

Contracts: 7 Deadly Clauses

When you agree to these in writing, you sign away your rights! Can you minimize your risk? Yes—by reading, negotiating and, if necessary, by voting with your feet.

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Contracts: You sign them; it's how you nail down the work you won via bid or negotiation. But the words within them determine your rights and responsibilities on each project. If you agree to it (signifying that with your signature), the courts will generally enforce it!

Legalese is confusing. Perhaps you can't afford to have a lawyer scrutinize every word. *What's the shortcut?* There isn't one.

But you can learn to spot the deadliest contract clauses and negotiate equitable alternatives. It's the only realistic way for an electrical contractor to minimize risk.

Learn to spot the deadliest contract clauses

In contrast, **"pay-if-paid"** forfeits your right to payment if an owner goes bankrupt or simply refuses to pay.

Only a few states have outlawed "pay-if-paid" provisions as against public policy. Watch for this clause. If you see it, be sure to insert language to preserve your right to payment, unless the owner's refusal to pay results from your work.



There are two variations of this clause. **"Pay-when-paid"** requires you to wait for payment of your invoice until the project owner pays the general contractor; in most states, the presumption that this means a "reasonable period of time" allows you to maintain your right to payment.



This provision states that the terms of a general contractor's agreement with the owner are included in contracts between the general and the subcontractors.

If you don't know what is in the owner-general contractor agreement, you may be accepting

- a *no lien* contract;
- design responsibility; or
- notice provisions that affect your rights.

Other than not signing the contract, what should you do if and when you see this provision?

One logical action is for you to request a copy

of the documents “incorporated by reference”—**and read them**. With what significant commitments will these documents encumber you?

Another would be to insert language *into your contract* that negates the application of any clauses more restrictive or onerous than those in your direct contract with the general.



Since the mechanic’s lien claim is a “derivative” claim, your rights depend on the flow of that claim through the general contractor.

Bottom line: If your customer agrees to a “no-lien” contract, **so have you**. That hurts. A no-lien project removes the only recourse you have to enforce payment, since you cannot retrieve your products once they are installed.

To go one step further: Language in *lien waiver forms* is a more insidious way of negating your payment rights. Always coordinate the date of your waiver with the completion date of the work for which you are invoicing.

Additionally, make sure the language of the form does not forfeit your right to future payments.



It’s the shell game of the construction industry! Retainage *allegedly* assures completion of the work.

What’s the logic of retainage? Apparently, contrac-

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tors are unethical sleaze balls who must be coerced, through the withholding of sums greater than their usual profit margins, to perform their contractual obligations.

In application, retainage makes *you* the final source of financing on underfunded projects. It provides leverage with which an owner/general contractor can coerce a discounted settlement in exchange for the promise of repeat projects.

What are your options here? The ideal world would see you able to negotiate a no-retainage contract.

Not possible? Then work to mitigate the effect of retainage. How? Insist on inserting language that limits the percentage retained to what is withheld from the general contractor. It should require line-item release of your retainage upon completion of your work.

Further: Take care that you **do not** waive your lien rights on the retainage.



This provision entitles you to a time extension if there are delays caused by others. But you won’t receive extra money to cover additional costs of mobilization, demobilization, idle crews, or overtime to expedite at a later date.

What’s more, there’s a flip side of this—**the demand**

for acceleration. That results in decreased productivity, overtime, and more accidents.

Ironically, should a subcontractor cause a delay, many general contractors (under the contract they have with the owner) are entitled to liquidated damages as reimbursement for their costs!

Preserve your right to recover your additional expenses in the case of scheduling delays.



You expect to protect other parties from your own errors or negligence. If you're smart, you'll pay for insurance to cover these risks.

But wait. When you are asked to "hold harmless" not only the owner and general contractor, but a laun-

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dry list of design professionals, inspectors, and random visitors to the project site, you may be agreeing to self-insure the additional risk.

In many states, *broad form hold harmless provisions* are unenforceable. So some courts will not support transfer of responsibility for one's own negligence to another party.

Make sure that you accept only those risks you are able to maintain control over (or for which you can

insure yourself). It is suggested that you strongly consider **walking away** from any contract that requires you to accept uninsurable risks.



This provision makes you responsible not only for the work that is defined in the plans and specs, but *for anything not shown therein*.

How does that sit with you? By affixing your signature to a contract with such a deadly clause, you are agreeing to do whatever is deemed "necessary" to complete the project. By signing, you forgo the right to submit change orders or extras.

What beats that? Quite simply, the contract should limit your obligation to the scope of work as defined in your bid, or to work specifically identified in the plans and specs.



We've not exhausted the list of contract provisions that can cause you harm. These words (if endorsed with your signature) can ruin your business—so evaluate them carefully.

Remember two things:

1. Everything *is* negotiable.
2. Sometimes, it really *is* better to walk away. ⚡

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