

# A Plain-Language Construction Contract

by Thomas O'Brien and Paul Barbahen

A simplified contract can protect you from pitfalls on small jobs



"Get it in writing" is a pretty good rule of business. For a variety of reasons, however, contractors often ignore this adage. The job is too small, or you know the client; or, maybe you think it's not worth the time or money to pay an attorney to draft a proper contract. But informal documents, verbal agreements, and handshakes can break down and lead to conflicts or courtroom battles.

A written contract that anticipates potential areas of conflict helps prevent later misunderstandings. On smaller jobs, the contract needn't be pages thick with dense legal lingo. A simple, "plain-language" contract will serve just as well. In fact, the clearer the terms are, the more likely it is that you and your client are starting out with a common set of expectations.

For this purpose, we've developed a sample "plain-language" contract (see "Sample Construction Contract," on next page). With minor changes, the sample contract can be used for new or existing construction. Go over the suggestions in this article with an attorney licensed in your own state: Each state's construction laws are a little different.

## The Construction Contract

In any project beyond handyman dollars, you'll want your contract to have a general description of the work, right in the body of the contract, even if plans are attached. The payment terms should be clear. The insurance provisions and completion dates should be clear as well.

**1. General.** The contract must provide an accurate written description of the work, with plans, specifications, and a visual representation of the work to be done. The specifications should describe the quality of the materials (for example, 1/2-inch, CDX ply sheathing; 3-tab fiberglass shingles). Drawings should be clear. Simple drawings are better than none because they reduce possible misunderstandings.

If you are using a third party's documents, such as an architect's plans, you have a duty to look them over carefully when you bid. The courts frequently

side with the owner if you err in your bid.

Be sure to have adequate language regarding change orders and extras, and simple language alerting the owner to unforeseen conditions.

**2. Price.** The price should be crystal clear and set out on the very first page of the document.

**3. Starting and completion.** For new construction, you should spell out starting and target completion dates, along with permitted reasons for delay. Contractors can still get owners to sign contracts without dates, but this frequently cuts two ways. The owners say X was a reasonable date, and the contractor says X plus 30. Since the law presumes a "reasonable time" where no precise time is set out, failing to use dates only invites litigation, unless there truly is an understanding that the project may proceed at its own pace.

Small companies frequently don't have as much experience scheduling and coordinating jobs as they do with the construction itself. But even a small company can meet completion dates by agreeing only to realistic time frames, making sure the crew size is adequate, making allowances for weather delays, and most important, communicating with the owners about the many legitimate reasons for delays. Owners will usually accept that a rough-in plumbing inspection is holding things up, if they are told. Owners also have to accept responsibility if they cause delays by not making materials' choices on time.

Related to completion-date terms are penalty clauses, usually in dollars per day, for late completion, and bonus/incentive clauses, also in dollars per day, for early completion. While these are primarily used in bigger projects, they are often asked about by owners anxious to establish a move-in date.

If possible, avoid penalty clauses, since they create an area of dispute, and few of us want to admit fault in a late completion case. You might try leaving in only a bonus/incentive clause for early completion: it will probably be received well by owners who have

heard their share of construction horror stories.

**4. Permits and codes;** compliance with local law. Obviously you have to do work according to codes, but some states, such as Illinois, still give unpaid material suppliers and subs the right to place a lien on property and be paid, even if the general contractor has been paid. A clause reflecting the laws of your state in this regard may be required by statute and is always appropriate. It also is a sign of professionalism and invites a discussion with the owners about how the payouts they make will be applied.

**5. Specific requirement for materials and workmanship.** We have put enough space in the sample form to provide specific details. This makes the form more flexible, since not every project calls for separate specifications. Also, many owners can describe in a few words what they want based on work they've seen on a nearby project. Even when the particulars are repeated on a plan or spec sheets, a few extra words are better than a misunderstanding.

Allowance provisions are common in new home construction. Fixed dollar allowances permit the owner to select appliances, colors, carpet, or light fixtures. Allowances work well unless they are unrealistically low. Large developers usually limit the buyer to a fixed number of choices.

**6. Payment.** Owners expect to make a reasonable down payment, often as much as 25% of the price. In at least one state, consumer laws limit front money by law to 25%. You must know any such law in your area and incorporate its terms in your documents.

Most owners will willingly sign a contract with payments keyed to developments they can see, such as a portion after excavation and foundation work, a portion after framing, etc. But problems often arise when the owners refuse to make a final payout, based on a minor punch list. Key your entitlement to the last payment to a Certificate of Occupancy, or some other objective standard, rather than to the owner's sat-

isfaction.

A key phrase in this section is "time is of the essence." This time-tested legal phrase permits the contractor to stop work without being in default if the payment due is not made when due.

**7. Signature.** Sometimes work starts without a signed contract. Since your rights under your local lien laws may be limited to the "reasonable value" of the work unless there is a contract with the value agreed upon, an unsigned contract is worthless.

## General Conditions

The second part of most construction contracts is called "general conditions." These are the things that stay the same from job to job. As in the main body of the contract, there may be differences from state to state. You can have the "General" reduced to illegible "fine print," but that is a mistake. Go over these provisions with your client.

**1. Contractor's duties.** This section spells out who is going to be responsible for what. Two of the important points are d) to notify the owner about unforeseen conditions and e) to provide locked storage. You don't want the owners to worry about their child getting into your tools.

**2. Owners' duties.** The model contract contains self-explanatory owners' duties. While the owners may be under the impression that they have no obligations beyond the payment of the construction bill, this is incorrect. Owners are involved in selection of materials, negotiation of extras, and final approval of the project.

Owners today frequently want to participate in construction. This often sounds okay until you consider your liability. Formalize any arrangement about client labor, in writing. Any claims against you should be expressly waived by the owners.

**3. Closing.** (new construction only). If you are developing and selling new homes, your local title insurance company or escrow service probably handles the legal work on the deed. Select a deed clause that is customary in your area.

**4. Deed (new construction only).** If you are developing and selling new homes, your local title insurance company or escrow service probably handles the legal work on the deed. Select a deed clause that is customary in your area.

**5. Title insurance (new construction only).** Any sale requires title insurance acceptable to the buyer's lender. Most title insurers are members of the American Land Title Association and use a standard title insurance policy. Loans are often resold to investors who want to see a standard title insurance, not an abstract. If you build spec houses, you will get a builder's rate from your local title company and a great deal of valuable assistance processing lien waivers and releases.

**6. Material substitution.** The "substitution clause" allows a contractor to substitute materials that are in substantial conformance with the materials set forth in the contract. That way, if you get a price break from a supplier of another comparable brand, you can switch.

Be careful, however about switching brands of major components on an owner without notice. If an architect has specified a particular Lennox unit and you think Carrier is better, the prudent course of action is to get the buyer's consent, regardless of equivalency.

**7. Delay.** The "acts of God clause" protects you from liability from acts or events that are beyond your control. These include war, riot, lighting, earthquake, tornado, strikes, and the like.

Owners must be conscious that extras and changes will cause delays, as will their failure to select materials on schedule. Some General Conditions expressly include "owner-originated" delays.

**8. Insurance.** Insurance is a hot topic among contractors. It costs too much and covers too little. Buy whatever you need for the work you do. Not paying for insurance is the world's worst idea for saving money.

You need to remind owners to get "builders' risk" or owners' risk policies. These cover losses to buildings undergoing substantial improvements. If a fire burns down the building, and the owner hasn't insured the cost of improvements, the owner may not be able to pay for your work.

**9. Hidden, concealed, and unforeseeable conditions.** These clauses alert the owner to necessary cost increases if concealed conditions required the owner to spend more money than the original contract called for. Common remodeling surprises include asbestos, radon, structural defects, and lead plumbing. Owners justifiably react with alarm when told that the new bathroom will cost \$1,000 more because the contractor has found (now that the walls are open) that there's no vent stack. You'll have a particularly tough time persuading an adamant owner that you're getting a raw deal if you don't have this provision in the contract. Once the walls are open, try to figure out what's reasonable, and put the resolution in writing.

Remember that the owner thinks you are the expert and should have known what was behind the walls. Take the time to educate the owner up front about this important clause.

**10. Extras.** Most contractors want extras paid for in cash, when ordered. Problems can arise when owners change their mind after giving verbal approval. But stick to your guns on any extras. It's best to get all orders in writing, and get paid before you order.

**11. Subcontractors.** Contractors need to develop written subcontract forms to maintain orderly scheduling and improve the efficiency of their subs. Too many subcontracts are verbal, and on some smaller jobs, the subs don't see the prime contract and may not have all the information they need to perform their subcontracts properly.

**12. Arbitration.** Arbitration sounds good, but don't agree to it unless you find that it really works in your area. You and the owner can select a dispute resolution mechanism and put it in your contract. However, many contractors feel that the "Better Business Bureau" type of arbitration may be partial to owners. Sometimes the courts provide a more equitable decision.

**13. Termination and cancellation.** The contractor should have a right to stop work if a payment is not made within a specified grace period, and owners have rights when contractors don't show up for days at a time. The law also excuses performance when property is destroyed.

It is hard to draft a clause that adequately compensated a contractor for the owner's default; if the owner isn't paying, changes are the dispute is headed for court. Problems also arise when the owner has reason to fire the contractor, such as for not showing up. It's hard to determine the fair value of the work in place, especially when a second contractor cannot finish the work for the unpaid balance. A contractor would not, however, be in default if the job site flooded. The courts interpret termination and cancellation clauses on a case-by-case basis.

**14. Warranties.** By all means use something in writing, or you may find that your state law dictates an implied warranty far longer than you thought. New home contractors often have warranty provisions separate from their contracts. We suggest that you give a reasonable warranty on materials and labor for one year, and thereafter, that you agree to replace defective materials while being paid for the labor. This forces the owner to go to the company that produces the material in order to recover the material costs. Many new materials are installed by small contractors who can least afford the labor costs of replacing them if they prove inadequate through no fault of theirs. If you have doubts about a novel building product, remember that you are on the hook unless an architect specified it.

**15. Notices.** There should be a notice clause so that it is clear when you have properly notified the owner. Sometimes a notice of termination is not effective because it can't be properly delivered.

**16. Severability.** These clauses protect you from having an entire contract declared invalid, just because one part of it is. If a lawyer in your state says to use this clause, do so.

**17. Entire agreement.** These clauses protect you from having some scrap of paper "incorporated" into your contract by a court. Additional provisions to a contract should be formal enough to be recognized as part of the original contract.

## Conclusions

A good contract is something like a good car; no single model captures all the good features. Not every clause in our model contract applies to every project, nor does every project require every clause.

Analyze your contracts and contract procedures just as carefully as you do your business plan and you hands-on-work. Develop your own forms to eliminate future problems. Bear in mind that each year contractors' lawyers lose cases they should win because the contract itself, or the attached plans and specifications were loose, or because the contractor failed to document a change order or an understanding with a cover letter. While there seems to be too much paper in the works, the one piece you need to win a case is often missing due to a lack of attention to the most basic aspect of contracting – the contract between the parties. ■

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# Sample Construction Contract

This contract, dated \_\_\_\_\_, is by and between the following owner and contractor:

Owner: \_\_\_\_\_ Property address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Telephones days \_\_\_\_\_ eves \_\_\_\_\_ Mailing address (if different) \_\_\_\_\_

Contractor: \_\_\_\_\_ Representative: \_\_\_\_\_

Street \_\_\_\_\_ City, State, Zip \_\_\_\_\_ Telephone \_\_\_\_\_

## 1. GENERAL

This contract is for the following work and materials to be performed by the contractor (or new construction) on the property address above. The project is generally described as follows:

The contract consists of this document, any plans or specifications or exhibits referenced herein, and the General Conditions following the signature page.

(Identify here any plans or drawings, with enough specificity to show which attachments are included in the contract.)

Change orders and modifications shall be in writing and shall become part of this contract.

## 2. PRICE

The total price for the work agreed upon is \$ \_\_\_\_\_. Payment terms are set out below in Paragraph 6.

## 3. STARTING AND COMPLETION PROVISIONS

The work will begin on \_\_\_\_\_, and will be completed, absent unusual circumstances, on \_\_\_\_\_.

(Optional) Owner agrees that if the work is completed earlier than the above date, a bonus of \$ \_\_\_\_\_ per day will be paid. A penalty of \$ \_\_\_\_\_ per day will be deducted from the final payment for each day beyond the completion date that the work remains incomplete.

## 4. PERMITS AND APPLICABLE CODES; COMPLIANCE WITH LOCAL LAW

a. All work to be done under this contract will be in accordance with the building codes presently in force in the City of \_\_\_\_\_, \_\_\_\_\_ County, State.

The contractor shall obtain all necessary permits and pay all required permit and plan fees from the contract sum. Unless otherwise agreed, all plan and permit fees shall be paid by the contractor from the down payment paid by owner.

b. The contractor shall at all times comply with the laws of this state regarding mechanic's liens.

## 5. SPECIFIC REQUIREMENTS FOR MATERIALS AND WORKMANSHIP

a. This contract will be completed by the contractor in a good and workmanlike manner, using good quality materials.

The parties agree upon the following materials specifications and work description, together with any plans or specifications incorporated herein:

windows \_\_\_\_\_ wall construction \_\_\_\_\_

roof detail \_\_\_\_\_ cabinets \_\_\_\_\_

fixtures \_\_\_\_\_

[other as applicable]

b. If applicable, the contract price includes the following allowances:

kitchen cabinets \_\_\_\_\_

bathroom tub, toilet, and vanity \_\_\_\_\_

other as applicable \_\_\_\_\_

## 6. PAYMENT

a. Timely payment by the owner of all sums due under this contract is of the essence to this contract. The parties agree to the following schedule of payments:

1. Initial payment: \_\_\_\_\_

2. Progress payments:

stage of work	date expected	amount
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a. _____	_____	_____
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b. _____	_____	_____
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c. _____	_____	_____
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The contractor shall provide the owner with his own waiver or cumulative subcontractors' waivers equal to the amount paid for any progress payment.

b. The contractor may cease operations if any progress payment is not made by the owner as required herein, and proceed to collect any balance due with any legal remedy. Alternatively, the contractor may continue operations, as set forth in the attached General Conditions.

## 7. SIGNATURE

Attached hereto are General Conditions governing the rights and obligations of the parties to this contract. The parties are further subject to the laws of this state governing contracts and mechanics' liens.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

Owner \_\_\_\_\_

Contractor \_\_\_\_\_

## GENERAL CONDITIONS

These General Conditions are part of the contract between \_\_\_\_\_ ("owner") and \_\_\_\_\_ ("contractor") for work at \_\_\_\_\_, dated \_\_\_\_\_.

### 1. CONTRACTOR'S DUTIES — GENERAL

a. To direct and control the work contracted for in accordance with the terms of this contract and all applicable codes, laws, and regulations, and as the building permits, if any, issued for this project require.

b. To inspect the site, examine the plans and specifications, if any, and supervise all of contractor's employees, and to direct the work of all subcontractors selected by contractor.

c. To maintain the work site in a safe and clean condition, to the extent consistent with the contract.

d. To advise the owner promptly if concealed conditions are ascertained which require additional or different work, and to proceed in such event in accordance with this agreement.

e. To provide locked storage for any equipment, tools, or other property used in the performance of this contract, unless otherwise agreed upon in writing.

### 2. OWNER'S DUTIES — GENERAL

a. To provide adequate utilities for the work agreed upon.

b. To advise the contractor of any condition of the property which affects contractor's ability to perform.

c. To provide secure storage areas for materials delivered to the work site.

d. To execute in a timely manner all permit applications and other documents necessary for the work to proceed.

e. To perform no work on the project without a written agreement with the contractor.

f. To avoid interfering with workers.

g. To make no agreements with any tradesperson, subcontractor, or contractor's employee outside the scope of this contract without the written consent of the contractor.

h. Owner shall be entitled to make periodic inspections of the work site when accompanied by a representative of the contractor, provided such inspections do not interfere with the work and can, in the sole judgment of the contractor, be made safely. Any other entry onto the construction site shall be at owner's risk.

i. Owner shall notify his insurance agent of the execution of this Agreement and obtain any necessary Riders to his current coverage or any locally customary forms of coverage, such as Builder's Risk, to cover owner's interests and liabilities during the construction process.

### 3. CLOSING (new construction/with sale only)

This transaction shall close within 10 days of the contractor's notification to the purchaser that the property is ready for occupancy. The closing shall take place at a location agreed to by the parties or at the office of the title company. The parties agree that the home shall be ready for occupancy at such time as a Certificate of Occupancy is issued by the appropriate government agency.

As to those minor finish matters which may not be completed at closing, a pre-closing inspection shall take place and any such unfinished matters noted. The contractor shall complete any such items within \_\_\_\_ days of closing; as to such matters, the owner's agreement to close does not constitute acceptance of such unfinished work which has been identified.

### 4. DEED (new construction/with sale only)

The Contractor shall deliver its stamped Warranty or Trustee's Deed conveying the subject property to the Purchaser. This Deed shall be subject only to real estate taxes for the current year that are not yet due and owing, easements and restrictions of record, building and zoning laws, highways, and rights of way.

### 5. TITLE INSURANCE (new construction/with sale only)

At least three business days prior to closing, Contractor shall deliver to Purchaser, at Contractor's expense, a commitment for ALTA Extended Coverage Owners Title Insurance Policy in an amount covering the total purchase price of the property, including extras, but excluding any personal property. Said commitment may be subject to matters to which the conveyance will be subject.

### 6. MATERIAL SUBSTITUTION

Contractor reserves the right to substitute other materials, products and/or labor, of similar, equal or superior quality, utility, or color. The Contractor reserves the right to make alterations to the heating and/or cooling system, provided any such substitution or alteration has comparable durability and performance characteristics. In the event of the substitution of any appliance or heating equipment, the warranty terms of the substituted materials shall be equal to those originally specified unless the owner otherwise agrees in writing.

### 7. DELAY

Contractor shall not be responsible for delays caused by events beyond the control of the contractor, including but not limited to: strikes, war, acts of God, riots, governmental regulations and restrictions. Delays caused by owner's failure to make allowance materials' selections or caused by the performance by contractor of extras or necessary work (as described in Paragraph 9) shall likewise be excusable delays.

### 8. INSURANCE

Contractor agrees to maintain all necessary forms of insurance to protect the owner from liability for any occurrence arising from the performance of this contract. Contractor agrees that he shall cover his own employees for worker's compensation and carry general liability, and that all forms of insurance carried hereunder shall be with reputable companies licensed to do business in this state.

Owner agrees to carry full coverage on the subject property covering owner's risk of loss during the construction period, together with all special forms required by reason of the performance of this contract. Specifically, owner shall contact owner's insurance agent and secure any necessary Builder's risk coverage prior to the commencement of the work.

### 9. HIDDEN, CONCEALED AND UNFORESEEABLE CONDITIONS

The parties agree that in the event contractor discovers a condition requiring an extra cost that they shall proceed as follows: The contractor shall notify the owner verbally at once to expedite agreement as to the charge to correct or cure such condition, and provide a written estimate as soon as practicable. The parties must agree to such extra charges, or agree to a resolution method, or this contract may be canceled by either of them.

For purposes of this section, a "hidden, concealed and unforeseeable condition" shall mean a condition not readily observable to a prudent contractor inspecting the subject property for the purpose of performing this contract.

### 10. EXTRAS

Any extra work or materials desired by the owner shall be agreed upon in writing and such extras shall become a part of this contract. Unless otherwise agreed, extras shall be paid for as performed. Failure of the owner to sign an extras order shall not preclude recovery for same by contractor, and acceptance of said extra work or materials shall be presumed, unless there is written notice to the contrary.

Contractor shall advise owner at the time of agreement on an extra as to any additional time required to perform this contract.

### 11. SUBCONTRACTORS

a. Contractor shall select subcontractors as required to complete this contract. Owner acknowledges that various portions of the work will be done by subcontractors. Any subcontractor selected by the contractor shall have all requisite licenses for the work to be done by such subcontractor, and the contractor shall issue subcontracts in writing whose specifications are consistent with this agreement.

b. It shall be the duty of the contractor to use reasonable care in the selection of subcontractors. Absent objectionable performance by any subcontractor, the selection of subcontractors shall be with the contractor exclusively. The contractor shall require all subcontractors to have such types of insurance in force as are required to hold harmless and indemnify the owner from any claim for injuries or property damage by any agent or employee of any subcontractor.

c. Contractor shall pay subcontractors on a timely basis and obtain from subcontractors any necessary documentation required to release their lien rights, if any, as the work proceeds.

d. Contractor shall exercise reasonable care in the selection of materials used by subcontractors, but shall not be responsible for later discovered materials' defects or damages from installation methods, not reasonably ascertainable at the time of installation.

### 12. ARBITRATION

This contract shall (not) be subject to binding arbitration by the \_\_\_\_\_.  
Such arbitration shall be (non) binding on the parties hereto.

### 13. TERMINATION and CANCELLATION

The contractor may terminate and cancel this contract if any payment called for hereunder is not received as scheduled, provided that notice is given to the owner as provided below. Upon such termination, the contractor shall have all remedies provided by law, including such lien rights as then apply.

The owner may terminate this contract upon the following conditions:

a. Failure of the contractor, or his subcontractors, to pursue the work contracted for, absent excusable delay, as provided in Paragraph 7 above, for a continuous period of \_\_\_\_\_ days, without a written agreement permitting same, which may be satisfied by a simple notation to this agreement.

b. Failure of the contractor to rectify any condition regarding which building code enforcement authority has issued a citation or violation notice, within \_\_\_\_\_ days' notice of such violation, unless owner and contractor otherwise agree.

c. Any other failure to perform this contract required by the terms of this contract.

d. No termination shall be effective unless 10 days notice of owner's intent are given as provided below, during which time the default may be cured by the contractor.

### 14. WARRANTIES

a. The work of the contractor, including materials and labor, shall be guaranteed for a period of \_\_\_\_\_ years, during which period contractor shall at its own expense correct any defect arising from its work unless Paragraph 11 (d) of these General Conditions applies. This provision is in lieu of all other warranties, express or implied, and owner has no action at law or in equity against the owner after said date.

b. Any and all warranties for appliances or mechanical systems shall be delivered to owner when contractor's final payment is received.

c. Notwithstanding any manufacturer's warranty of any component, appliance, or system, no action may be brought against the contractor on this contract, for the performance of this work, except as provided above.

### 15. NOTICES

Notices may be sent to either party at the addresses shown above, or mailed by certified or registered mail. Any mailed notice shall be deemed given as of the date of mailing.

### 16. SEVERABILITY

If any portion of this agreement is found invalid or unenforceable by any court, the remaining provisions shall remain in force between the parties.

### 17. ENTIRE AGREEMENT

This contract consists of the documents defined above, and constitutes the entire agreement of the parties. It can be modified only by a written document.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this

\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, State.

Owner

Contractor