

Contract Clauses That Keep You in Control

by Dennis Dixon

The key to making money is control, and the key to control is the construction contract. This essential management tool ensures profitability and protects both the contractor and the customer. But to be effective, it needs to anticipate every detail, circumstance, and problem that might come up.

During my 28-plus years as a builder and remodeler, I've tracked what has and hasn't worked for my company's projects and sought feedback from clients, architects, subs, and suppliers. That information and a good construction attorney helped me craft a solid contract. Careful contract wording will keep you out of trouble and in control, and

give clients more confidence in your company. I have found that clients who built or remodeled previously with other contractors almost always appreciate that my contract is so detailed, because they understand it will prevent a lot of problems down the road.

My contract boilerplate has 45 numbered sections, arranged by subject. While all are important, I'm going to focus here on the areas that people tend to shortchange — with sometimes dire consequences, as I've seen in my work as a consultant on construction litigation. For reference, I've included excerpts from my contract; when drawing up your own, you should consult with an attorney.

Names and Addresses

Some contracts list only basic contact information for client and builder — names, addresses, phone numbers, email addresses — but that's not sufficient. A contract should also include the project's physical address, tax assessor number,

lot number, subdivision, county, city, and state. You should verify all of these at the county assessor's office to make sure your contract is with the property owner. If it's actually with some third party, you may be unable to put a lien on the property or file a suit for nonpayment.

Beware of properties owned by trusts or LLCs. In California and Arizona, for instance, you can't put a lien on or file a lawsuit against such a property. To assign legal responsibility to the person behind the trust, your attorney will need to draft the appropriate language.

If discussing property ownership causes an owner to become agitated, obstinate, or incredulous, you may want to move on. Some projects just aren't worth the risk.

Owner and Contractor Representatives

Only one person — the husband or the wife, not both — can

be an owner representative. He or she will be your main contact for approvals, questions, change orders, and the like. Having one owner rep eliminates the problems that arise when several people — the owners, the architect, the interior designer — give you directions. You need only respond: "Please have the owner representative contact me to discuss this."

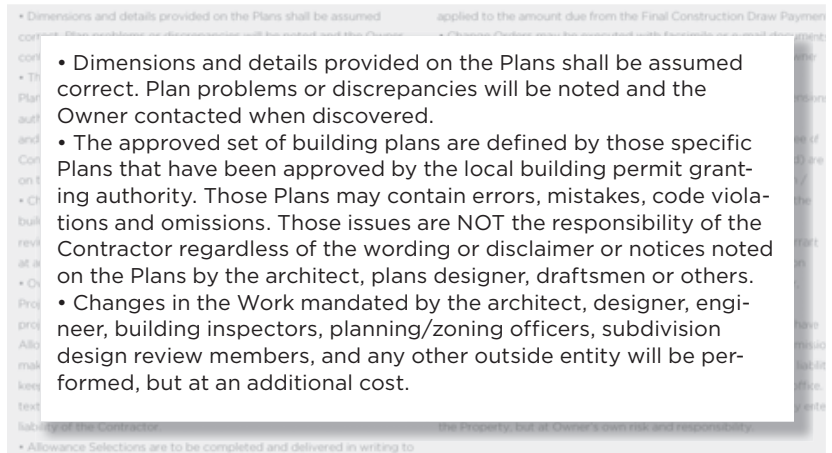
Similarly, my contract specifies that only my job superintendent and I can authorize changes. This prevents the "I told your mason about that while you were at lunch" syndrome. The mason can relay a message that the customer wants a different brick for the entryway, but nothing will happen until there's a signed change order.

Plan Details and Contingencies

You and the homeowner should each sign two sets of plans and detailed written specifications. The plans should have all necessary approvals — for instance, from the building department and the zoning or design board. Edits or open-ended issues should be noted, as well as the name of the person who prepared the plans, the date of signing, and the number of pages. The plans also should verify any regulations that apply: height limits, setbacks, solar access by neighboring properties, survey requirements, flood-zone requirements, even subdivision rules on workdays and hours.

All of this takes work. But no set of plans is 100 percent correct, and poorly detailed specs or limitations are often interpreted differently by clients and contractors. If the customers don't sign off on everything, you may have to assume responsibility for any errors.

This part of your contract should also note that local government can insist on changes — such as for updated building-code requirements — after the plans are approved. Because of this, I require remodeling clients to have at least a 15 percent cash reserve. I handle these issues in a paragraph labeled “contin-



gencies,” which states that the project price is based on current information, but most projects run into unforeseen problems (especially during demolition on a remodel) and these can cause prices to escalate.

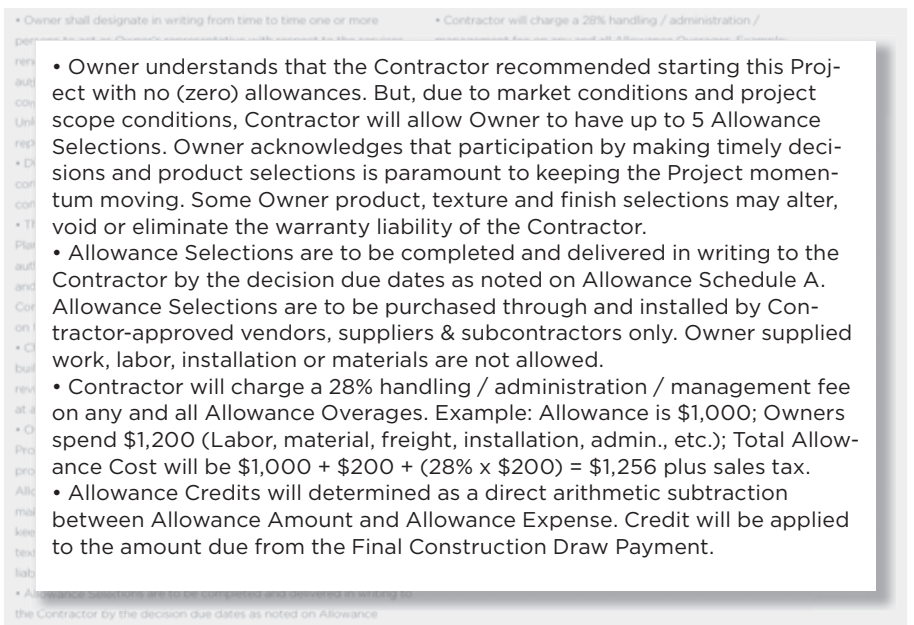
If you're not a design-builder, you should include a section in your contract that makes it clear you did not draw, finalize, or approve the building plans, and that you are not responsible for errors and omissions that may result in additional costs or delays.

Allowances

When you give clients allowances, you need to put an allowance summary in the contract. Each entry should define exactly what the allowance is buying and when. It should include the item (carpet, faucets, cabinets), the dollar amount, the date a decision is needed, any relevant footnotes, and the “calculated” allowance. It should also list where in the home the allowance items will be installed (for example, all rooms to be carpeted).

Specificity is critical. A carpet allowance of “\$35 per sq. yd.” is too vague and can expose you to liability; numerous court cases have backed up customers who filed suit for “unrealistic allowance amounts.” Instead, use a calculated allowance, which looks something like this: 358 sq. yd. + 18 sq. yd. (5% waste) = 376 sq. yd. x \$38/sq. yd. = \$14,288.

Carefully review the allowance summary with the owner. Mistakes in orders are nearly always blamed on the builder, not the interior designer or architect. (And make sure the allowance is for what you will actually buy. If you have 287 square yards of floor



area, but the carpet comes in 100-yard rolls, you need three rolls.)

Finally, limit the number of allowances you provide. Breaking ground with too many unknowns results in too much talk, duplication of effort, and a job that drags on past the completion date. In my book, projects should be a no-go until all facts, figures,

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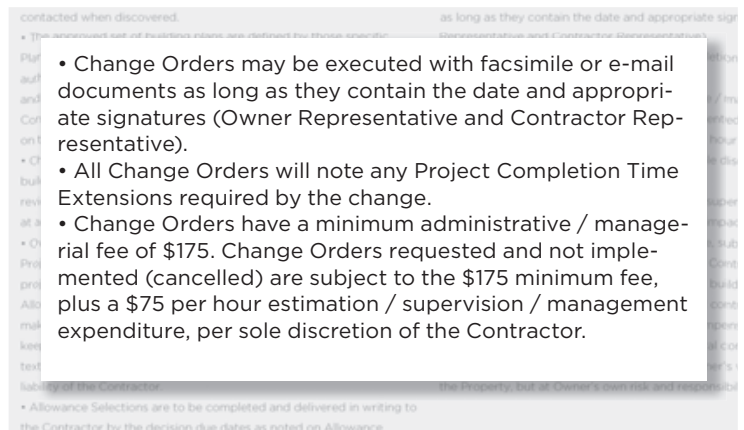
model numbers, selections, colors, textures, and the like have been chosen and priced — but that’s not realistic in today’s contracting environment. Although my preference is zero allowances, I’ll accommodate up to five for new construction and seven for remodels.

Clear policies prevent arguments and misunderstandings, so I have a separate section in my contract that spells out my allowance policies. It summarizes how each allowance will be spent, what vendor or vendors will be used, and how underages and overages will be handled.

Change-Order Policies and Procedures

This section should make it clear that all change orders will be in writing and signed by both parties; that there will be a minimum fee for preparing a change order, even if the change is cancelled; and that owner and builder reps are the only parties authorized to make changes.

Even small changes that don’t add cost should be documented. If the clients want a different wall color in the bedroom, I write a brief change order. That way, if things go south at some point, the clients can’t claim that I deviated from the specs.

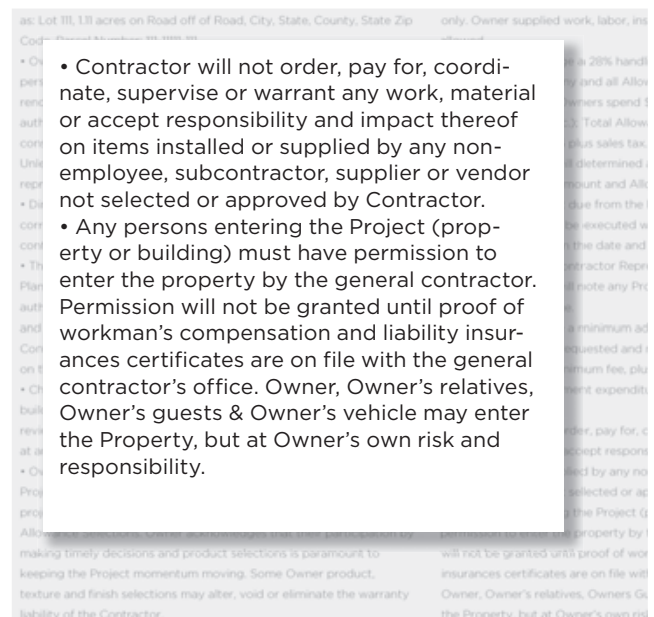


Work by Other Contractors

Some homeowners hire their own tradespeople for specific items. This frequently causes problems. You could find that their landscaper has cut off the water one day, or that their wallpaperer is getting in the way of your painter, or that his truck is blocking the driveway. And if one of their contractors causes damage or gets hurt, you will be held liable.

Your contract should spell out that your company is the only one authorized to manage, oversee, direct, hire, and fire anyone and anything for the project; the client can’t hire anyone without written permission from your company.

The contract should also require that all subs and suppliers have workers’ comp, liability, and license certificates on record at your office before starting work. If the subdivision requires automobile insurance verification for employees, subs, suppliers, or anyone else, that should be specified in the contract as well.



Dennis Dixon is a licensed general contractor in Flagstaff, Ariz., and a regular speaker at JLC Live.