

Contracts for Contractors – A Best Practices Guide



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A written contract is an important tool for all parties in the construction arena. While many fear a contractual agreement can interfere in a business traditionally done on a handshake, a thoughtful contract that addresses the specifics of the project will create a dialogue early in the project that can strengthen the client relationship by eliminating the unexpected, preventing misunderstandings and false expectations that can not only lead to a breakdown in your customer relationship but also jeopardize the project and result in litigation.

There are a number of model contract forms available to contractors, but the best approach by far is to develop your own in a manner that is tailored to your company, clients and the specific type of work that you do.

Embrace the Written Contract

While it may seem obvious that a business would use a contract with its customers, it is common that contractors begin work without a written agreement. Unfortunately, this approach can lead to disputes that center around “he said/she said” arguments, which are often extremely difficult to resolve and involve time-consuming and expensive litigation. If work needs to be started before a full contract can be negotiated, the parties should consider memorializing the initial work in a preconstruction agreement or letter of intent that can be assumed by the completed contract upon execution.

In addition to utilizing contracts with your clients, it is almost equally important that your employees, business development teams and estimators are familiar with the same agreements. As an extension of your business, it is important that your sales force commitments are consistent with your contract. If not, you run the risk of facing allegations beyond a simple breach of contract claim. Instead, you may be exposed to fraud claims or claims under an unfair merchandising practices act.

Keep Your Contracts Current

Businesses that have been relying on the same contracts for several years should review and update their agreements on an annual basis. In addition to keeping terms current with your clients, this provides an opportunity to make certain your agreement reflects any recent changes in law, in the industry, or in your own business. Considering the potential damage that could be caused by an outdated contract, a quick review is well worth the investment of time – the process typically only takes a few hours.

Define the Scope of Work

A properly drafted scope of work is the single most important part of the contract and should clearly state exactly what services and materials you are going to perform or provide. This portion of your agreement needs to be tailored for each individual project and speak specifically to the project at hand. The purpose of the scope of work is to make sure that you and your customer are on the same page when it comes to knowing exactly what the project entails.

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Unforeseen Conditions

Few construction projects go exactly as originally planned. It is important to have a clear unforeseen conditions provision that delineates what amounts to an unforeseen condition and how it will be addressed by the Parties.

Exclusions or Clarifications to Scope of Work

As important as it is to identify exactly what services and materials you are going to provide your customer, it's equally important to make sure your customer knows what is not included in the scope of work. If a contract is silent on exclusions, disputes are much more difficult to resolve and are often accompanied by additional expenses, including attorney's fees associated with litigation.

Warranties and Disclaimers

It is important to not only make certain that your warranty is clear but also that your sales people understand and are properly communicating the scope and terms of your warranty to customers. Even if you don't provide your customer with a warranty beyond a manufacturer's warranty, contractors should be aware of implied warranties, which are guarantees of the quality of goods or services that do not have to be written or even expressly stated to apply. Make sure that you have language in your contract specifically disclaiming any implied warranties.

Disclaimer of Damages or Limitation of Liability

A contractor should consider if it is appropriate to limit types of damages in your contract. These limitation of liability clauses can be a useful risk management tool. But, it is far from foolproof. In Missouri, for example, it's much easier to enforce a limitation of liability clause in a contract between two commercial entities, such as on a commercial project, than it is in a residential project involving a claim by an individual homeowner. You can increase the likelihood that your limitation of liability clause will be enforced by doing a few simple things such as not burying the provision in fine print, bolding the provision in the contract, and/or asking your customers to sign the provision.

These are just a few of the different types of terms that you may want to consider adding to your contracts. Depending on the nature of your business, the different states where you are currently performing work, and the types of projects in which you are involved, there are a host of additional contractual provisions that you may want to consider.