Legal

Idiot-Proof Your Contracts

by Quenda Behler Story

You probably write your own contracts. By that I mean you buy a form book or copy contracts from other jobs. As someone who writes form books, I can tell you that it's fine to do this.

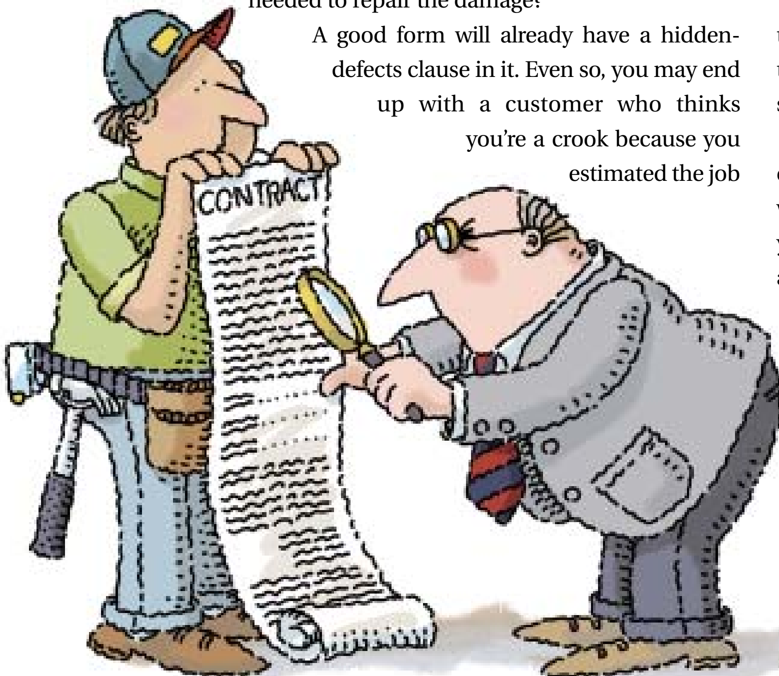
I regularly advise people that writing construction contracts does not involve rocket science.

What Steps to Take

Still, there are pitfalls to using ready-made contracts. It's a poor idea, for instance, to simply fill in the address blanks and write a five-word description of the job. Even if we're talking about handyman work, there are details that need to be hammered out ahead of time.

Hidden conditions. When filling out the contract, start by looking at the job carefully and thinking about the problems you might encounter. Make sure your contract covers those surprises. If you're replacing a window, say, and the surrounding frame turns out to be full of dry rot or bugs, who will pay for the extra work and materials needed to repair the damage?

A good form will already have a hidden-defects clause in it. Even so, you may end up with a customer who thinks you're a crook because you estimated the job at $500 and it's running close to $1,000. Guess who he won't call when it's time to put on an addition.



Dan Drabek

Explain what's in the contract. Which brings us to another important step you need to take before the job starts. When you hand this contract to your customer, say a few words about what's in it and why. Talk about the kinds of unexpected problems you could run into and explain that there's no way to know about them until you begin taking things apart. Explain that there are variables you simply can't nail down beforehand — such as knowing exactly how long the job will take or precisely what it will cost.

Also, be sure that your contract makes it clear who is responsible for what and when. Who will supply the electricity? When will payments be due? Who will get the permits? When is the customer supposed to make the property available to you? What does "available" mean? Does it mean unlock the door for you, or get those kids and animals out of the way?

What exactly do you mean? The third step you need to take with your customer — and this is really crucial — is to make absolutely sure you're both talking about the same thing.

For example, let's say you offered the customer a contract that said "paint-ready," because the customer wants to do his own painting. When you say paint-ready, you mean when you're done with the drywall, taping, and rough sanding. But maybe your customer thinks paint-ready means something else: that all he has to do is open the can and starting spreading paint over the primed wall.

The Customer Is (Almost) Always Right

According to the courts, even if you did get the contract off a pad of forms you bought at the lumberyard, you wrote it and therefore it's "construed" against you. Construed is a legal word meaning that the author of the contract is stuck with the way it reads to a reasonable person.

If the contract could be understood in more than one way, and the customer likes his way better, the courts are most likely to say to you: Hey, you should have written what you meant.

I don't mean here that every interpretation that could possibly be squeezed out of the contract will get you in trouble, and I certainly don't mean that you have to worry about commercial customers who understand very well what paint-ready means.

I simply mean that if a reasonable person with the same sort of background as your customer could read your words and come to the same conclusion as your customer, then you're responsible for the misunderstanding. Legally, it's your problem.

It's perfectly okay to use a standard form for your contracts, but be sure to read everything in it very carefully.

Different for subs. Just so all you subs out there know, the rules are a little different for you. If this situation were to involve a sub, the outcome would hinge on the local industry's usage of the term "paint-ready." So, if a dispute occurred and you were a sub, you would bring in a local person who earns his living painting, and he would define the term for your side.

Your opponent, of course, might bring in someone else with the same credentials to say the opposite. We have a term for that in the legal profession that I can't use in a family publication, and it's one of the reasons I usually recommend avoiding litigation and, instead, getting an arbitrator with experience in the construction industry.

Defective Contracts

But there's another side to the problem of miscommunication. Suppose it's not the customer who's confused — it's you. Perhaps the reason the language in your contract is so confusing is that you didn't understand the bid documents, or the architectural plans, or the information about the project you were given. So you wound up with a contract that you would have written differently had you realized what was really being asked of you.

If this confusion costs money or causes delay, whose problem is that? Yours or your customer's?

That depends on how obvious the confusion should have been to you.

Patent defect is your problem. If sitting down and considering the proposal and the construction documents more carefully would have revealed that there was a problem, then that's what the law calls a "patent" problem. A patent problem is your problem, not the customer's. The law's take on it goes something like this: Next time, pay more attention.

Why wouldn't the hidden-defect clause in the contract protect you? Because this isn't a defect in the site or the project, it's confusion in the documents.

Latent defect is someone else's problem. Now, if the problem in those documents is something that you, as a reasonable contractor, couldn't have noticed just by reading the documents more carefully, that's what's called a "latent" problem, and you can pass those extra costs along to your customer.

You Can't Be Too Careful

To sum up, I'm essentially saying that while it's okay to use a standard form for your contract or to copy from an existing contract, *read everything carefully first.* Think about how the language fits each particular job. If you foresee potential problems, talk to the customer about them and document what is said.

Explain everything — even the stuff you think any idiot would understand.

Quenda Behler Story, *author of* The Contractor's Plain-English Legal Guide, *has practiced and taught law for more than 25 years.*