

# Practical Tips on Drafting Construction Contracts

By: Milene C. Apanian  
Abdulaziz, Grossbart & Rudman

Although some construction projects may be completed on a handshake and do not warrant a complicated and lengthy written contract, it is better to have a written agreement because an agreement establishes the obligation of the parties and helps avoid misunderstandings.

A successful construction project starts with having the right contract executed by the parties involved. A well drafted contract clearly identifies the duties of the parties, allocates risk between the players, and curtails unnecessary disputes during and after the construction is done. A construction contract must address a wide range of issues; a comprehensive study of construction contracts is not possible here, however, below are some practical suggestions regarding negotiating and drafting a construction contract.

## Negotiating The Contract:

Construction contracts are typically the result of negotiations by the parties executing it<sup>1</sup>. To successfully negotiate your contract, make sure you are negotiating with the decision maker and that the person has the authority to enter into a contract with you. Additionally, start with providing a copy of your “form contract” (with the boilerplate language) as the basis for initiating discussion. If you do not currently have a “form contract,” invest the time to come up with a typical or “form contract” you can alter and use on your future projects. While negotiating, if revisions are made to the contract, keep track of the various drafts and changes just in case a dispute arises. Also, in order to be credible during negotiations, be familiar with the proposed contract and understand the legal significance of the suggested terms, conditions, and various provisions. If you do not understand any portion of a proposed contract, get professional help before you execute the document. While negotiating the contract, identify and understand your priorities, let go of insignificant issues and do not argue over them. Be flexible, creative and willing to negotiate the terms. Most importantly, do not start the construction before there is an agreement regarding all of the terms and all parties have signed the contract. Once the work starts, your bargaining power diminishes.

## Drafting The Contract:

Choose The Right Contract: One size does not fit all when it comes to construction contracts. Evaluate the project and create a contract that works for the project. Is it a commercial or residential project? Is it a small, short term, simple job or a complex construction job? Do you want a Stipulated Sum/Fixed Price, a Cost + Fee, a Cost + Fee Guaranteed Max, or a Time & Material contract? All these issues must be considered and addressed when drafting the contract.

In order to save time and money, you can choose to start with a construction industry form contract generated by a construction trade association. The benefit of using industry forms is that courts in different states have already interpreted the meaning of the various contract provisions and the outcome during a court dispute will be more predictable than if a custom contract is used. However, since trade associations routinely revise the form contracts to reflect industry changes and requirements, make sure you use an updated and current version, not an outdated form contract. Additionally, in choosing a form contracts, understand which trade association drafted the contract because some form contracts may allocate or shift risks and duties with undesirable results for contractors.

When drafting your contract remember not to cut and paste from other form contracts and from contracts used by colleagues or competitors because you may violate copyright laws and may unintentionally pick up provisions that have adverse consequences for you.

Coordinate The Contract Documents: A typical construction contract usually has several components. Clearly reference and incorporate into your contract all the components, including the agreement (which has the signatures of the parties), the construction plans, the general conditions, the special conditions or the specifications, any exhibits, building codes and standard specifications. Before finalizing the agreement, review the different components, identify and resolve any conflicts that may exist between the plans, specifications and the notes. Include language in your agreement which sets forth the order of precedence or the contract documents and identifies which document governs if a conflict exists between the various parts.

---

<sup>1</sup> Most, if not all, public works contracts are drafted by public agencies and offered as a “take-it or leave-it” basis and contractors have little ability to negotiate the terms.

Typically, specially prepared specifications govern over general specifications, detailed plans govern over general plans, and detailed drawings and notes govern over general drawings and notes.

If other contracts, such as prime contracts, are incorporated into your contract, obtain a copy and review it before your contract is executed. Make sure the terms and conditions incorporated from the prime contract do not conflict with your contract or subcontract.

**Allocate Risk:** Clearly allocate risk and identify the duties of the parties. A few issues to consider are: Who will obtain the building permits, who will pay for them? Who will interface with the governmental entities such as local building departments and design review boards or the neighbors? How will the project proceed in case of unusual weather, labor strikes, material shortages, or natural disasters? What will happen if unforeseen conditions are met on the job such as unanticipated subsurface conditions? Who will pay for the removal of asbestos, mold, hazardous substances and lead paint? Who will obtain insurance for the project?

**Identify The Obligations of the Parties:** In order to avoid ambiguities and disputes during the project, expressly identify and establish the scope of the work to be performed. Clearly identify exclusions and items you do not intend to include in the contract. For example, expressly exclude asbestos, mold, hazardous substances and lead paint from your contract and require that the owner cleanup such substances or that the owner pay you extra for such work.

Also, identify the obligations and duties of the project owner. Avoid accepting responsibility for defects in design documents provided by the owner or the owner's architect. If you have concerns about the owner's ability to finance the project, include a provision allowing you to request assurances regarding the owner's financial arrangements to fulfill the project. Establish a reasonable timeline for the project completion and set a schedule of payments by the owner. Consider including a "Right To Stop Work" provision if the owner fails to timely pay you for the construction work already performed. Additionally, since changes and additions are common to construction projects, identify the procedure by which you will be compensated for extras.

**Check Local Statutes And Requirements:** Some states highly regulate construction contracts. Make sure your contract complies with statutory requirements of your state. For example, in California, a contractor performing a home remodel project must comply with the Home Improvement Act which requires that a written contract be signed by the homeowner before any work starts. The statute also regulates what must be addressed in the contract, including a detailed description of the work, identification of the plans and specifications, and exclusions, alternatives and allowances, the contract price and a schedule of payments. The statute also limits the amount of down payment allowed and requires that the owner be given a "Right to Cancel Notice", along with a "Notice to Owner" warning about mechanic's liens.

**General Considerations:** Typically courts will interpret contract ambiguities against the party who drafted the agreement. If you are proposing a custom contract, include language that says each party to the agreement consents to the use of the language and that any contract ambiguity shall not be resolved against any party. Additionally, consider including a dispute resolution provision identifying the procedure for resolving conflicts. For example, it is typical for construction contracts to include mediation or arbitration as a dispute mechanism instead of litigation. Also, you may decide to include an attorney's fees provision allowing the recovery of attorney's fees for the prevailing party in a dispute.

#### **Additional Tips:**

- Keep the contract clean, short, and concise: unnecessary, extra words do not necessarily make the contract better
- Spend time/get it right: it will save everyone a lot of headache later on, and help avoid lawyers!
- Be fair to all parties: an unfair contract will not be enforced by the courts
- Finalize the terms of the contract before work starts, and memorialize them in writing. Obtain the signature of all the parties before the construction starts. An unsigned contract may be unenforceable.

To conclude, a construction contract should be the roadmap for the construction project. If you have trouble creating the roadmap, chances are, you will have trouble performing the work. If you have questions and/or concerns regarding your construction contract, contact an attorney even as early as when you begin negotiations. With the help of an attorney, you can prepare a well drafted contract and try to anticipate and prevent disputes.



**Milene Apanian** assists contractors, subcontractors, material suppliers, and owners prevent and resolve disputes on public and private projects. Prior to practicing law, she worked for architects and contractors, gaining valuable knowledge and experience in construction. Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients and it does not establish an attorney-client relationship with the reader. This document is of a general nature and is not a substitute for legal advice. Since laws change frequently, contact an attorney before using this information. Milene Apanian can be reached at Abdulaziz, Grossbart & Rudman, (818) 760-2000 or by E-Mail at [mca@agrlaw.com](mailto:mca@agrlaw.com) or at [www.agrlaw.com](http://www.agrlaw.com).

May / Jun 2016