
HOW TO WRITE IRONCLAD CONTRACTS

If you're ready to contact the local printer for another 1,000 copies of your standard contract form, now's a good time to make some revisions. As an arbitrator, I see case after case in which remodelers use scanty, poorly worded contracts, even on major jobs like second-story additions or whole house remodels. In most cases, these remodelers simply haven't taken the time to properly prepare their contracts. Some believe the rapport they've established with their customers will smooth out any miscommunication. In my experience, this casual approach may work for awhile, but eventually every remodeler learns — usually the hard way — that a well-prepared contract is the only way to avoid working for free.



and for proven loss sustained upon any materials and equipment, including reasonable profit and damages.

The timing you use in this clause varies according to state laws and how long you can survive without payment. Some remodelers will leave a job if payment hasn't been received within three days. But they may be required by the state to give the owner 14 days before terminating the contract. For your case to stand up in court, the contract must be terminated. Otherwise you will be accused of abandoning the job.

Put it in writing. Change orders are accepted as a fact of life by everyone but your clients. They view them as your opportunity to draw a few more dollars from their veins.

Presenting Your Contract

Ideally, your contract should anticipate all areas of conflict that might crop up on a job. Unfortunately, that ideal contract would probably be 60 pages long — not a good sales tool. Imagine how a customer might feel when presented with an inch-thick document by a remodeler who's installing a new front door.

The best way to keep yourself covered and minimize lengthy, extraneous clauses is to use a word processor to tailor each contract to the specific job (see "Mix and Match Contracts," next page). This way, you create a menu of clauses from which you can pick and choose according to your needs.

There are many different opportunities for presenting the contract. Some remodelers go over a sample contract during the initial sales call. Others prefer to wait until it's actually time to sign the document. Regardless, taking the time to go over your contract helps your customers understand the way you work and gives them an opportunity to ask

questions or bring up objections before work starts.

Legally, contracts are construed against the author. In other words, because you wrote it, the courts will always assume that your contract is tipped in your favor. But if you can demonstrate that you understand the elements and the way they are phrased *and* that you took the time and effort to explain the document to your customers, the courts will look upon your side of the story more favorably.

Once the form has been accepted by both parties, stick to it. If you say change orders must be in writing, be consistent. Any deviation will threaten your credibility and, should you wind up in arbitration or in court, your actions will speak louder than your written words.

Playing It Safe

The following are suggestions for wording that will make some of the more controversial portions of your remodeling contract clear, concise, and fair.

The phrase that pays. Nothing is

more important to both contractors and clients than the payment schedule. How you work this out with your customer varies according to the size of the job, the type of financing the customer has, and even the regulations provided by your state's consumer protection agency.

Whenever possible, key your draws to the commencement of a phase of work instead of its completion. Then you'll never be stuck for the balance of the work. The final draw, which is ideally the smallest payment in the draw schedule, should be tied to a certificate of occupancy rather than "substantial completion." That way people can't hold on to your money for things like loose doorknobs.

Should the owner fall behind on payments, give yourself room to get out of the job with the following:

If the owner fails to issue a payment within ten days after payment is due, the remodeler may, upon seven days written notice to the owner, terminate the contract and recover from the owner payment for all work executed

Alan and Robert Hanbury, owners of House of Hanbury Builders in Newington, Conn., urge their employees to write down any additional requests the owner makes, "even if it's on the back of a Dunkin' Donuts bag." They also present their customers with a "Change Order Addendum" when they are going over the contract with them. This explains the change order process in detail, describing all the steps involved, billing practices, work delays, and so on. "Even though we have a change order clause in our contract," said Robert Hanbury, "we've learned the more you can spell out ahead of time, the better."

It's always a good idea to discuss the types of things that become extras as the work progresses. Then cover yourself with the following:

The owner, without invalidating the contract, may order changes in the work consisting of additions, deletions, or modifications (the contract sum and the contract time being adjusted accordingly). All such changes in the work shall be

BY BOB MERZ

TO AVOID CONFLICT, USE THESE CLAUSES IN YOUR CONSTRUCTION CONTRACTS

Mix-and-Match Contracts

by Mike Turner

One of the first jobs my company did was to add a room above a garage. In my contract I stated, "Will perform necessary electrical wiring." I thought this sounded very professional until I realized we had to rewire the entire garage at our own cost because it was not up to code. In that same job, I also ended up reventing the laundry room plumbing, also at my cost.

Neither of these extras were very expensive. But I quickly realized that a contract is more than a standard form to be glossed over in the sales presentation. So I started going to seminars to learn more. Nowadays, I have dozens of clauses I use to cover myself in any situa-

tion I can dream up. And I'm always adding new ones (which I fax to my lawyer first for his approval) as my customers come up with new ways to challenge us.

About five years ago I started entering these clauses into my word processor. I've subdivided them according to the different sections of the contract. For example, under article 16, "Changes in the Work," we include three different clauses that outline different procedures for change orders based on the job.

When it comes time to put a contract together, I write a list of clauses I think should be included. My assistant plugs in the items on this list, plus our hazardous materi-

als clause (see main story) and three additional clauses:

- Landscaping: "Contractors shall have no liability for damage to landscaping as a result of gaining and maintaining access to the job site."
- Wiring: "The parties acknowledge that any electrical or wiring changes that, by regulation, must be upgraded in accordance with the existing code are not included in the contract sum and will be charged by change order."
- Utilities: "All utilities are to be paid by the owner during the construction period."

We print out the contract on our letterhead, then package it in a clear-cover binder with a blue spine to match our stationary. Instead of calling it a contract, we refer to it as a "construction agreement." This

is just a matter of semantics, but somehow customers feel more comfortable signing it.

There are a few disadvantages to the system. First of all, a large contract is a shock to many customers. It helps to break the contract into smaller sections and keep the wording as brief and simple as possible.

Also, because our contracts have normal-size print, people don't need magnifying glasses to read them. They are therefore more likely to study and question it. But a contract that's easy to read, especially if it's worded simply and clearly, is as good a communication tool as well-prepared plans and a thorough set of specs.

Mike Turner is president of TLC Builders, a remodeling firm in Atlanta, Ga.

authorized by a written change order signed by the parties.

Then, to save yourself from chasing down everyone involved in the job:

Only one signature from each respective party shall be necessary to execute the change order.

You need to decide who that one person is when the contract is signed. That way you'll avoid the disputes that arise when, for instance, the wife authorizes something but the husband doesn't.

Hazardous materials are hazardous to your business. Mike Turner, president of TLC Builders in Atlanta, Ga., remembers well the day his crew broke open a concrete slab in front of a commercial property they were renovating. The dirt was a funny color and smelled like paint thinner. They also saw the remains of a grease rack.

"We stopped work immediately and called in the owners," he said. They discovered that the building had been used as a gas station and the fluid that was soaking the ground was a petroleum distillate. Cleaning the site cost the owners several thousand dollars — a cost Turner might have had to cover if he hadn't included a hazardous materials clause in his contract.

Most remodelers are familiar with lead-based paint and asbestos, but there are lots of other dangerous materials out there, especially if you're doing commercial work. To cover yourself on all of these, include:

The discovery and/or removal or testing of any hazardous material as defined by the Environmental Protection Agency (EPA) is excluded from the scope of work. The contractor reserves the right to stop work until such materials are removed.

Tying your contract into the EPA's list saves you from naming each item.

Needed: X-ray vision. When Michael Beutel, president of Avalon Builders in Mill Valley, Calif., started in the business five years ago, one of his first jobs was to install a window in an old house. When he opened the wall, he discovered the studs had rotted. The customer was unwilling to help cover the costs and Beutel's contract did not cover him for pre-existing conditions. So he ended up replacing the old studs, as well as the drywall and the exterior shakes he disturbed in the process. The company lost about \$1,500 in time and materials, but Beutel learned a valuable lesson.

Your contract should include:

All hidden, concealed, or unforeseeable conditions, including code violations, that must be repaired, corrected, replaced, or overcome, shall result in a change order to the work.

What warranty? Everyone's approach to warranties is slightly different. Some remodelers offer 60 days on small jobs and a year on large jobs. Others, like Alan Hanbury, base their warranty service on the customers. "We always give a one-year warranty," he said, "but if they're good clients, we'll go back six or seven years later if we need to. If they've been difficult, we hold them right to the year."

In some cases, your state's consumer protection agency requires that you warrant your work for a certain time period. Even if this isn't the case where you live, some type of warranty statement is necessary to protect you from clients who want you back to fix a loose screw six years later. Try this simple statement:

We hereby warrant all materials and labor involved in this project for a period of 60 days.

There are some phrases you should not include in your warranty section. These include "first-class dwelling," "built with high quality materials," and "all work performed in a workman-like manner." Although these phrases show you are proud of your work, they invite interpretation.

Tie your performance to specific industry standards. You can write your own or you can use the National Association of Home Builders' Quality Standards for the Professional Remodeler (Home Builder Press, 1991; 800/223-2665). Use the following to show your willingness to correct any problems or defective workmanship:

The contractor reserves the right to repair, replace, or pay reasonable sums in order to effect those repairs to any mutually acknowledged deficiencies (based on the standards) both during the construction process and the warranty period.

I've got this friend. There isn't a customer out there who doesn't have a friend in the business. Whether that friend is a supplier, an electrician, or a carpenter, getting them involved in the job spells trouble. Dwight Griffith, a remodeler and builder in Fallston, Md., tells of one job where the customer's electrician "friend" took four months to rough-in the wiring. He's also had to cope with plumber "friends" who didn't send all the parts for the fixtures and carpenter "friends" whose work didn't meet code.

The following clause will help:

Owners agree they will not use subcontractors, contractors, laborers, suppliers, distributors, craftsmen, or other persons on this job except as provided by the builder pursuant to the terms of this contract. Any deviation must be approved by the builder in writing and the owners may not hold the builder responsible for the quality of

the workmanship and materials utilized by these persons. The owners will also be responsible for any delay caused by the use of any outside contractor.

Dispute resolution. Homeowners and remodelers at odds with each other rarely agree to arbitration, so it's a good idea to put this in your contract upfront:

All claims or disputes between the owners and the contractor arising out of, or relating to, the agreement or breach thereof, shall be decided by binding arbitration in accordance with the rules and procedures of [insert the name of an arbitration service here, such as the American Arbitration Association], unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed within a reasonable time after the dispute has arisen.

Clause Swapping

Perhaps the easiest way to develop a good, thorough contract is to swap ideas and clauses with other remodelers. One trade group in California had a contract workshop one evening where everyone brought in a copy of their contract to pass around. A remodeler I know found a good clause while visiting another remodeler in Canada. Remember, if you do incorporate phrasing from another remodeler's contract, it's always a good idea to run it by an attorney before you start using it. ■

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For More Information

A good source for contracts is NAHB's *Builder's Guide to Contracts and Liability* (Home Builder Press, 1989; 800/223-2665).