



**Construction Owners
Association of America**

Webinar

AECOM


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 **RIESS LEMIEUX**

Customize Your Payment Clauses... Or They'll Come Back And Haunt You.

Learning Objectives.

By the end of this session, participants will be able to:

1. Describe features of various payment clauses, with a focus on methods to reduce the impact of Owner and higher-tier contractor bankruptcies and insolvencies.
2. Discuss strategies to address the impact of large scope changes on a contractor's cashflow.
3. Examine consent agreement terms and practical aspects of addressing the role of lenders and sureties who have taken over the work.
4. Develop a checklist summarizing key payment terms to look for.





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OUR SPEAKERS TODAY.

When you think of key payment terms in contracts, what words come to mind?

As an Owner, what is the most important payment provision to you when you are negotiating your contract with the general contractor?

- Withholding payment
- Right to stop work
- Proof of financing
- Establishing the contract price
- Conditions for payment
- Lien waivers
- Payment cycle and required documentation





KEY PAYMENT TERMS

KEY PAYMENT TERMS.

- Proof of financing
- Establishment of contract price
 - What is included and what is excluded?
 - Allowances
- Prepayment for materials and equipment
- Payment cycle and documentation required for payment
- Late payment interest
- The right to stop work
- Mechanic's lien rights

A modern building with a glass facade is shown on the right side of the image. The building's reflection is visible on a dark, reflective surface in the foreground. The sky is a uniform light green color. The text 'KEY PAYMENT TERMS' is centered in the upper half of the image.

KEY PAYMENT TERMS

Case Study



WITHHOLDING PAYMENT

WITHHOLDING PAYMENT.

- Contract may allow withholding of payment to protect Owner's interests
- Especially important if contractor is not paying subcontractors
- Interest terms and legal rates
- Changes in the scope of work

WITHHOLDING PAYMENT

Case Study



LOCAL LAWS

UNDERSTANDING LOCAL LAWS.

- Prompt payment laws
- Prevailing wage laws
- Laws related to contingent payment clauses
- Laws related to changes
- Mechanic's lien laws
- Other jurisdiction-specific laws



LOCAL LAWS

Case Study



NIGHTMARE #1: LENDER TAKES OVER WORK

When the Owner defaults and the lender takes over the project, what rules govern going forward?

- The contractor's contract with the Owner
- The lender's consent agreement
- Performance bond
- Other

LENDER TAKES OVER WORK.

- The Owner defaults on a project, and the Owner's lender steps in and takes over the project
- Contractor signs consent agreement, but the consent conflicts with the terms of the lender agreement
- Consent often requires the contractor to perform the work but limits the contractor's ability to recover
- Contractor should be sure the consent agreement does not modify its payment terms
 - Including payment for changed work issued via change orders or construction change directives

LENDER CONSENTS: **WHAT RULES GOVERN?**

- Contractor may be required to sign lender consents
- After the lender takes over after a default, what rules govern?
 - The Consent governs
- Do not take the Contractor's Consent lightly
- Rarely should a contractor accept the standard form it receives from the lender
- Make it fair and protect your rights

LENDER CONSENTS: **NEGOTIATION.**

- Negotiate the consent rules properly
- Does the consent mandate the satisfaction of the Owner default before going back to work?
- Contractors: Do not undo any payment terms in the consent
- Force the lender to agree to cure pre-takeover defaults (including payment defaults) in addition to paying post-takeover costs
- These terms must be negotiated by the contractor at the time it is being asked to sign a consent form

LENDER CONSENTS: **IMPACTS.**

- Lender consents can result in the contractor paying for the Owner's default
- Most consents do not obligate the lender to pay the contractor any amounts unpaid at the time of takeover
- Contractor may be forced to go back to work without payment



NIGHTMARE #2: CONVERSION TO COST-PLUS

CONVERSION TO **COST-PLUS**.

- A contract is converted to cost-plus due to tremendous changes
- The contractor should not have to pay for Owner-related issues
- The Owner holds a portion of payment hostage and argues over delay, inefficiency, and quality of the work
- The Owner wants a discount as a condition to paying

CONVERSION TO **COST-PLUS**.

- **Changes:** Have you accounted for changes in the work?
- **Delays:** Have you accounted for delays?
 - Schedule analysis so contractor can get paid for that period
- **Defective Work:**
 - How do you deal with punch list items?
 - Do items need to be 100% perfect?
- **Other issues that must be addressed:**
 - Extensions of time
 - Warranty work, re-work
 - What does the contractor get paid for?
 - Owner related issues are at no fault to contractor



Q&A | OPEN DISCUSSION

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Thank you.

