

# What You Need to Know to Negotiate Funky Contract Clauses

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*Presented by*

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# Session Objectives and Takeaways

- ◆ Identify and understand funky contract clauses that put you at the most risk
- ◆ Know how to respond to these key funky contract clauses
- ◆ Learn proven negotiation tactics
- ◆ Take home valuable inserts and language you can use in your contracts



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# First Rule of Contracting

- ◆ Know and Assess Who You Are Contracting with (know the Contractor and Owner)!
- ◆ The “contractor factor” – due diligence in investigation
  - Technical Experience & Competence
  - Trustworthiness
  - Reputation
  - Track Record With Similar Projects
  - “Empty Shell” – the project specific “LLC” dilemma



# Contract Deal Breakers

- ◆ Personal guarantees
- ◆ Prospective waiver of lien rights
- ◆ Broad form indemnity provisions  
(covers other party's negligence)
  - "Subcontractor agrees, to the fullest extent permitted by law, to indemnify and hold Contractor harmless against liability for all claims, whether or not such claims arise from, result from or are caused by the Contractor's negligence."





# Creating Leverage

- ◆ Your price
- ◆ Your quality
- ◆ Your history
- ◆ Conditioning your bid or proposal on use of the American Institute of Architects (AIA) A401 Standard Form of Agreement Between Contractor and Subcontractor
  - “This bid is conditioned on the use of the AIA A401 contract document or otherwise mutually agreeable contract.”



# Funky Contract Clauses

- ◆ Indemnification
- ◆ Additional Insureds
- ◆ Waiver of Subrogation
- ◆ Contingent Payment Terms (Pay-if-Paid)
- ◆ Change Orders
- ◆ Delay Issues and Liquidated Damages
- ◆ Force Majeure Clauses
- ◆ Bonds
- ◆ Professional Liability (Errors and Omissions Insurance)



# Indemnification

- ◆ Arguably the most important provision.
- ◆ We want to avoid accepting liability for the negligence of others.
- ◆ Seek to limit liability to insurance covered damages.



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# AIA® Document A401™ – 2017 Standard Form of Agreement Between Contractor and Subcontractor

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.





# Indemnification – Inserts

Insert: . . . to the extent caused by a negligent act or omission of Subcontractor or someone for whose acts Subcontractor is responsible . . .

Insert: Subcontractor is not obligated to provide indemnification for damages, losses or claims to the extent due to the negligence of indemnitees or others for whose conduct Subcontractor is not responsible.

Insert: Similarly, Contractor shall indemnify and hold harmless Subcontractor from all damages, losses, or expenses, including attorney's fees, arising from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to the extent due to the negligence of Contractor or the fault of any of its agents, representatives or employees.



# Indemnification – Inserts

◆ Negotiation tactic – Add language that you want, but know you can live without.

◆ Reciprocal Indemnification

- Insert: Similarly, Contractor shall indemnify and hold harmless Subcontractor from all damages, losses, or expenses, including attorney's fees, arising from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to the extent due to the negligence of Contractor or the fault of any of its agents, representatives or employees.



# Indemnification – Responses

To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless Contractor and Customer from and against any and all claims, demands, complaints, suits, causes of action, damages, liabilities, and losses (“Claims”), whether such Claims are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of property, arising out of or resulting from the performance of the Work **to the extent caused by a negligent act or omission of Subcontractor or someone for whose acts Subcontractor is responsible.**



# Additional Insured

- ◆ Right behind the indemnity provision in terms of importance.
- ◆ Problematic because additional insured provisions can unfairly shift the financial responsibility for claims to the subcontractor or its insurance company.





# Additional Insured – Insert

Insert: Naming Contractor and Owner as additional insureds on Subcontractor's liability insurance policy and making that coverage primary is intended to apply only to the extent that a negligent act or omission by Subcontractor causes a claim to be asserted or a loss to be sustained by Contractor or Owner. This additional insured endorsement is not intended and shall not be construed to cause Subcontractor's insurer to be liable either to defend or to indemnify Contractor or Owner for claims against or losses sustained by Contractor or Owner that are not due to the fault of Subcontractor.



# Additional Insured – Response

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |              |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |              |
| Imageone Industries LLC, customers of the Company and all related, parent or subsidiary companies and each of their respective parents, managers, members, agents, officers, employees and representatives are Additional Insured on a primary, non-contributory basis with respects to General Liability, Automobile Liability, and Umbrella/Excess Liability when required by written contract. The Insurer will not provide the additional insured with a higher limit of liability than required by the written contract. <del>Whereas the endorsement applies in favor of the aforementioned Additional Insureds respects to General Liability, Auto Liability, Umbrella and Workers Compensation as required by written contract.</del> |              |
| CERTIFICATE HOLDER                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | CANCELLATION |

34.

Just add it in with an Addendum!

34: Naming Contractor and Owner as additional insureds on Subcontractor's liability insurance policy and making that coverage primary is intended to apply only to the extent that a negligent act or omission by Subcontractor causes a claim to be asserted or a loss to be sustained by Contractor or Owner. This additional insured endorsement is not intended and shall not be construed to cause Subcontractor's insurer to be liable either to defend or to indemnify Contractor or Owner for claims against or losses sustained by Contractor or Owner that are not due to the fault of Subcontractor.

# Related – Waivers of Subrogation

## ◆ What is it?

- A contract clause that prevents an insurer from suing the third party (contractor) that caused the insured's (subcontractor) loss.

## ◆ Example: "Coverage shall contain a waiver of subrogation in favor of Contractor and the Owner."

## ◆ Delete it or seek a reciprocal waiver of subrogation.



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# AIA A401: § 12.5

## Waiver of Subrogation

- ◆ The Contractor and Subcontractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other, and (2) the Owner, the Architect, the Architect's consultants, and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees for damages caused by fire or other causes of loss to the extent those losses are covered by property insurance provided under the Prime Contract or other property insurance applicable to the Work or to property at or adjacent to the Project site, except such rights as they may have to proceeds of such insurance held by the Owner as a fiduciary. The Subcontractor shall require similar written waivers in favor of the individuals and entities enumerated herein from the Subcontractor's Sub-subcontractors, agents, and employees. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this Section 12.5 shall not prohibit this waiver of subrogation, which shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the property damaged.



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# Pay-if-Paid Clauses

- ◆ Contingent payment clause – contractual provision making payment contingent upon the happening of some event.
- ◆ Construction contracts – conditions payment to the subcontractor on the general contractor's receipt of payment from the owner.



# Pay-if-Paid Clauses

## ◆ Two forms:

### ■ “Pay-if-paid”

- ◆ Owner must pay the contractor in order for the subcontractor to ever receive payment.
- ◆ Allows a contractor to permanently withhold payment from its subcontractor where the owner has failed to pay the contractor.

### ■ “Pay-when-paid”

- ◆ Links the timing of payment to the subcontractor to the time when payment is made by the owner to the contractor.
- ◆ Courts generally interpret “pay-when-paid” clauses to require a contractor to pay its subcontractor within a “reasonable time” of the completion of satisfactory work.



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# Pay-if-Paid – Responses and Inserts

Payment by the Owner to Contractor shall be ~~a condition~~ precedent to Contractor's obligation to make any interim progress payment to Subcontractor, **unless Owner's nonpayment is due to Contractor.**

Receipt of payment by the Contractor from the Owner for the Subcontract Work is ~~an express condition~~ precedent to payment by the Contractor to the Subcontractor, unless Owner's nonpayment is due to Contractor. The Subcontractor hereby acknowledges that it accepts the risk of nonpayment by the Owner. **Subcontractor does not accept the risk of Owner nonpayment to Contractor due to the Contractor.**

**Insert:** If Subcontractor has performed its work but Owner does not make payment to Contractor for some reason unrelated to Subcontractor such as a problem or dispute with Contractor or another trade, Subcontractor shall be entitled to payment.



# Change Orders

- ◆ Watch out for terms that allow for the waiver of change order work if no written change order is given.
- ◆ Avoid language that does not include reasonable contemporaneous compensation for changes.
- ◆ Avoid clauses that do not clearly permit and specify the method for preserving claims.





# Change Orders – Insert

Insert: If Subcontractor is requested by Contractor to perform extra or changed work that was not part of Subcontractor's original scope of work, Contractor will provide reasonable compensation to Subcontractor for said work. Contractor shall not give orders to Subcontractor for work that is required to be performed at that time and then refuse to make payment on the grounds that a Change Order was not executed at the time the work was performed or the Contractor's representative was not authorized to order the change. Contractor and Subcontractor recognize that in order for construction projects to proceed in a timely and efficient manner, changes in the original specifications frequently are made prior to execution of formal change order documents. The parties agree to work in good faith with each other so that Subcontractor does not proceed with changed work without authorization and Subcontractor receives fair compensation for authorized, change work.



# Scheduling

- ◆ Identify the days needed with conditions suitable for your work to achieve substantial completion.
- ◆ Have input on scheduling.



# Scheduling – Inserts

Insert: Subcontractor shall be entitled to a minimum of \_\_\_\_ work days with conditions suitable for its work within which to achieve substantial completion.

Insert: Each Work Order shall contain a mutually-agreed upon minimum number of workdays with conditions suitable for performing insulation work for Subcontractor to achieve substantial completion.



# Scheduling – Response

4. Schedule. Time is of the essence of this Contract. Contractor agrees to begin the Work on the date set forth in the applicable amendment hereto and to complete the Work according to Owner's work schedule, as may be amended from time to time. Contractor shall achieve final completion of the Work, including punch list items, no later than the date set forth in the applicable amendment hereto ("the Completion Date"), \_\_\_\_\_<sup>2.</sup>

- ◆ Just add it in with an Addendum!
- ◆ 2: Subcontractor shall be entitled to a minimum of \_\_\_\_ work days with conditions suitable for its work within which to achieve substantial completion.



# Liquidated Damages

- ◆ Delay damages set at a specific daily amount in the contract.
- ◆ LDs can easily add up!
  - \$500 per day
  - \$1,000 per day
  - \$5,000 per day



# Liquidated Damages – Insert

Insert: Liquidated damages shall only be assessed against the Subcontractor to the extent due to the fault of the Subcontractor.



# Liquidated Damages – Response

Subcontractor agrees that liquidated damages may be assessed and recovered by the Contractor on the Owners behalf against Subcontractor and its Surety, in the event of delayed completion and without the Owner being required to present any evidence of the amount or character of actual damages sustained by reason thereof; therefore Subcontractor shall be liable to the Contractor for payment of liquidated damages in the amount of (amount to be determined by the Owner) for each day that Substantial Completion is delayed beyond the Contract Time as adjusted for time extensions provided by the Contract Documents. **Liquidated damages shall only be assessed against the Subcontractor to the extent due to the fault of the Subcontractor.**



# Force Majeure Clauses

## ◆ Force Majeure

- French term meaning “greater force” or “superior strength”
- Clause that excuses one or both parties from performance of the contract following a defined event outside the control of the parties
- Think natural disasters



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# Force Majeure Clauses

- ◆ **Force Majeure.** Subject to the Prime Contract, if and to the extent that either Party is prevented, precluded or hindered from performance by force majeure circumstances including acts of God, acts of terrorism, disease, viruses, pandemic, epidemic, acts of governmental authorities, strikes, lockouts, casualties, or other similar or dissimilar causes beyond its reasonable control, such performance shall be excused, but only for the time period and to the extent that such performance is prevented, precluded, or hindered by such causes.



# Force Majeure – Response

- ◆ **Force Majeure.** ~~Subject to the Prime Contract, If~~ and to the extent that either Party is prevented, precluded or hindered from performance by force majeure circumstances including acts of God, acts of terrorism, disease, viruses, pandemic, epidemic, acts of governmental authorities, strikes, lockouts, casualties, or other similar or dissimilar causes beyond its reasonable control, such performance shall be excused, ~~but only for the time period~~ and to the extent that such performance is prevented, precluded, or hindered by such causes.

# Bonds

1. **SCOPE OF WORK:** Subcontractor shall perform and p Work ("Work") according to the Specifications of the Co Work in accordance with this Subcontract and the Contr the extent that such duties and obligations are related to would constitute a breach of the Contract. If the Contra Subcontract is made conditional upon Owner's approval.

## Requirements

- o Bond 100% (Performance and Payment)

- ◆ Three-party instrument/contractual undertaking
  - Surety (insurance company), Principal, and Claimant
- ◆ Payment Bond
  - Assures owner that contractor will pay its subs and suppliers (surety will be liable for nonpayment).
- ◆ Performance Bond
  - Assures owner/GC that the GC/subs will perform per the contract (surety will be liable for nonperformance).



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# Professional Liability Insurance (Errors & Omissions)

12. **Professional Liability.** If the services provided by Subcontractor include performing engineering, design, architectural or other professional services, Subcontractor shall maintain a professional liability policy with minimum coverage of not less than \$1,000,000 each claim and aggregate. The policy coverage shall be effective (retroactively, if applicable) from the date of commencement of all Work provided by Subcontractor in connection with the project.

- ◆ Specialty trades – material selection or application
- ◆ Professional liability will sometimes be an additional contractual insurance requirement on top of:
  - Workers Comp and Employer Liability
  - Commercial General Liability (CGL)
  - Automobile Liability
  - Additional Insureds



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# Now Let's Negotiate!

- ◆ I'm the GC
- ◆ You're the Sub
- ◆ Goal is to negotiate a **fair and equitable** Subcontract
  - Indemnification
  - Contingent Payment Terms (Pay-if-Paid)

## SUBCONTRACT AGREEMENT

Made on [REDACTED] by and between:

Contractor:

[REDACTED]

and

Subcontractor:

[REDACTED]

Contract #:

[REDACTED]

Specifications: N/A

Project:

[REDACTED]

Addenda: N/A

[REDACTED] Project #:

2022-138

Owner:

[REDACTED]

Architect:

[REDACTED]

Drawing(s):

[REDACTED]

Contract Price:

[REDACTED]

Scope of Work: Provide all supervision, labor, equipment, submittals, closeout documents, materials, permits, inspections, and/or other instruments to complete [REDACTED] scope of work per Project's Plans, Drawings dated [REDACTED], and Specifications. Includes, but not limited to, all submittals, as-built drawings, warranty information, and required closeout documentation. Completion of work per [REDACTED] schedule, hereinafter referred to as the "Work".

Substantial Completion Date:

[REDACTED]

Submittals/Shop Drawings Required by: N/A

Changes in the Scope of Work:

Claims for additional work shall include a combined overhead and profit consideration of no more than:  
ten percent (10%) on self performed labor  
ten percent (10%) on material  
five percent (5%) on subcontracted work.

Owner Payment Terms:

The period covered by each application for payment shall be one calendar month. Provided that all payment requirements are met, Owner shall make payment to the Contractor not later than sixty (60) days following certification by the Architect of Contractor's application for payment.



# Indemnification

## ◆ Subcontract Section 8.7

### INDEMNIFICATION

8.7 To the fullest extent permitted by law, the Subcontractor agrees to defend, indemnify and hold harmless the Owner, Architect, Contractor and their Consultants, and each of their respective shareholders, officers, employees, agents, attorneys insurers, successors and affiliated companies, from and against any and all claims, cost, damages,, expenses, fines, penalties and any other liabilities, damages, liquidated damages, losses, expenses, claims relating to indemnification and/or liability contractually assumed by the Contractor (including attorneys fees, legal expenses and court related costs) , resulting from, arising out of or allegedly resulting from or arising out of, in whole or in



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# Contingent Payment Terms (Pay-if-Paid)

## ◆ Subcontract Sections 5.0 and 5.01

### Article 5

#### PAYMENTS TO SUBCONTRACTOR

5.0 On or before the **twenty-fifth (25<sup>th</sup>) day of each month**, the Subcontractor shall submit to Contractor, in AIA format (G702 and G703), or as otherwise provided, a written requisition for payment showing the proportionate value of the Work installed to date, from which shall be deducted **ten percent (10%)** retainage, all previous payments; and all charges for services, materials, equipment and other items furnished by Contractor to or chargeable to the Subcontractor. The balance of the amount of such requisition, as approved by Contractor and the Architect and for which payment has been received by Contractor from the Owner, shall be due and paid to the Subcontractor within seven (7) days of receipt of payment from the Owner.

5.0.1 Subcontractor understands and agrees that neither Contractor nor Contractor's surety, if any, shall have any obligation to pay Subcontractor for any Work under this Agreement, whether a progress or final payment, or for extras or change orders or for Delays to the Work, unless and until Contractor has first received payment in full from Owner both for such Work of Subcontractor or for Delays to the Work and all



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# ICAA Standard Proposal and Contract Form



- ◆ Proposals
- ◆ Scope of Work
- ◆ Insurance
- ◆ Payment
- ◆ Damages/Delays
- ◆ Changes in Work
- ◆ Material Cost Escalation

[INSERT INSULATION CONTRACTOR NAME]  
STREET ADDRESS  
CITY, STATE ZIP CODE  
Phone:  
Fax:]

## ICAA STANDARD PROPOSAL AND CONTRACT FORM

DISCLAIMER: THIS STANDARD PROPOSAL AND CONTRACT FORM IS INTENDED FOR COMMERCIAL PROJECTS. THE STANDARD PROPOSAL AND CONTRACT FORM WILL NEED TO BE MODIFIED FOR RESIDENTIAL PROJECTS TO ACCOUNT FOR STATE SPECIFIC NOTICE REQUIREMENTS AND OTHER STATE SPECIFIC RESIDENTIAL CONSTRUCTION REQUIREMENTS.

[INSERT INSULATION CONTRACTOR NAME] (hereinafter, "\_\_\_\_\_" or "INSULATION CONTRACTOR") proposes to perform and furnish the labor, materials, insurance, supervision, equipment, and warranty (hereinafter, collectively referred to as the "Work") described herein for:

[INSERT OWNER/CONTRACTOR/CUSTOMER] ("Customer"): \_\_\_\_\_

ADDRESS: \_\_\_\_\_

PROJECT: \_\_\_\_\_

### A. SCOPE OF WORK:

### B. LEGAL DESCRIPTION OF THE PROPERTY:

C. APPROXIMATE START DATE: \_\_\_\_\_

D. APPROXIMATE COMPLETION DATE: \_\_\_\_\_

E. CONTRACT PRICE: \_\_\_\_\_

F. TERMS AND CONDITIONS: The terms and conditions set forth on the following pages are a part of this Proposal/Contract.

G. INSURANCE: Insulation Contractor carries workers' compensation and general liability insurance.

H. LIST OF DOCUMENTS TO BE INCORPORATED INTO THE CONTRACT:



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# Thank You!



## ANY QUESTIONS?

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