

Subcontractor Agreements: Do They Have to Be in Writing?

by Jack K. Merrill

Untimely or poor subcontractor work can prevent contractors from completing projects on schedule and within budget. To prepare for that possibility, it makes good business sense to create a written subcontractor agreement.

A well-written agreement carefully describes the work that will be performed, outlines firm work and payment schedules, and provides the contractor with a remedy for poor performance. It brings order to daily operations by spelling out who is responsible for what. A written contract can save money by helping you avoid disputes that could damage productivity, undermine customer relationships, and cost tens of thousands of dollars to resolve in court.

A Handshake and a Promise

Why, then, do so many construction companies operate on handshakes and oral promises? The simple answer is that working without written agree-

ments seems to save time and money. There's no contract to draft and no lawyer to pay. You discuss the job, agree on price and timetable, and then keep your word.

The problem is, verbal agreements can break down. A disagreement arises, and all of a sudden the contractor realizes that both the project and his customer relationship are in trouble. The sub has been overpaid but claims he's been underpaid, work grinds to a halt, the customer is upset, and one or more lawsuits are looming. The contractor finally calls a lawyer, realizes what it may cost to get out of the mess, and wonders why he didn't put the deal in writing in the first place.

Case in Point

Take, for example, the case of the Massachusetts builder whose previously reliable electrician started having personal problems. The kitchen rehab was well underway, with rough electrical partially installed and cabinets sit-

ting in the garage. Without warning, the electrician stopped appearing at the job site. It took days to reach him; when he finally returned the calls, he said he'd get there when he could. Meanwhile, the customer was complaining about the schedule, and an inspection revealed that some of the wiring had been installed in the wrong place. When the contractor asked him about it, the electrician exploded. He insisted he was owed \$5,000 for work already performed and refused to appear on the job until he was paid in full. He also threatened to sue, a threat he later made good on.

In the end, the contractor ran up a substantial legal bill before deciding it would be cheaper to pay the electrician what he was asking for, given the cost of going to trial and the uncertainty of the result. The dispute delayed the project, damaging the contractor's reputation and creating problems with the customer. The customer relationship was eventually repaired, but the contractor had to perform extra work as a concession. The subcontractor did not pay for any of this.

To avoid repeating his experience with the electrician, the contractor now requires a standard written agreement for all but the tiniest subcontractor jobs.

Reducing Uncertainty

Going to court is an uncertain and expensive way to collect money and enforce contractual obligations. That's particularly true in construction cases, where quality is often a matter of personal judgment. Successful litigation often turns on the strength of contract terms. The more clearly you spell out your requirements, the more likely it is you'll prevail in court. Your attorney can draft a form agreement that

Update: Drugs and Employer Liability

In last month's *Legal* column ("Drug Testing Employees"), I talked about what happens when one of your employees gets injured in an accident that was caused by his own use of illegal drugs. The column stated that an employee is entitled to workers' comp "even if the accident was caused by his drug use." That's true, but as an employer you should be aware that you're not off the hook just because the injured party is covered by workers' comp. Many comp policies include disclaimers that allow the insurance company to withhold payment for injuries caused by the use of illegal drugs. If you aren't diligent about preventing employees from working under the influence of illegal drugs, you could find yourself in a situation where an employee is injured and the insurance company refuses to pay. The employee would still be entitled to comp, but you as the employer would have to pay it out of your own pocket.

— Quenda Behler Story

includes space for you to tailor it by filling in the details of the job being done. When you complete the form, take the time to carefully describe the work, the time frames involved, and the benchmarks that must be reached before payment is made.

Remedies

Human nature is such that even reliable relationships can go bad. Divorce, illness, and other personal traumas can transform a good worker into a bad one. A good contract, then, needs to anticipate problems and spell out the remedies. Paying for work only after it's complete is one safeguard, as is a provision that allows a sub to be replaced if, say, he fails to show up on schedule. Barring a subcontractor from quitting a job (and, in fairness, a contractor from firing him) without advance written notice is another. A contract might also include a provision for deducting the cost of a replacement subcontractor from any amount owed him or her under the original contract. And a contract should expressly provide that the sub will reimburse the contractor for any damages suffered as the result of a sub's breach of contract.

Even if all the contractual bases are

covered, suing and being sued are costly and time consuming. There are experts to hire, documents to assemble, depositions to attend, and time spent in court. Every contract, then, should require the sub to pay the contractor's legal fees following a successful suit.

Arbitration

Contractors should consider including in the subcontract a provision for arbitration, especially on larger jobs. This process avoids a courtroom by submitting disputes to an arbitrator, who more quickly and informally hears the facts and issues a binding decision. There's no judge or jury and no case backlog, so arbitration is much faster and far less expensive than a lawsuit.

Should Every Subcontract Be Written?

The answer to this question is probably yes, though practical considerations can make the contracting process burdensome. Some subcontractors are used frequently by a contractor and are trusted partners in the business. Others are accustomed to working on handshake deals and may be hesitant to sign written documents. Still, it makes

good sense to require subcontractors (and vendors) to sign written agreements. Standard form annual agreements that define relationships and expectations can sometimes be used to avoid the need for creating a new contract for every job.

State Law Requirements

In some states, home improvement contracts must be written and must include certain provisions. Whether or not such a law applies to subcontractor agreements, following it in general if it exists in your state may still make sense. Among the information required may be firm names and other identifying information, including contractor registration numbers; start and end dates for work to be performed; detailed work descriptions; and authorizing signatures. Where these items and others bind a contractor to a homeowner, it's important to ensure that subcontractors understand their obligations so that their behavior doesn't lead to a breach of the customer's contract.

Jack K. Merrill counsels small businesses on employment matters and dispute resolution for Kushner & Sanders LLP in Wellesley, Mass.