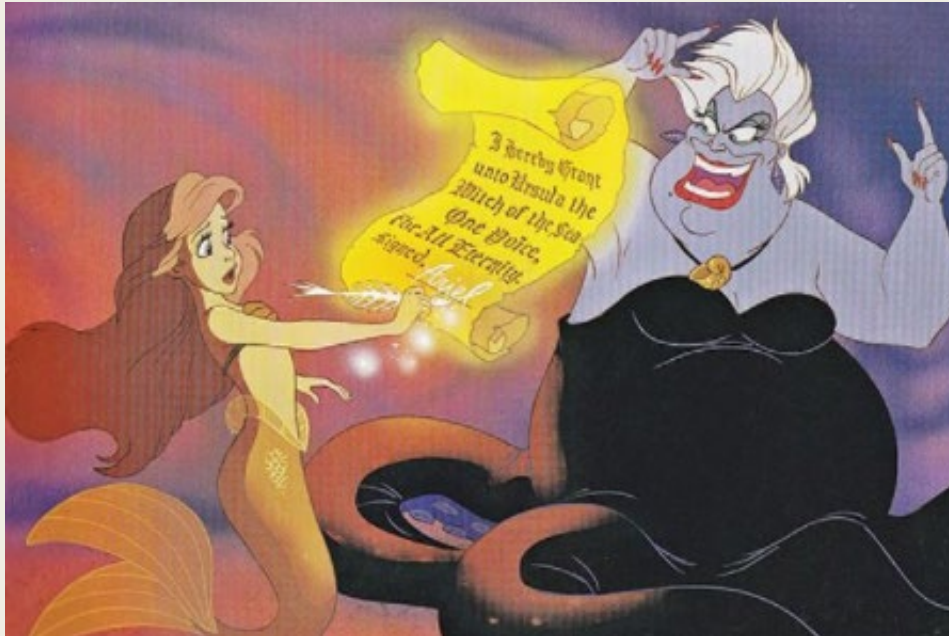


KILLER CONTRACTS

Don't Sell Your Soul to the Sea Witch



Presented By:
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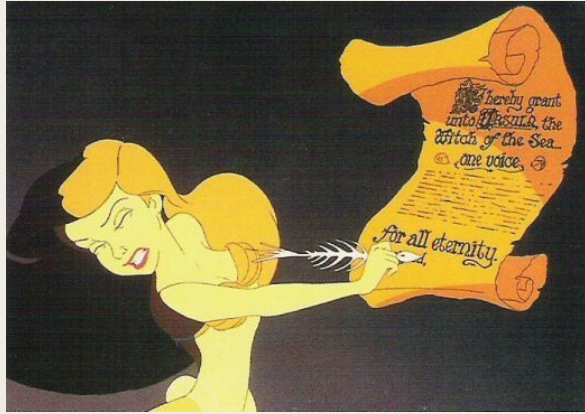


Scope of Presentation

1. Audience = Intended for subcontractors negotiating terms upstream with their customer (GC)

2. Goal = All contracts apportion responsibility for risk, among other things → Goal is to shift it from completely GC-favored to more balanced

3. Depth = Covers most common / evil issues trending currently



Common Misunderstandings

1. Your bid/proposal/quote is **NOT** the governing document
2. Force Majeure is **NOT** a “Get Out of Jail Free” Card
3. Contract starting point is **NOT** mid-point or balanced
4. Terms **NOT** confined to that particular clause
5. Fairness generally **NOT** part of Courts enforcing contracts



Specific Terms & Clauses

1. Bid Conditions

- Bid NOT automatically part of Contract – even if it says it is. (RTFC)

- Conditions to Consider:
 - ✓ Your Standard Conditions - Items specific to your scope, pricing, inclusions, exclusions
 - ✓ Time Frame (material pricing good for limited time) –
 1. *Expires if not accepted in writing by ____ date.*
 2. *Void if performance does not begin by ____ date.*
 - ✓ **Mutually Agreeable Contract Terms** (and in the event cannot, Subcontractor not obligated to perform OR Parties agree to use _____ form contract, etc)

1. Bid Conditions (Cont.)

- “Merger Clause” or “Integration Clause” = New contract replaces all previous documents
- If you want Bid to be part of contract, needs to be Exhibit A and needs to be referred to IN CONTRACT ITSELF
- Condition your bid:
 - *“This bid is expressly conditioned on [Your company] and [Your customer] reaching a mutual agreement on written contract terms prior to [Your company]’s obligation to proceed with any performance of work referenced in this bid.”*

2. Supply / Escalation Issues

- Material AND Labor
- Cost AND Timeline
- Tailor to your operational setup
 - *Is the time frame the issue?*
 - *Storage?*
 - *Can absorb it as long as its not over X dollars?*

2. HOW TO FIX: Supply / Escalation Issues

Typical “Lump Sum” Terms -

“General Contractor shall pay Subcontractor the sum of \$10,000 (“Subcontract Amount”), which includes all amounts necessary for completion of Subcontractor’s Scope of Work in accordance with the applicable Contract Documents.”

Modified “Lump Sum” Terms re: **Material Price Escalation** Issues –

““General Contractor shall pay Subcontractor the sum of \$10,000 (“Subcontract Amount”), which includes all amounts necessary for completion of Subcontractor’s Scope of Work in accordance with the applicable Contract Documents. **Provided, however, if during the performance of the contract, the price of _____ increases in excess of ___% as measured by the cost to Subcontractor from the date of signing this Contract to the date of performance, Subcontractor shall be entitled to an equitable adjustment in an amount necessary to cover same.**”

3.

“Contract Documents” & Incorporation by Reference

- General Description:
 - List of all the documents that make up your contract or agreement
- Risk/Problem:
 - Seems innocuous
 - Usually you do not have all documents
 - Blind agreement



3. HOW TO FIX: “Contract Documents” & Incorporation by Reference

- Strike documents you do not have
- Strike statements saying you have documents that you do not have
- Insert language about “this document controls”
- Insert language about “only incorporated to extent it directly affects my scope of work”

4.

Change Order in Writing

- General Description:
 - *States format of change order*
 - *Requires certain format or certain approval for change order to “stick”*

- Risk/Problem:
 - *They can hold your change order hostage*
 - *They can have someone in the field sign who really is not allowed to → change order no good*
 - *The “good ole boy” problem*

4. HOW TO FIX Change Order in Writing

- Make terms on WHO can sign it for your customer very broad/vague
- Insert terms allowing you time to price out work and negotiate change order before you do it
- Insert terms making “writing” broader (ie. Not just their pet form, but an email, etc)

**IF I LOSE MY TEMPER
YOU LOSE YOUR HEAD!**



5. FORCED WORK

- General Description:
 - *Requires you to keep working even if there is a dispute or if there is a change*

- Risk/Problem:
 - *THIS IS A BLANK CHECK*
 - *Increased risk if you've bonded it*

5. FORCED WORK

HOW TO FIX:

- State that the “Federal doctrine of cardinal change” applies
- State that you will be paid based on time and materials if no other agreement is reached
- Limit the amount of forced work either by a dollar amount or by a percent

5. FORCED WORK

6A.

Disputes: Your Notice **to** Them

- General Description:
 - *When and how you have to tell them if you think you have a claim or think they've breach the contract*
- Risk/Problem:
 - *Usually have short deadlines or its waived*



6A. HOW TO FIX Disputes: Your Notice **to** Them

- Increase timeline for notice
(watch for “whichever is earlier”)
- Make requirements of notice contents broader or looser
- Recite that it can be sent by email and specifically list email addresses it goes to



6B.

Disputes: Their Notice **to** You

- General Description:
 - *Procedure for how they tell you you're doing something wrong and also procedure for how you get a chance to fix or respond*
- Risk/Problem:
 - *Used to “set up” subs for a claim or for nonpayment*
 - *Often have unreasonable terms*

6B. HOW TO FIX Disputes: Their Notice to You

- Require at least 5 business days to respond
- Require at least 5 business days to commence cure or offer plan to cure and diligently continue
- Require them to send it to you by email and for it to go to at least 3 emails to be effective
- Require notice to be (1) in writing and (2) effective on actual receipt

7.

Advance Waivers / Liquidations

- General Description:
 - *Terms can be difficult to understand or realize the effect of in reality (tip: read aloud)*
 - *Limits or eliminates your options and rights*

- Risk/Problem:
 - *If GC or other subs caused delay or other problems, you usually have NO REMEDY*

7. HOW TO FIX Advance Waivers / Liquidations

- Remove if possible
- Insert language regarding prevention doctrine
- Insert language regarding general duty to coordinate trades, etc.

8. Scheduling Terms / Delays

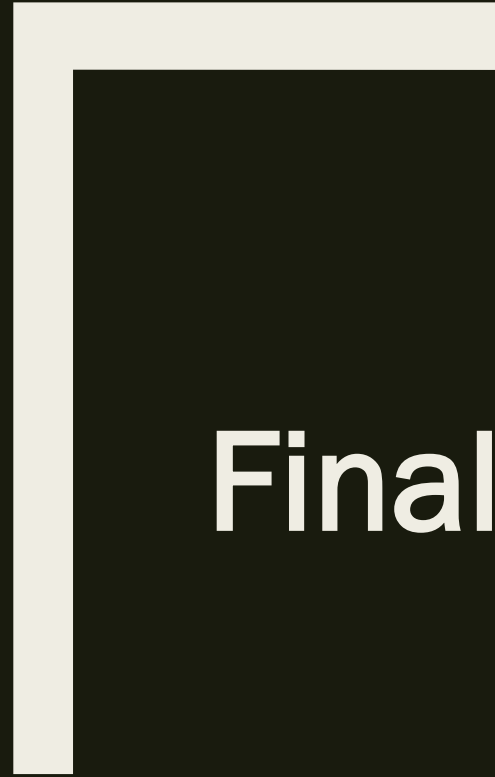
- General Description:
 - *You agree they get to modify schedule however they want*
 - *You agree you get no money for delays to you or your work*
- Risk/Problem:
 - *You may have to unreasonably accelerate performance.*



8. HOW TO FIX Scheduling Terms / Delays

- Limit increased cost by dollars or percent as a result of their changes
- Limit their ability to modify schedule by inserting “reasonable” or “as mutually agreed”
- Change “no damage for delay” to allow for certain hard costs





Final Tips

Negotiations

1. Use Questions = Honey over Vinegar
2. Make it Mutual
3. Say what you mean and mean what you say
4. Legal can help
5. Volume of changes and grouping by issue
6. Be prepared with stories/examples specific to YOUR company

Additional Items of Note

1. DO NOT bond a project if you don't have to
2. Ignore cover letters re: "Never ever ever ever change my contract"
3. Word "sole" is generally bad for you, strike it
4. Word "reasonable" is at least something we can all fight about later, add it
5. "Governor" concept as a compromise
6. If you're already done or mostly done with your work, DEFINITELY do not sign or negotiate their contract at that time – nothing for you to gain

THANK YOU!!



***And Remember:
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