

Essential elements of a construction contract

Handshake agreements won't cut it in construction.

Protect your business from legal conflicts with a foolproof contract.

But where do you start?

Industry-drafted contracts may be a good option, but they are hard to read, are not specific to the type of job and can favor architects depending on who drafted them. Most states have regulated the need for particular language in a contract that templates will not have. Simply put, industry templates can leave a contractor exposed in many ways.

You may want to consider consulting a legal professional to draft a contract that fits your business and scope of work. Keeping in mind that different jobs may need different agreements depending on the size and scope of the project. A \$15,000 bathroom remodel does not need the same elements as a \$750,000 custom new build.

Outside of the obvious legal protections, contracts can also be a sales tool. Professionalism paired with a transparent, easy-to-understand contract will sell you more jobs and make you more money. When a potential client cannot understand the contract, it becomes an obstacle. Having the ability to communicate the terms of the contract with understanding and confidence will diffuse any concern and seal the deal!

This guide will help prepare and inform you to successfully draft a contract with the guidance of a legal expert. It will not only reduce the risk of costly errors and disputes, but will also give your clients confidence in knowing they are doing business with the best in class.

1. State-specific language

What is this

States may have different rules and require language specific to these rules to appear in signed contracts.

Why it may be an element you need in your contract

Each state you work in may have different contract requirements such as: the right to cancel, formaldehyde and hazardous substances, e-signature laws, etc.

Other considerations for you and your legal expert

If you work in multiple states, you may need separate contracts depending on each state's required rules and regulations.

2. Delivery method

What is this

The project delivery method is the comprehensive process of planning, design and construction required to execute and complete a project or build.

Why it may be an element you need in your contract

The delivery method establishes strategy for a minimum of three parties: owner, designer and contractor. This section of the document should define contractual relationships and the documents you are relying on to complete the construction.

Other considerations for you and your legal expert

When deciding what delivery method to use, for example Design-Bid-Build or Design-Build, there are different levels of risk. You will want to assess with a legal expert to know which insurance policies cover the work and if you will need language that provides compensation in the event of design error.

3. Identification of key parties

What is this

The date of commencement is the date that construction activities will actually start, not just the date of signing or the date you intend to proceed. On the other hand, the date of completion is the date when a construction project is deemed sufficiently completed to where the owner can use it for its intended purpose. Importantly, the date of completion and final completion can often be two different things.

Why it may be an element you need in your contract

This section of the contract is important to have in the event of a dispute. If these parties are misidentified or missing, it can cause issues with collection rights.

Other considerations for you and your legal expert

In some cases, the person you are talking to or working with may not be the owner of the property. The contract needs to be communicated in a way that ensures you're doing business with the correct people.

4. Economics

What is this

This portion of the contract is where expectations are set and all financials (i.e. total price, draw schedule, etc.) need to be defined.

Why it may be an element you need in your contract

Reducing all conversations about project or build costs into writing allows you, the contractor, to be certain all parties are on the same page.

Other considerations for you and your legal expert

Transparency is key. You will want to define when and how payments will be made, terms for final payment and any penalty or interest for late payments.

5. Dates of commencement and completion

What is this

These are the dates that construction will begin and when construction will be circumstantially completed by.

Why it may be an element you need in your contract

Along with many other elements, these date help to set expectations with your clients. One thing to note with COVID-19, almost everyone is having a tough time relying on materials.

Other considerations for you and your legal expert

Do you have a "time is of the essence" clause in your current contracts? With this clause, the project must be done on the date specified, anything later would be a breach of contract.

6. List of documents also included in the agreement

What is this

A section to identify various plans, bids and other construction documents.

Why it may be an element you need in your contract

As the contractor, you will want to be specific and verify that you and your clients are relying on the same documents. If you plan to rely on a bid or proposal as the underlying plans, you should explicitly mention that in your contract to ensure that everyone is on the same page.

Other considerations for you and your legal expert

Buildertrend allows you to leverage the Documents feature and keep all governing documents such as bids and proposals in one easily accessible location.

7. Reps and warranties

What is this

The reps and warranties section sets obligations for the contractor and the homeowner. It fundamentally states that: "I, as the contractor, am going to build your project and you, as the homeowner, are going to pay me."

Why it may be an element you need in your contract

Having a reps and warranties section will encourage your clients to make prompt selections with a homeowner's policy that sets sufficient limits to cover the cost of the finished project.

Other considerations for you and your legal expert

You want to know that your client who says they're going to pay you, has the ability to pay you. It's important to include provisions in your contract that state the homeowner will provide proof if necessary.

8. Indemnification

What is this

An indemnification clause serves to compensate a party for harm or loss resulting from another party's actions. The language is designed to shift liability away from one party to the party causing the harm or loss.

Why it may be an element you need in your contract

This section will ensure you are prepared when mistakes happen. And when they do, you will carry the responsibility for damages you caused. However, you do not want to assume any responsibility for damages caused by the homeowner or some other third party.

Other considerations for you and your legal expert

Some states have laws in place to prevent a provision that is too broad. A legal expert can help you draft a clause that is best appropriate for your state and business.

Glossary

Indemnification A contractual obligation of one party to compensate the loss incurred to the other party due to the acts of the indemnitor or any other party.



9. Insurance and bonds

What is this

Insurance and bonds are a means of protection from financial loss. They are your first line of risk management before your contract.

Why it may be an element you need in your contract

In this section you will list your requisite coverages and, if necessary, include language that states the homeowner is maintaining coverage in relation to the work being done.

Other considerations for you and your legal expert

Ensure that your contract is written in such a way that states your insurance policy covers the risk you carry.

10. Change order processes

What is this

As a contractor, you want to identify and lay out your change order process.

Why it may be an element you need in your contract

Very seldom does a project get completed without a change being made and this is when most disputes arise. Changes can sometimes be made faster than the price of the change can be calculated. Be sure to record all changes and follow the process you laid out in your contract.

Other considerations for you and your legal expert

With Buildertrend's Change Order feature you can create and approve change orders on the spot. That being said, you still want to be sure to have the process laid out in your contract.

11. Termination and suspension

What is this

A termination and suspension clause will give certain parties the right to terminate or suspend projects in certain circumstances.

Why it may be an element you need in your contract

This clause will ensure that neither party has the right to walk away or change the contract without the agreement of the other parties.

Other considerations for you and your legal expert

Avoid a convenience clause. If you're a general contractor, a convenience clause could cause you to lose out on the money you would have made if you don't have work lined up to make up for the loss.

12. Dispute resolution mechanism

What is this

A process that resolves disputes or grievances.

Why it may be an element you need in your contract

Having a dispute resolution mechanism such as mediation or arbitration in your contract will ensure you're prepared in the event of a disagreement between parties.

Additional notes

Look for an upcoming webisode where we will be diving deeper into this topic!

13. Boilerplate clauses

What is this

Boilerplate clauses are specific provisions that are the same in every contract and never change. For example: merger clauses, legal fees and advertising

Why it may be an element you need in your contract

All contracts will have boilerplate clauses. It's important to understand what they are and how they affect each involved party.

Other considerations for you and your legal expert

Consider including a legal fees clause, which entitles the winner of a dispute to have their legal fees paid.

14. Force majeure

What is this

A provision that relieves a party from performing a contractual obligation when circumstances beyond their control arise.

Why it may be an element you need in your contract

If an event is unforeseeable, you will be protected by a force majeure clause if it's included in your contract.

Other considerations for you and your legal expert

Do not think of issues related to COVID-19 as under this clause. It may have started out protected, but we are now aware of the delays that can be caused by contact tracing and unavailable materials.

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Glossary

Dispute resolution mechanism

Arbitration is a form of alternative dispute resolution. It is a way to resolve disputes outside the courts and is commonly used in the construction industry.

Force majeure

Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties.

