

CLOSING Contract Loopholes

A well-crafted contract can save
you from a world of trouble

Standard Contract

Ed's Construction, Inc.

May 1, 2001

Owner's name: Robert and Barbara Smith

I. Parties

This contract (hereinafter referred to as "Agreement") is made and entered into by and between Robert and Barbara Smith, hereinafter referred to as "Owner", and Ed's Construction, Inc., hereinafter referred to as "Contractor". In consideration of the sum of \$4,580.00, the Contractor agrees to perform the following work:

II. General Scope of Work Description

1. Remove existing built-up flat roof on garage. Haul all debris to landfill.
2. Furnish materials and labor in new pitched roof on garage per plan.
3. Furnish and install gutter, downspouts, and flashings on newly framed roof.
4. Install felt underlayment and 20-year composition roofing shingles to match color of existing roof.

LUMP SUM PRICE FOR ALL WORK ABOVE:

III. General Conditions

A. Exclusions: This Agreement does not include the following work:

1. Project Specific Exclusions: Paint work.

2. Standard Exclusions: Unless specified, this Agreement does not include:

mental permits and fees for any site. Final construction of "broom sweep" concrete framing. Repair of existing roads, sidewalks, and driveways are being used in the course of construction.

B. Date of Work Completion and Substantial Completion: Construction time to substantial completion: Approximately 3 weeks. Delays caused by inclement weather, additional time required for Contractor beyond the contract time.

C. Change Orders: Concealed Conditions and Additional Work: This Agreement is based solely on the condition of the structure in its current condition at the time this Agreement was built.

1. Conditions: Any alteration or deviation from the Scope of Work involving extra costs of materials or labor (including but not limited to changes in the Scope of Work required by government or owner) shall be a written change order signed by Contractor and Owner.

Utilities shall be furnished by Owner at no expense to Contractor.

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What's the most important clause in a construction contract? In many cases, unfortunately, it's the

compiled by JLC Staff

clause that wasn't there when you needed it. The painful truth is that no contract is perfect, and even the most experienced builder sometimes gets burned by the unforeseen.

But that works both ways: It also means that every contract can be improved. Knowledgeable builders review their contracts regularly and revise them often in the light of experience — that of others as well as their own.

It's a Two-Way Street: Defining Owner Responsibilities

Alan Hanbury, a remodeling contractor from Newington, Conn., has vivid memories of one contract-related problem that took place nearly 20 years ago. "The trouble really started when one of our guys used the bathroom at a client's house, and left it smelling kind of bad. It wasn't his fault — sometimes that just happens, right? — but the owner was furious and decided we couldn't use her bathroom anymore."

Jane Doe Clause

Source: House of Hanbury, Newington, Conn.

Toilet Facilities and Utilities: Owner agrees to make toilet facilities available to all workers or compensate Contractor for the cost of rented units. Electric, water, and other utilities shall be furnished by Owner at no expense to Contractor.

Access to Work: Owner shall grant free access to work areas for workers and vehicles and shall allow storage of materials and rubbish. Owner agrees to keep driveways clear and available for movement and parking of trucks during normal working hours (this includes removal of snow and ice).

Protection of Owner's Property: Contractor and workers shall not be expected to keep gates and the like closed for animals and children. Owner agrees to remove and/or protect any personal property, in or near the work area, including shrubs, flowers, wall hangings, knickknacks, and the like.

Homeowner's Insurance

Source: Criner Construction, Yorktown, Va.

Prior to commencement of construction, Owner shall have Contractor listed as loss-payee on Owner's hazard insurance policy by means of endorsement, or shall purchase separate policy to protect Contractor's interest. In the event Owner fails to do so, contractor may procure such insurance and Owner agrees to reimburse Contractor in cash for the cost thereof. Contractor may waive this requirement at his sole discretion. Contractor shall carry at his own expense workman's compensation and public liability insurance at least to the minimum requirements of existing laws.

Owner-Supplied Materials and/or Labor Warranty

Source: Hilton Enterprises, Stilwell, Kan.

Materials and labor supplied by the owner often create scheduling and warranty problems. We do not recommend supplying material or labor for your own protection. Should you decide to supply materials they will be exempt from our warranty and, at our discretion, void the warranty of related work if failure occurs.

Should work to be performed by the owner cause delays in the work we or our subcontractors are to perform as part of this contract you may, at our discretion, be charged for the time if we or the subcontractors cannot work on another project elsewhere during the delay. Owner assumes all liability for injury or damage to materials or premises while engaged in Owner Supplied Labor.

For the next two months, Hanbury recalls, the crew had to use the bathroom at the corner gas station, as relations with the client continued to deteriorate. "The stress of dealing with her actually put me in the hospital with a heart irregularity," he says. When the job was finished, the troublesome client presented Hanbury with two bills: one to cover an estimated \$40 increase in her electric bill, and another for \$20 and change, representing the cost of a carefully recorded number of telephone calls made from her home phone, charged at pay-phone rates.

Utilities, access to work, and property protection. "Isn't it obvious that if someone is working in your house for two or three months, they're going to have to go to the bathroom once in a while and use the phone?" Hanbury asks. "I used to think it was, but now I know better." Hanbury's standard contract now carries what he calls the "Jane Doe Clause" (above left), which spells out the owner's responsibilities in a number of key areas.

Insurance. Homeowners tend to think of insurance in terms of contractor liability. But as Yorktown, Va., contractor Robert Criner notes, the customer has an important responsibility in this area as well. "You've got to make sure that they've increased their homeowner's insurance to cover the finished value of the project," he says. "If you're doing a \$100,000 addition on a \$100,000 house and the place gets hit by lightning, you have a real problem on your hands." Criner's standard contract (left) requires the customer to purchase additional insurance or authorizes the builder to purchase it at the customer's expense.

Kansas remodelers Troy and Candi Hilton insert a similar clause, which also specifies that the owner accepts liability for all materials that have been delivered but not yet installed. "I think it should be a standard clause," Candi Hilton says. "We haven't had many problems with theft or loss, but it's always a possibility."

Managing Customer Expectations

In addition to nudging your customer into taking on certain tasks, a well-drafted contract can also prevent the client from becoming too involved. A familiar example is the weekend warrior homeowner who wants to do part of the work himself, or at least provide materials.

No amateurs need apply. To maintain control of both the job site and their profit, Troy and Candi Hilton's contract includes a clause designed to discourage the resident handyman from signing on as a sub or supplier (left). Besides putting the customer on notice that the builder will not warrant owner-supplied materials, the clause also holds the client accountable for the cost of any associated delays.

At the same time, the Hiltons structure their allowances with an eye toward maintaining customer goodwill. "The way things are today, I can't buy materials any cheaper than the customer can get them at Lowe's or Home Depot," Candi Hilton says. "Customers know just how much materials cost, and if you put your markup on top, they'll feel like they're being overcharged. We write the lower material price into the contract and make up the margin in the labor rate."

Match existing, within reason. The difficulty of obtaining a perfect match with existing material can be another source of friction in remodeling projects. "What I think matches and what you think matches may be two different things," says Robert Criner. His contract commits the builder to make "every effort" to match existing materials (above right) but clearly states that a perfect match is not promised. "You've heard the saying 'underpromise and overdeliver'?" he asks. "It's a good strategy, as long as you underpromise in writing."

On the level. Alan Hanbury's contract contains a brief clause that informs customers that remodeling work isn't necessarily square or plumb (right). "It's really a matter of education," he says. "Otherwise, the client's going to come in with his two-foot level after you've left for the day, and in the morning he tells you, 'Hey, this baseboard is all wrong.' "

The Contract as Fall Protection

Some contract clauses — like those dealing with payment schedules or change-order procedures — are like framing hammers or circular saws: They're familiar to everyone, and they see a lot of hard, routine use. Others are more like a piece of safety equipment that goes unnoticed until the moment it's suddenly all that stands between you and disaster.

Hidden damage and other surprises. "When we were starting out, we were lucky to get some good advice from a real veteran contractor," says Candi Hilton. "The first time we tore open an interior wall that was eaten by termites, I mentally thanked him for the hidden damage clause we still use today" (right).

Asbestos, lead paint, and other hazardous materials can also spell disaster for the unprepared builder. A protective clause like the one favored by Robert Criner can be a lifesaver (right).

Sign here. Okemos, Mich., remodeler Quenda Behler Story learned an important lesson from a pair of unhappy, indecisive clients. "The husband had signed off on some change orders that the wife didn't learn about until much later," she recalls. "The wife said, 'I never agreed to that, and I'm not going to pay for it.' " Unfortunately, Story says, the woman was within her legal rights under state law and refused to

Matching Materials

Source: Criner Construction, Yorktown, Va.

Contractor calls attention to the Owner to the limitations of matching plaster, stucco, concrete, masonry and roofing materials, and while contractor shall make every effort to match existing materials, textures, colors and planes, exact duplication is not promised. Contractor shall have the right to substitute materials of similar quality, pattern and design if unable to obtain the exact matching materials.

Square and Plumb

Source: House of Hanbury, Newington, Conn.

Out of square and plumb conditions of existing structure will require some of the same in new work to properly mask the existing conditions and not call undue attention to those details.

Hidden Damages

Source: Hilton Enterprises, Stilwell, Kan.

For the purpose of this contract, a hidden, concealed and unforeseeable condition shall mean a condition not readily observable to an experienced contractor or subcontractor inspecting the property for the purpose of estimating for and performing the work specified within the contents of this contract.

Hazardous Materials

Source: Criner Construction, Yorktown Va.

Hazardous Materials — unless otherwise specifically provided for, the contractor shall not be responsible for removal and/or disposal of any hazardous materials as defined by any federal, state or local law, regulation or ordinance, including without limitation, lead-based paint, asbestos, and material containing asbestos. If such hazardous materials are encountered in the course of the contractor's work, then the owner shall pay any and all additional costs to remove and/or dispose of such hazardous materials in accordance with such federal, state, and local laws, regulations, and ordinances.

Owner Signature

Source: Quenda Behler Story, Okemos, Mich.

The owners agree that changes resulting in the furnishing of additional labor and/or materials will be paid for prior to the commencement of the extra work. The owners also agree that either of them may sign a change order, and that signature will be binding on both.

Requirements of Public Bodies

Source: House of Hanbury, Newington, Conn.

Any changes, alterations to, or omissions from the drawings or specifications which may be required by any public body, utility, or inspector shall constitute a change in the work and shall be paid for in the same manner as any other change in the work.

Dispute Resolution and Attorney Fees

Source: Minkler Construction, Bayfield, Colo.

Any controversy or claim arising out of or related to this Agreement involving an amount less than \$5,000.00 must be heard in the Small Claims Division of the Municipal Court in La Plata County (CO). Disputes involving amounts over \$5,000.00 must be settled by binding arbitration administered by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules. Judgment upon the award may be entered in any Court having jurisdiction thereof. The prevailing party in any legal proceeding related to this Agreement shall be entitled to payment of reasonable attorney's fees, costs, and expenses.

budge. Story now makes use of a contract clause that commits both owners to a change order signed by either (left).

Code-required changes. Like many remodelers, Alan Hanbury is occasionally frustrated by unpredictable and seemingly inconsistent interpretations of building codes. Depending on the individual inspector, for example, the removal and reinstallation of an unvented sink could be an acceptable existing condition or a piece of new construction requiring its own roof vent.

"It shouldn't be my responsibility to guess the inspector's state of mind that day," Hanbury says. His contract makes it clear that code-required changes in a job are processed and paid for like any other change order (left).

Early Warning Clause

Sooner or later, every builder has a painful experience with some version of the Customer from Hell. It makes for some good stories later, but there's much to be said for avoiding trouble in the first place. A good contract can supplement judgement and experience in flushing potential troublemakers into the open before it's too late.

Mediation and arbitration. Bayfield, Colo., contractor Charlie Minkler's contract includes a clear procedure for settling disputes (left). Disagreements involving sums of \$5,000 or less are to be decided in the county small claims court, while larger amounts are settled by binding arbitration administered by the American Arbitration Association. Minkler credits the clause with his perfect record in avoiding customer lawsuits. "I think including that language discourages the kind of client who likes to go to court," he says. "They think, 'Well, maybe it won't work with this guy,' and they go somewhere else."

The indecisive client. Newton, Mass., remodeler Paul Eldrenkamp has a contract clause that notes that the homeowner may be charged a nonrefundable \$100 fee for each change-order estimate beyond the first five, whether the change is ultimately carried out or not. "Putting it in the contract is sort of a red flag," he says. "There's a direct correlation between how concerned a client is about that fee and the amount of stuff they're thinking about adding."

Minkler guards against last-minute cancellations by having customers agree to a nonrefundable drafting and planning fee if the project doesn't go forward. The fee can be "fairly arbitrary," Minkler says — his vary from \$100 or so to \$3,000 — but should be large enough to dissuade clients from seeing the builder as a free consultant. If the project doesn't proceed, the plans and drawings become the property of the homeowner (next page, top right).

Avoiding the “Russian Winter” Syndrome

Then there's the sort of job that bogs you down, wasting time and money, damaging morale, and generally calling up images of Napoleon's disastrous winter retreat from Moscow.

Reining in change orders. Paul Eldrenkamp once had a client who executed 87 change orders, besides considering and rejecting several times that number. “His hobby was seeing whether we could do things or not,” Eldrenkamp recalls. “We'd finish a staircase, and he'd decide it might be nice to have little drawers in all the risers.”

When he suspects that a client may produce a blizzard of change orders — a suspicion that may be triggered by the customer's reaction to the \$100 change-order fee described above — Eldrenkamp sometimes inserts an additional protective clause. “It states that if the value of the change orders adds up to 10% of the value of the original contract, we have the option of retroactively converting the contract to time and materials. We've never had to trigger the clause, but it's there if we need it.”

Finally, Eldrenkamp's change-order clause contains a clause (right) designed to nudge the homeowner into deciding on change orders in advance, rather than waiting until the last minute: “With at least 24 hours of notice of a projected change, the builder will work up the cost of the change in advance.” In the absence of that advance notice, the customer signs a change order that details the additional work required, but leaves the cost-assessment phase until the work is actually complete. “It encourages customers to think ahead by having them sign what amounts to a blank check for those last-minute changes,” he says.

Designating a homeowner agent. It's not unusual for clients to choose to go away on vacation to escape the noise and dust of a remodeling project. That can also be convenient for the builder — until the unexpected happens and the job grinds to a halt because there's no one on hand to make a key decision.

If the homeowner is going to be unavailable, Troy and Candi Hilton require him or her to designate an agent with legal authority to make decisions relating to damage, hidden conditions, and other unforeseeable events (right). A reliable local contact can also be helpful in other ways, Hilton observes. “Say you set off the security alarm while you're working. When the police show up, it's nice to have someone to tell them you're supposed to be there.”



Thanks to the builders and remodelers who contributed to this article.

Drafting, Specification, and Planning Fee

Source: Minkler Construction, Bayfield, Colo.

Owner(s) agree to pay a nonrefundable fee of \$_____ for drafting, specification, and planning. Contractor agrees to provide owner(s) with drawings for the construction of the project as set forth in the Specification and Work Order and this document. These drawings shall be fully suitable and acceptable by any and all local municipal building agencies. If drawings, specifications, and proposed cost are not accepted by owner(s), this agreement shall be terminated and said drawings, in consideration of payment already made, shall become the property of the owner(s).

Required Notice

Source: Byggmeister, Newton, Mass.

If Byggmeister determines that the change-order request requires work to be performed within 24 hours, then Byggmeister will prepare a written change-order agreement with a detailed description of the changed or additional work to be performed, the adjusted date of completion, if applicable, and the adjusted payment schedule, if applicable. The costs for the change-order agreement to be performed within 24 hours will be assessed, upon completion of the work, by adding the invoice cost of any subcontractors utilized, plus the invoice cost of any materials utilized, plus \$43.50 per hour for work performed by Byggmeister employees. Finally, 16% of the preceding total will be added to cover overhead costs, plus 6% of the preceding total to cover profit.

In the event that Byggmeister determines that the change-order request requires the work to be performed in greater than 24 hours, then Byggmeister will prepare the same written change-order agreement described above, but will delineate the exact costs to Homeowner for the change order.

Homeowner's Agent

Source: Hilton Enterprises, Stilwell, Kan.

In the event the owner(s) is out of town and unavailable by telephone and/or fax, then the owner will appoint a person as their agent and give that person the legal authority to make decisions for the time the owner(s) is unavailable. The decisions to be made pertain to hidden, concealed and unforeseeable conditions, and will require a letter to correct the condition or proceed without correcting. Without this ability, work will stop until the owner(s) return and is available to make the decision in person.