FIRST RULE
CONTRACT TRAINING

5 Critical Contract Changes

Every Subcontractor Needs to Make NOW

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Construction contracts are complicated, and reading them is often a long, hard slog. They're written in dense legalese and seem to be decorated with 19-comma, risk-laden sentences. Like it or not, however, they're a fact of life in what is a very tough industry. Don't make it tougher.

Your job is not to fight over every single provision. Instead, pick your battles. Make sure you recognize the most important issues on which to make your stand.

Those are the terms that have the potential to make or break your company. But when you find them – when you learn to identify the contract provisions that could mean the difference between making a profit and taking a huge loss – make your stand.

Don't go mountain climbing over molehills.

CRITICAL CHANGES

Every Subcontractor Needs to Make NOW

01. Know What The Contract Is...and Isn't.

In law, there is something known as the Objective Rule of Contracts. It means that the agreement is not what you think it is; it's what an objective third party, such as a judge or an arbitrator, thinks it is. To meet this challenge, you must actually incorporate or insert into the contract every term you believe is critical for your performance of the agreement. Just because you included an exclusion or unit pricing in your bid doesn't mean those things are in your contract. If the contract is silent as to something you believe is important, your job is to insert language making it absolutely clear that your critical terms are contract terms.

02. Reject Risk You Don't Need to Assume.

At least half of the provisions in a typical subcontract are written with one goal in mind: to transfer risk from the general contractor to you. It's fair that you assume risks relating to your performance as well as to materials you supply to the job. Most of those risk-transfer provisions are, however, extremely overbroad. They are written to make sure you assume all risks.

You should make sure that the contract specifically acknowledges that you are entitled to rely on the accuracy of materials provided by the owner or the general contractor, such as expert reports, studies, specifications, or drawings, and that you will not be held responsible for any errors.

03. Put a Fence Around Indemnification.

The real-world intention behind indemnification provisions is "you will become my insurance company, if..." The language, though often complicated, seeks to hold you responsible for most anything that happens on the project. Your job is to accept your fair portion of the risk while paring back the language to make sure you are not going to be held responsible for someone else's negligence.

CRITICAL CHANGES

04. Watch Your Warranty.

It is reasonable to expect that you will stand behind your work and any equipment you install on the site. By that same token, it is imperative that your obligation be precisely spelled out and limited to what you actually intended to provide. Change the standard warranty provision to ensure that your start date, end date, and the exact or your warranty are precisely what you intended them to be.

Finally, make sure the warranty in your subcontract does not get wiped away by a flowdown provision requiring you to adhere to the Prime.

05. Protect Your Right to Get Paid.

Construction contracts follow a predictable payment process.

But what if some of the documentation actually waives your right to receive payment for some of your work?

Do the work → **Submit the documentation** → **Receive Payment**

The fact is that the typical lien release – the so-called “boilerplate” that most contractors don’t even bother to read allows the general contractor to claim that you waived your right to receive payment for pending change orders. If you want to protect your right to get paid, you have to roll up your sleeves and dig into the boilerplate. Change the language so that your lien waiver paves the way for payment, rather than preventing it.

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