

# 17 Contract Clauses That Other Subs Have Negotiated Successfully

A project is only as good as its contract. You simply can never be too protected. Billd recently gathered 68 subcontractors from across the US to discuss what clauses they use and which ones they redline when trying to protect their rights and relationships.

## General Clauses

- 1 Make Lien Releases Conditional:** GCs often want you to sign lien releases, even as you're floating thousands of dollars while waiting for payment. Execute a sidebar agreement that says the lien release is conditional upon getting this payment. If you don't get the payment, the lien release becomes effectively useless.
- 2 Customize Indemnification Agreements:** Modify indemnification clauses by creating a template indemnification agreement that's been blessed by your insurance carrier. The GC/owner will welcome the chance to review it and it can typically be signed seamlessly, but was created on your terms.
- 3 Guarantee Access to Information to Assert Lien Rights:** A judge can disavow your lien if it's missing information, like proper legal descriptions. It's critical to know exactly who you're working for and where you're doing the work, and to ensure this information will be seamlessly provided to you. Include a clause that says, upon written request, the owner will provide all information for you as the subcontractor to assert your lien rights. Should they provide incorrect information, it's a breach on the owner's part.
- 4 Make GCs Pay for Labor Costs:** If you are concerned about a project's cash flow, include a clause that says when payment is questioned, the GC will at least pay your labor costs, which will help keep cash moving.
- 5 Make the Bid a Contract Addendum:** In recent years, more and more GCs are not honoring the exclusions stated in your bid. They're asserting that the contract documents overrule everything, including exclusions that clearly state what you will not do. To protect your exclusions, strike through any language that says the bid is not a contract document (or language that voids all prior discussions or agreements other than the main contract). Then, make the bid itself an addendum to the contract.
- 6 Create Payment Terms That Work for You:** Pay When Paid/Pay If Paid clauses can cause payment delays for subs, and are further complicated by state-specific laws. To protect yourself, add a clause that specifies you will be paid as soon as your portion of the project is completed. This way, you're not waiting until the end of the project. State exactly how many days the GC has to remit payment, then include consequences for being late. After 60 days of nonpayment, state that your labor resources will be removed from the jobsite. After 90 days, state that interest will be charged on a monthly basis until the account is brought current. In California, for example, you can charge up to 10% annual interest, according to one sub we spoke to.
- 7 Add an Addendum That States Labor Rates:** Labor rates often increase annually. On jobs that last longer than a year, include an addendum that explicitly states regular and overtime labor rates and how they will increase. This encourages transparency. If a contract goes on for 5 years in a state with a 3% annual increase in labor rates, they will increase 15% over the course of just one project. Communicate this to the GC at the get go.

- 8 **Set Deadlines on When the GC/Owner Can Raise Certain Concerns:** GCs may try to push back against paying you on your own terms, and point to things like workmanlike manner concerns. If they have issues with your workmanship, they would like to be able to withhold payment because of it. You can counter this by stating exactly how many days they have to communicate things like workmanlike manner issues to you.
- 9 **Specify When You'll Receive Retainage:** Some GCs prefer to send retainage X days after they've received architect or owner approval. If that approval has no contractual timeline, then you should state that you want retainage X days after sending your invoice instead.

## Clauses Specific to Change Orders

- 10 **Ensure You Can Get Timely Payment for Change Orders:** For change orders specifically, include a clause that states all time and material will be paid within that particular pay period when the change order work was conducted.
- 11 **Clarify Markup on Change Orders:** Specify the amount of markup you're allowed to charge on the change order, whether it's an owner-directed change or a prime change.
- 12 **Assert the Conditions Under Which You'll Do Change Order Work:** Add a clause that explains that you will send a notice when the GC fails to respond after you've submitted your pay app on a given date, stating you won't do any additional work without a written directive and an approved change order.
- 13 **Create Change Order Allowances:** In the event that you've been doing an egregious amount of unpaid change order work, establish a change order allowance that you can charge against. At the end of the week, if you get time and material slips signed, and they don't process them within the month, you can stop doing extra work until they get processed.

## Clauses to Redline

- 14 **Work Continuation Clauses:** Clauses that say even in the event of a dispute, you'll continue to execute work, including disputes over the cost of the work they're forcing you to continue doing.
- 15 **As Amended Labor Escalation Clauses:** In labor escalation clauses, strike language like "as amended." This is dangerous because it means if there's a delay, as a prevailing wage is amended, they will be able to file for that labor escalation.
- 16 **Pay When Paid/Pay If Paid Clauses:** Redline pay when paid/pay if paid and state your own payment terms.
- 17 **Indemnity Clause Language That Lets You Take the Fall for Another Sub's Mistake:** Sometimes subs in neighboring trades will see their indemnity claims blur together. It's possible that the GC will wrongfully hold you responsible for small infractions that don't even fall under your scope of work, because a related sub didn't do their work correctly. Redline language that holds you to standards that can only be met when a neighboring trade did their work flawlessly. That way, if they don't, you won't be held accountable for your work not meeting standards, when it was built upon work that they did incorrectly.