

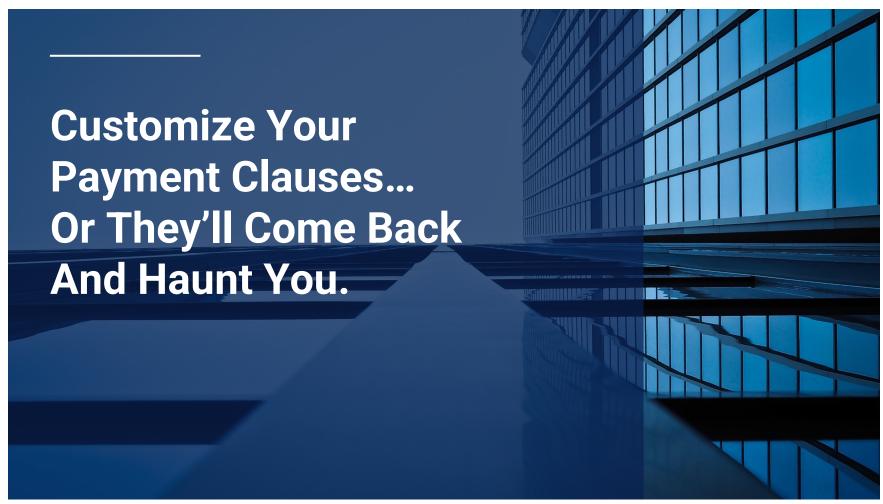
Webinar











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.





JOSE PIENKNAGURA
Director, Large Construction
Gallagher Insurance
jose_pienknagura@ajg.com



Assistant General Counsel
AECOM Hunt
lauren.catoe@aecom.com

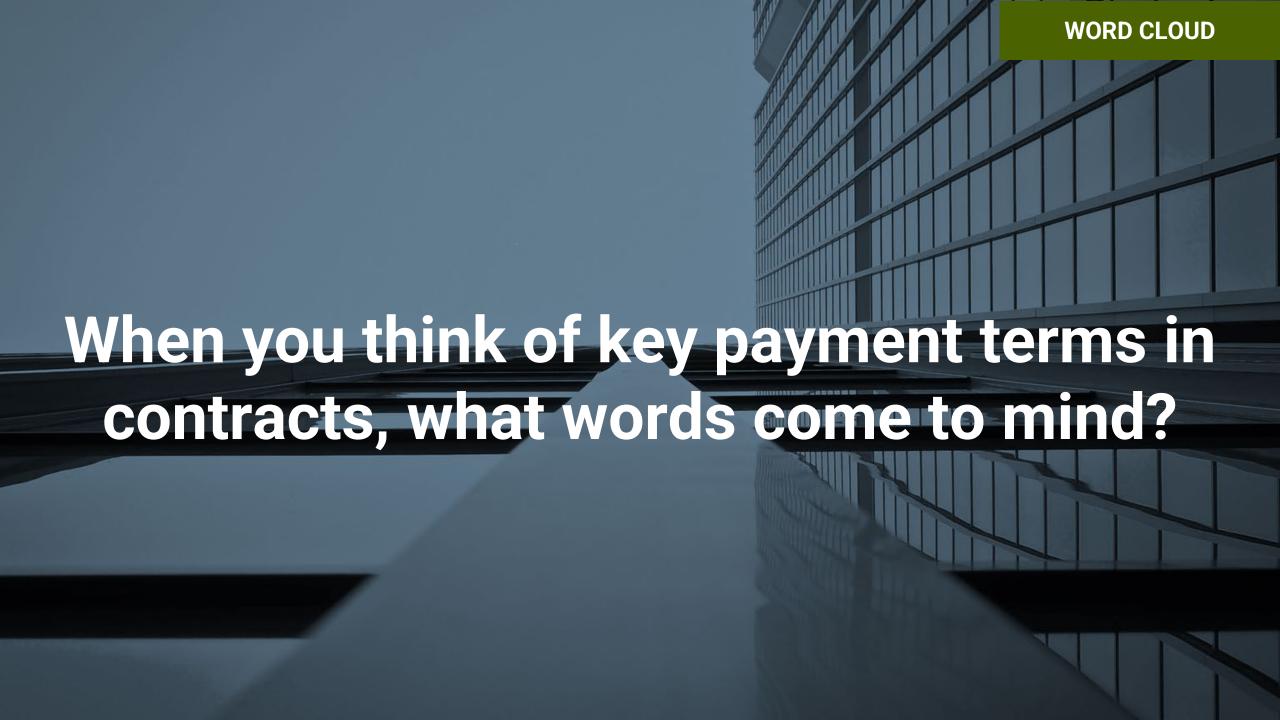


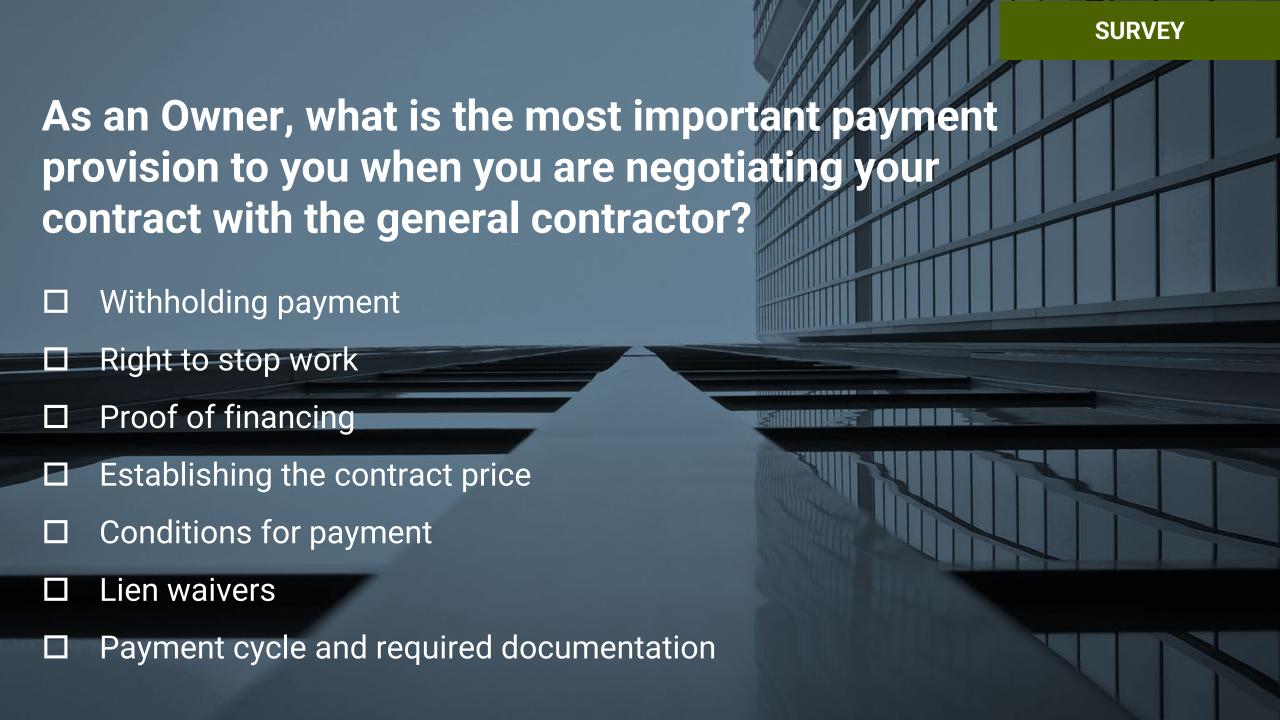
JOHN WOLF
President
Peritia Partners
john.wolf@peritiapartners.com

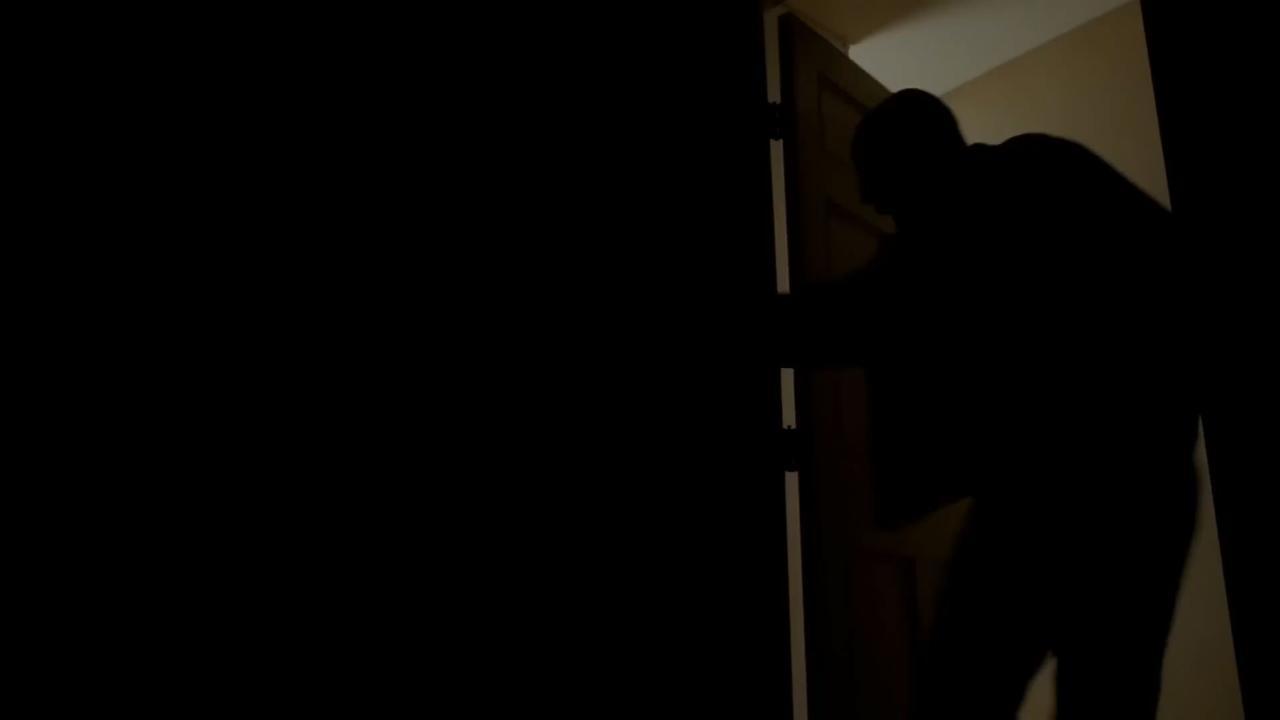


CHRISTOPHER K. LEMIEUX
Founding Partner
Riess LeMieux
clemieux@rllaw.com

OUR SPEAKERS TODAY.









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





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





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





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









