

Contracts--And Why You Need One

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Many people in our industry still use a bid proposal or an invoice as a contract. Very often, the bid proposal or invoice itself contains nothing more than the agreed upon purchase price and a general description of what is to be done or what is sold or purchased. Oftentimes this is insufficient to protect your legal interests.

Specific contract conditions should be attached to the bid proposal or invoice. Make sure that the buyer dates and signs the contract conditions so that you can enforce the contract if the buyer does not pay.

Every business should have a contract. You might want to include the items listed below in your contract.

- 1. Scope of Contract** - Describe all the materials, equipment and labor that you will use in the contract. Make sure you describe in detail what is being covered by the contract. If you are a landscape contractor, attach a landscape drawing to the contract. A down payment provision is advisable, particularly for larger contracts.
- 2. Workmanship** - You should state that all workmanship will be of high quality and will conform to accepted standards in the industry. Workmanship can be specifically guaranteed for a number of years. However, this guarantee should be given only if you have a good track record and are willing to stand behind your work years after the contract is completed.
- 3. Guarantees** - Many businesses guarantee that plant materials will be replaced, or the purchase price will be refunded, if the plant material dies during the initial growing season. Make sure you qualify this guarantee by excluding any injuries to the plant material resulting from any mechanical damage, acts of God, unforeseen weather conditions, and the buyer's own negligence in caring for the plant material. Smaller plant material you may want to provide with no guarantees and merely sell it "as is."
- 4. Maintenance** - In landscaping service contracts, you should spell out when and for how long the services are to be conducted. The contract should also state whether the buyer will provide any materials, i.e. water, fertilizer, pesticides, etc. Maintenance services can be guaranteed to conform with accepted standards in the landscaping and maintenance industry. However, as a contractor, you are taking a risk if you give any additional guarantees.
- 5. Materials** - The contract should specify that the materials conform to a particular name, grade or line of product. If the specified materials are unavailable, substitute materials should be provided of "equal or similar" quality. You may want to provide a list of materials to the buyer

which describes both the primary and substitute products that you normally use in your contracts. This will limit potential claims regarding substitution of unspecified and substandard materials.

6. Unavailable Conditions - It may be advisable for you to cancel or delay a contract should weather conditions, strikes or other circumstances beyond your control interfere with the contract. This should be clearly stated in the contract. Leave yourself some leeway on the beginning date of the contract. The contract should state at "the earliest available date" or "beginning no later than _____."

7. Unforeseen Damages - The contract should limit the damages only to the contractor's own negligence or the quality of the materials. If landscaping services are provided, you should exclude any damages resulting from any interference with utilities on the premises. Also, you may want to exclude damages for thefts of plants or other materials left on the premises during the course of the contract. Check with your insurance agent to see if certain items are covered or excluded under your general liability policy. In some cases, you may want to state in the contract that any unforeseen damages will be the property owner's responsibility.

8. Permits - Usually the property owner will be responsible for paying for any necessary permits such as zoning, building or construction permits. Make sure that these costs are listed separately in the contract. Specify whether the contractor or the owner is responsible for obtaining the necessary permits.

9. Liens - Contractors must issue a separate "lien letter" to comply with the lien law. The letter will inform the buyer as to how liens are determined and enforced. The letter should also list the buyers' and the contractors' rights should a lien dispute arise under the contract.

10. Change Order and Extra Charges - Change orders and extra charges can result from concealed conditions, unforeseen circumstances, or by agreement between the parties. Any change orders or extra charges should be in writing and be initialed by the buyer. The contract can also include a provision that any "unanticipated" price increases for labor or materials are included as extra charges or a percentage of the contract amount.

11. Finance Charges - Some contracts are written to include a finance clause provision. Usually this charge is based upon a delay in payment exceeding 30 days after the invoice is presented. The buyer is charged an additional 1% or more a month. Keep in mind that your bookkeeping department will have to accurately track any unpaid bills and related finance charges if you want to include these charges in the contract.

12. Disclaimers - You should specify what is and what is not covered by any contract warranties. If some warranties are given under the contract, you might consider asserting a disclaimer clause for all other express or implied warranties not given, including any "implied" warranties for merchantability and fitness for a particular purpose.

13. Limitation of Damages and Remedies - In the event that the contract is cancelled by either party, the contract should state that the contractor is entitled to his/her time and materials expended when the contract is terminated. The contract can also state that the contractor will not be liable for any special, incidental or consequential damages to the buyer. Keep in mind that contract actions are usually enforceable for 6 years. You should consider inserting a contractual

provision to arbitrate any dispute between the parties before a lawsuit is started. The arbitration clause should state that the losing party agrees to pay the prevailing party's attorneys' fees and costs in an arbitration.

Good luck!

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