

Careful Contracts Win Good Customers

by Denise David Baer

The experience of a job gone sour, like the one I described in last month's column, was a hard way to learn a lesson, one that I wouldn't wish on my toughest competitor. But for my husband and me, it was also a much needed wake-up call. Until our company was hit with a lawsuit, we thought this contracting business was a piece of cake. We've always been the trusting sort, and we didn't have a clue how to protect ourselves from the occasional bad-seed client.

Obviously, the first line of defense is simply to avoid deadbeat clients altogether, but that's easier said than done. Any client and any job can turn sour if you let your guard down and miss the subtle cues that signal problems ahead.

If you're vigilant, however, you can reduce your chances of becoming tangled in an expensive misunderstanding. One of the best ways to protect yourself is to use a contract that's fair to both you and your clients. Such a contract should be drawn up by the best attorney you can afford, one who understands what it takes to run a business and whose principles of fairness reflect your own.

Custom Contract

Our old contract — the one that was in force on the job that almost took us down — was one of those standard three-part proposal forms available from a number of mail-order suppliers. The form provides space to write your own specs, and it includes basic boilerplate "terms" that cover the furnishing of labor and materials, contract sums, and payment dates. The one-page document concludes with a clause about acceptance that loosely addresses the issue of change orders and finance

charges for late payments.

I have no schooling in law, but even I can blow holes in this kind of proposal. One of the first changes we made was to develop a new contract from scratch. The current version is a seven-page document that addresses a multitude of issues. The initial pages contain the usual naming of parties, job location, contract documents, and so on. Early clauses also establish our labor rates and markup, stipulate responsibility for securing building per-

mits, and spell out other details.

Here's a brief rundown of the other major points addressed in our contract. We don't use the seven-page version for every job (we have a condensed version for small projects), but for jobs that exceed \$100,000, the unabridged version is essential. Also remember that laws vary from state to state, as does the nature of each job. Our contract suits our needs, but it may not work for you. Always consult an attorney before submitting any contract.

Contract Excerpts

The following excerpts illustrate some of the language included in our current contract to address problems encountered on earlier jobs. These excerpts are, however, taken out of context, and may not apply in all areas. Consult with an attorney before changing your contract.

Non-Binding Items. "Any specifications, drawings, letters, pricing, or conversation between Owners and Contractor prior to contract acceptance and/or during completion of project are to be used as guides only and are not binding upon Contractor."

Owner's Financial Condition. "Owners warrant that Owners have the present financial ability to pay Contractor within terms for all work. Owners have submitted to Contractor a recent financial statement or letter of owner's creditworthiness in the amount of \$ (contract sum) from (owners' banker), which statement Owners certify to be true and correct as of the date of this contract and contemporaneously with Contractor's extension of credit to Owners. Owners specifically warrant that there have been no adverse changes in Owners' financial condition. Owners shall immediately notify Contractor of any change or threatened change in Owners' financial condition which may affect Owners' ability to pay contractor in full."

Match Existing. "Contractor shall use best efforts to match existing finishes and materials. However, an exact match is not guaranteed by Contractor due to such factors as discoloration from aging, a difference in dye lots, and the difficulty of exactly matching certain finishes, colors, and surfaces."

— D.B.

Non-Binding Items

The cost-plus version of our contract clearly states that any information exchanged prior to acceptance is not binding on the contractor (see "Excerpts," on previous page). In other words, only those items included in the list of contract documents are binding to the contract parties. We were hung out to dry on just this issue in our "job from hell" (see last month's column), so watch what you say or put into writing to a potential client if your contract doesn't address this issue.

Mechanic's Lien

We never relinquish the right to a mechanic's lien to protect ourselves from a nonpaying client. To be fair, we protect the client from liens by subcontractors and suppliers by providing signed waivers. The subs and suppliers can sue us for nonpayment, but they can't go back on the client. This creates some extra paperwork for us because we have to get everybody to sign off before they start on the project, but it's routine now and our subs and suppliers are accustomed to it. (Not all states allow you to demand this kind of lien waiver — check with your attorney.)

Owner's Finances

The client is required to prove creditworthiness by providing us with a current financial statement or bank reference. Over the years, we've been asked to present financial statements to clients to prove that we are financially solvent; turnabout is fair play. We want to know up front that the client really can afford to pay for the work. This clause alone would have saved us from contracting the job from hell in the first place.

Billing and Payment Terms

Our contract spells out the billing arrangements, required down payments or retainers, finance charges for late payment, and exactly how many days the client has to produce payment. The language describes the conditions under which the client may

withhold payment, and also lists the consequences of withholding payment without cause.

Arbitration

We refuse to go to court ever again. It's a lose-lose proposition, except for the attorneys. Arbitration generally provides a win-win solution, and it's less likely to lead a contractor down the path to bankruptcy.

Insurance

The contract spells out exactly which types of insurance are to be provided, and by whom. We protect their interests; they protect ours.

Warranty Terms

We warrant our work for a period of one year from the date the certificate of occupancy is issued. The client must follow specific steps described in the contract to make a claim during that warranty period. We also disclaim any and all implied warranties (not all states allow this).

Hazardous Materials

We are not in the business of hazard abatement, and besides, our insurance carrier prohibits it. Our contract clearly states that if we encounter hazardous materials in the course of the project (not uncommon when working in older or historic buildings), we will cease work immediately. The client is responsible for hiring and paying a professional to remove the materials. According to the contract, the client must pay us for our services up to the date work ceases, and we can't be penalized for schedule delays caused by the abatement process.

Matching Existing Finishes

Because most of our work involves adding new work to old, we often have to match trim profiles, paint colors, siding, roofing, and other materials. Although we're known for working near-miracles, we include a clause that protects us from frivolous nitpicking by clients who aren't willing to pay for those extra efforts.

Decision-Making Authority

When dealing with more than one owner, it's always best to deal with a single decision-maker. Since this isn't always practical, however, we have a clause that makes any decision by any individual owner binding on all other owners. This is especially critical as it applies to change orders.

Attorney's Fees

The client is responsible for any attorney's fees we incur in efforts to collect sums due us.

Overkill?

Does all of this sound like overkill or paranoia? Maybe so, but once you've been through the wringer, you never want to repeat it. Plus, we have found that this daunting document sifts out potentially troublesome clients. Everyone who has signed this agreement has turned out to be a joy to work for. They are fair-minded people who treat contractors with dignity and respect. They understand what it takes to run a business, and don't begrudge us our need for a profitable bottom line.

On the other hand, those who have balked at our terms and refused to sign have later turned out to be some other contractor's headache. We've never regretted losing a potential client who complained about our contract. ■

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