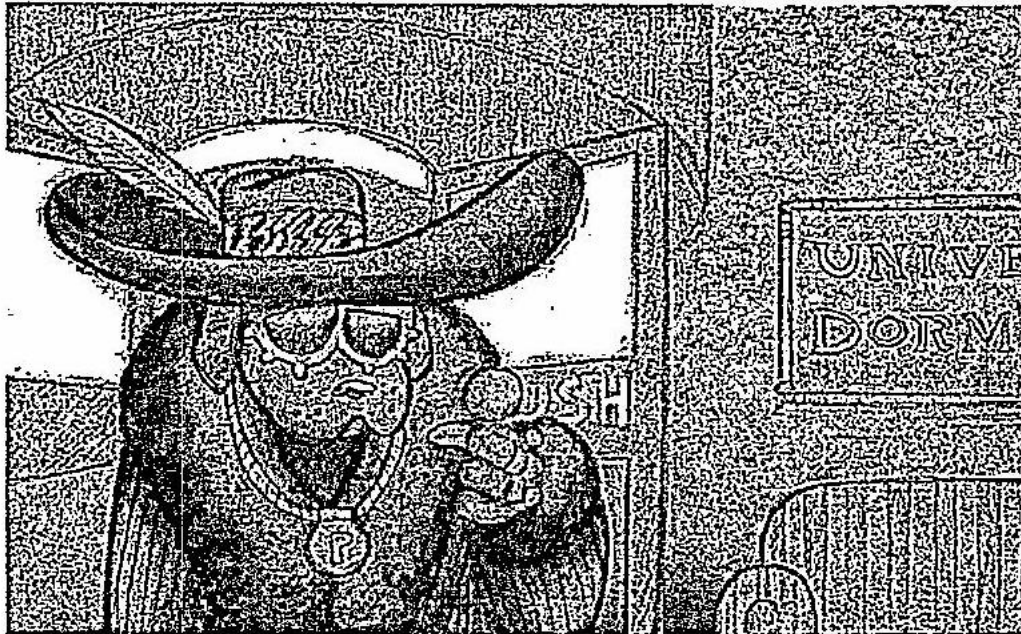
Do not commit to contract language, schedules, etc.

Be sure to include language for payment

Example:

“However, in the event GC does not enter into contract with Sub for any reason, GC shall pay Sub for all work in place and stored materials, no later than fifteen days from invoice.”

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**The Real Deal**

The spec for a university girls dorm included a hilarious typo - circulating pimp instead of circulating pump.

# READ THE CONTRACT “BEFORE” SIGNING

## WHY?!?

- Because:
- Every Contract Term is a Job Cost
- Cost assumptions should be contract terms

## Example:

You intend to do work in logical sequence with reasonable manpower increase over specific duration, e.g., multiple phases with gradual manpower increase for two months;

What if time cut in half and sequence changed? = Inefficient labor and increased costs

## Know Contract Requirements to Make Reasoned Decision Whether To Accept Based on Risk/Benefit Analysis

- Difficult job
- Bad drawings
- Tough Owner/GC
- Tight site foot print
- Bad weather (winter)
- Low profit margin
- Other work available in market place

SOMETIMES THE BEST DECISION IS TO NOT TAKE THE  
JOB.

## OTHER PURPOSES OF CONTRACT REVIEW AND NEGOTIATIONS:

- Send a “message” to GC
- Want to be an equal partner; not “weak sister” sub
- May be able to get some “concessions,” such as lower retainage or elimination of “pay-if-paid” clauses

## “NOTICE” REQUIREMENTS

- May have short time to notify GC of claim for extra work, e.g. “no later than 5 days from events giving rise to claim.”
- Otherwise claim may be waived

## KNOW OPTIONS IN CASE OF DISPUTE

- Some subcontracts say must file for arbitration within 30 days of “final decision” or “waive” rights, i.e., lose them
- Arbitration at “sole option” of GC
- Avoid court/hearing locations in distant venue, i.e., Minnesota when project in Alabama
- Avoid “home cooking”, *i.e.*, agree to venue in local court nearest GC’s offices
- Avoid agreement governed by laws of another state (see above example)

## AVOID “PAY-IF-PAID” CLAUSES

Example:

“GC shall pay Sub within 10 days after receipt of payment from Owner. Sub expressly acknowledges that GC shall have no obligation to pay Sub in the event of non-payment by Owner.” Sub is relying strictly on the credit worthiness and payment by Owner.”

## WHY – ENFORCEABLE IN MANY STATES!

Legally, GC not required to pay

- WORSE NEWS: surety can usually raise as defense

Alternative language: “However, in the event GC is not paid through no fault of Sub, then GC shall pay Sub within a reasonable time period.” (or, “pursuant to the payment terms herein”).

# RETAINAGE

Profit on the job!

Retainage should be kept as low as possible

- No greater than Owner holds on GC

Example:

“Retainage shall be reduced in equal proportion to percent of retainage held by Owner on General Contractor.”

Include language as bid condition or in subcontract

Government contracts generally reduced to 5% at halfway point of project if satisfactory progress.

Example:

“Provided that Sub’s performance is satisfactory at the point it completes 50% of its work, GC shall cease any further deductions of retainage.”

Negotiate 5% retainage, reduced to 2 ½% at Substantial Completion (“beneficial use and occupancy”).

Retainage should be fully released when Owner accepts your work. (NOT THE ENTIRE PROJECT).

## JOB SITE CONDITIONS

Not ready for delivery installation per contract schedule

- Methods to address:

Add language to bid proposal or subcontract

### Example:

“Any delays in delivery or installation shall result in a change order for increased costs, to be submitted per subcontract provisions.

Alternative – “In the event the project site is not ready for delivery or installation per the contract schedule, Sub shall be paid for stored materials, plus the cost of storage, where applicable.”

## SCHEDULING, SEQUENCING AND DURATION

Three keys to managing work profitably.

Key components in the logic used in bid

To be successful, must have input into schedule, sequence and duration.

Avoid, contract language giving GC sole right to change schedule, sequence or duration, absent right to additional compensation.

Example:

“GC shall have the unilateral right to amend or change the schedule, duration, or sequence of work, all without any additional compensation.”

Change to:

In the event the schedule, sequence or duration of activities is altered from the original schedule, Sub shall be compensated per the change order process outlined herein.”

## ACCESS TO WORK AREA

Inability to readily access work site costs money

- Site may have one access road, muddy conditions

Lack of access to elevators (hoists to move men and materials is costly)

- May have to walk materials into work area

Suggested Addition to Subcontract:

“Sub assumes GC to provide adequate access to the work site so as to not impair or impede Sub’s ability to expeditiously perform its work.”

## BACKCHARGES

Must have adequate notice of potential backcharge, i.e., “GC shall give Sub seven (7) days written notice prior to assessing backcharges.”

Be clear regarding clean up duties

- Sub responsible to clean own work area, not part of composite crew.

## Example:

“Sub shall be responsible to clean up its own work area at the end of each day. Failure to do so shall result in notice of default and an opportunity to cure within three working days of notice.”

# UNHOLY TRINITY

## INDEMNIFICATION, WAIVER OF SUBROGATION AND ADDITIONAL INSURED

- Indemnification clause may guarantee Sub or insurance carrier pays for third party's own errors/negligence

### Avoid Broad Form Hold Harmless Language

- May be unenforceable per state law

## Example:

“Sub shall defend and indemnify GC, Owner, Architect and their representatives for any damages or injury to persons or property arising out of the Work, except for the sole negligence of any indemnitee hereunder.”

## The Fix:

Strike the word “sole,” or add “but only to the extent caused by the negligent acts or omissions of the Sub.”

## Additional Insured

- Requires Sub list GC and Owner under its policy
- Effect: GC makes claim for coverage under your policy, not theirs.

### Recommendation:

Talk with your broker and make sure correct coverage in place per ISO form documents.  
Also, avoid listing architect or unknown “representatives as additional insureds.

# Waiver of Subrogation

- Requires your carrier give up its rights to recover from GC's carrier for GC's negligent acts.

## The Remedy:

Eliminate broad form indemnity and may not effect subrogation rights.

## Conclusion/Summary

- Condition Your bid
- Read subcontract, revise and negotiate
- Analyze if good project to assume risk
- Give timely notice (claims, change orders, etc.)
- Deal with GC from strength

Trade contractors build projects, not GC's.

Improve the odds to get paid for your work.

# PONTIFICUS



"WE ARE OUR OWN  
WORST ENEMIES  
A LOT OF THE TIME,  
BUT I STILL BLAME  
THE SUBCONTRACTORS."