

Is Your Credit Application Designed for Construction Credit?

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Why Is This Important

- Construction credit is much different than other industries. There are greater risks, generally higher outlay and different rules that are designed to protect suppliers selling to the construction industry.
- Making sure you take advantage of the rights offered to both help you collect what you are owed and to protect your company is paramount in today's world.

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#1 Payment Terms

- Clear terms of when payment is due
 - From date of delivery or date of invoice?
 - The terms in the credit agreement need to match the invoices?
- Finance Charges on past due invoices:
 - Specific Number vs. Highest Rate Allowed by Law

 A close-up photograph of a stack of US dollar bills, showing the texture and colors of the currency.

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#2 Inspection and Dispute Deadlines

- Specific time periods for your customer to review the material you have provided and raise disputes or concerns and if they do not, they have accepted the material and confirmed there are no issues.

“Customer shall inspect all material within 72-hours of delivery and notify Supplier of any defects. Failure to notify Supplier of any defects in the material within 72-hours shall conclusively establish that the material was delivered defect free.”



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#3 Right to Adjust Pricing

- “Escalation Clause”
- Costs fluctuate, especially in this day and age. Locking yourself into a long term committed price is risky, even a week could mean the difference between a profit and a loss

In the event Supplier’s cost to obtain materials ordered by Customer increases between the date of Customer’s order and the date the material is obtained by Supplier, Customer shall be responsible for the increase in cost.

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#4 Limitation of Warranty

- Limit any Warranty to the Manufacturer's Warranty
 - Sole and exclusive warranty
- Specifically exclude and disclaim any warranty
 - Generally must be conspicuous

8.5 Warranty Disclaimer. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH HEREIN AND TO THE MAXIMUM EXTENT ALLOWED BY APPLICABLE LAW, SUPPLIER AND ITS SUPPLIERS AND LICENSORS HEREBY EXPRESSLY DISCLAIM ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED, ORAL OR WRITTEN, STATUTORY OR OTHERWISE, REGARDING ANY SUBJECT MATTER OF THIS AGREEMENT. WITHOUT LIMITING THE FOREGOING, SUPPLIER AND ITS SUPPLIERS AND LICENSORS SPECIFICALLY DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS OR SUFFICIENCY FOR A PARTICULAR USE OR PURPOSE, NONINFRINGEMENT OR TITLE, AND ANY WARRANTY ARISING FROM A COURSE OF DEALING OR USAGE OF TRADE.

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#5 Limitation of Liability

- Limit your liability to a specific amount, like the amount of an order, or the amount sold on that project.
 - Make sure to include language that your limited liability includes all legal theories like "contract", "tort" and other legal theories.



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#6 Attorney and Collection Fees

- Most jurisdictions do not allow recovery of attorney fees unless there is a contract provision or a statute
- Courts have treated attorney fees and collection fees differently.
- Not all costs are covered, but some courts allow you to expand what is covered in your contract.

"In the event of a dispute arising under this agreement, the prevailing party shall be entitled to all attorney, fees, collection fees and costs."

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#7 Jurisdiction and Venue

- You can decide where lawsuits have to be filed and can select the state, location within the state and what state laws will apply
- Things to Consider
 - Location and Convenience
 - Favorability of Laws

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#8 Change in Corporate Owners

- If the owners of your customer, who you have built the relationship with are selling, leave, die or are otherwise are no longer involved, you want to know.
 - Do you want to continue to sell on credit , under the same terms, to a new ownership group you have no history with?
 - You don't want to find out when it is too late that your guarantor is no longer around.

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#9 Rejection of Conflicting Terms

- You want to reject any terms in a purchase order or other document provided to you by your customer that seeks to override your credit agreement terms.
 - Purchase and Sales Orders routinely come with a provision that says their terms apply; we want to outright reject these from the start.
 - If you accept an order with terms that may conflict with your credit terms the "battle of the forms" may give the later terms priority.

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#10 Personal Guaranty

- A third party individual promises to pay the debt of your customer.
- Should be in a separate section with its own signature line.
 - Include individual's personal information, address, social security number and phone number

I (we) jointly, severally and unconditionally guaranty and promise to pay when do any and all indebtedness of Customer to You, together with all interest,, attorney fees, collection cost, court costs and any other liabilities that Customer may owe you on account of you extending credit to Customer.

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#10½ Who is Signing a Guaranty

- Some states require both spouses to sign a personal guaranty to bind community property
 - Know if your guarantor is legally married



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#11 Supplier Discretion

- You want absolute control over your credit agreement, this includes:
 - Right to accept or reject any order
 - Right to cancel any order after it is placed
 - Whether or not you will accept returned material and under what circumstances and terms
 - Your right to terminate the credit agreement for any
 - The timeframe(s) you will deliver orders
- Each of these should be included in a section that starts with "Supplier reserves the right, in its discretion...."

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12. Right to Demand Joint Checks

- Joint checks are written to you and your customer.
- They help to avoid your customer absconding with a payment that should go to you.

Supplier may, in Supplier's sole discretion, require payment via joint check. Supplier may hold any pending order or cancel any order if Customer's customer refuses to enter into a joint check agreement.

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#13-Anti-Pay When/if Paid Clauses

- Pay **If** Paid Clauses- Generally Void!
 - “Payment by the Owner is a **condition precedent** to Subcontractor receiving payment for its work.”
- Pay **When** Paid Clauses – Sometimes ok, but only within reason

Customer shall pay each invoice within 30-days regardless of whether customer has been paid for the material provided in Supplier’s invoices.

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#14 Right to Amend Your Agreement

- Provisions, payment terms, etc. change order time. You want to make sure your customer is purchasing under your most recent credit terms.
- Two key points:
 - Customer agrees you can update and revise the credit terms at any point in time without notice to them.
 - By purchasing from you, Customer agrees to any amended credit agreement terms and conditions.

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#15 Indemnity Clause

- They do it to you, why not give them a taste of their own medicine!

“To the fullest extent permitted by law, Customer agrees to indemnify and defend **Supplier and their agents, employees, officers and directors** from any allegations, claims, costs, demands, losses, expenses, liabilities, damages, judgments, actions, suits, fines, penalties, attorneys' or other fees (Claims)...arising from, related to, incidental to, or in any way connected to the material provided by Supplier under this Credit Agreement.

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THANK YOU



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