

## **PUT IT IN WRITING:**

### **WHY YOU NEED A WRITTEN CONTRACT\***

by [Robert C. Port](#)\*\*

As an attorney practicing business litigation, I frequently am involved in lawsuits that could have been prevented had the parties clearly and carefully set forth their understandings about their business dealings before they started doing business.

Many times, parties will enter into a business relationship based on an oral agreement. While in most instances, an oral agreement can be enforced, if the parties' understandings or recollections of that agreement differ, the possibilities of a dispute are substantial. Other times, the parties do have a written agreement, but it is very general, or perhaps ambiguous, and does not completely address all of the arrangements between them. The unstated parts of their relationship might be left to their verbal agreements or future understandings. Again, in those instances, there is a real risk that once the parties have entered into their business relationship, a dispute might arise over those things which were not covered in their written contract.

While a written contract cannot fully protect you from someone who is dishonest, having a written contract may help to clarify and prevent potential disputes. In fact, the process of describing, in writing, how the business transaction or relationship will take place, and the obligations each party has to the other, will often reveal important issues that are best resolved before money is paid, goods are shipped, or services are rendered.

A contract can be viewed as a road map where, prior to entering into their relationship, the parties have thoughtfully considered all of the various needs and requirements each has, describe in clear terms how those needs and requirements are to be met, and provide the necessary assurance that their part of the bargain will be fulfilled. Sometimes, the parties realize, to their surprise, that the expectations each had for the other were so different that it is best not to enter into a relationship at all.

Often, business people are reluctant to incur the cost of an attorney to draft a proper agreement. Many businesses use form contract available from office supply companies, or copy agreements from other transactions. While a form contract might serve as a good starting point, they are by design very general, and might not provide the specific terms and conditions a particular transaction might require. Similarly, while a contract used in another deal might also be a good starting point, it too might have terms and conditions that are either not applicable or inconsistent with the new transaction being contemplated.

Unfortunately, when a dispute arises, the business person quickly realizes that the money spent on professional assistance before entering into an arrangement could have saved thousands, if not tens of thousands of dollars in avoiding a dispute that has now arisen.

With these considerations in mind, below are a number of subject areas that should be considered in almost every agreement, and addressed before the parties enter into their relationship, so each understands exactly what is required to perform their part of the bargain.

**Price and Payment Terms.** The price of the goods sold or services rendered should be clearly set forth. The manner of determining that price should also be considered. Will the payment be based on quantities? On hourly rates? On cost plus a percentage fee? Further, any conditions to payment (such as a certificate of substantial completion for the construction of a house, or certification from an independent auditor as to quantities, or certification of quality from an independent testing facility) should also be set forth.

**Time.** The time for performance should also be set forth. If goods are being purchased or manufactured, the delivery date should be specified. If services are being performed, a completion date, and perhaps interim milestone dates, should also be identified.

**Performance Criteria.** Performance criteria should be identified. If a product is being manufactured or delivered, what specifications should the product meet? If services are being performed, what standard should the

services meet? The parties may also want to identify how they will decide whether the services are satisfactory. Often, an independent third-party, such as an architect or engineer, might be designated as the one who determines satisfactory performance. In other instances, there may be an industry standard which must be met. Whatever the criteria, each side should understand before entering into the agreement what the performance expectation is.

**Warranties and Guaranties.** Are the goods sold "As Is", without any warranties or guaranties, or will the goods or services provided be warranted or guaranteed? What type of guaranty will be provided? What is the length of the guaranty? Who will stand behind the guaranty? Will the guaranty offer replacement of the defective item, a refund of all or a percentage of the purchase price, or some other remedy? Will the buyer's remedies be limited solely to what the warranty provides?

**Remedies and Damages.** The parties may wish to consider how any damages caused by delays in performance or delivery, or other failure to comply with the contract, will be addressed. Will the person causing the delay be responsible for compensating the other person for all actual damages caused by the delay? How will those damages be determined? Even though the parties might provide for "liquidated damages" (for example, \$100.00 for each day performance is delayed), the courts often find such liquidated damages clauses unenforceable when the actual damages caused by a delay can be determined with reasonable accuracy. A party might also want to limit their potential damages exposure, by limiting any recovery for failure to perform to a deposit previously given, or limiting damages to the price paid for the goods or services that should have been provided.

**Insurance.** If the goods or services being provided might cause injury to property or people, the buyer might require that it be protected by insurance provided by the seller. The parties should consider who will obtain and pay for liability insurance or other specific insurance coverage. In addition, one of the parties may wish for the other to indemnify them against any losses caused to others by the performance of the contract, such as an owner requiring that a builder indemnify it from damages caused to adjoining landowners by the construction process.

**Confidentiality and Trade Secrets.** If the agreement involves the sharing of any confidential information, the parties should consider whether there should be restrictions preserving the confidentiality of that information. If one party is going to share with the other any trade secrets or other proprietary business information, it is extremely important that the recipient to specifically agree that the information is not to be disclosed, that the recipient is required to take all proper precautions to prevent its dissemination, and that these secrecy obligations continue after the end of the contract.

**Non-competition and Non-solicitation.** In employment and services contracts, a non-competition or non-solicitation agreement may be useful. These types of agreements are heavily scrutinized by the courts, and must be narrowly written to achieve the legitimate purpose of protecting the former employer without unnecessarily restricting the former employee from earning a livelihood in their future jobs.

**Termination.** The parties should consider how they terminate their relationship if it is necessary to do so before the agreement is fully performed. Will a termination be permitted only “for cause” (i.e., failure to perform), or for any reason? How much notice must be given prior to the termination? If the termination is due to non-performance or poor performance, will the other party be given an opportunity to correct their deficiencies? Once terminated, how are any costs and damages claims arising because of the termination to be resolved?

**Disputes.** The parties may want to anticipate how and where to resolve any disputes that may arise. The contract may provide that if a suit is filed over the contract, it can only be filed in a certain location, such as the city where one of the parties has its principal office, or in the city where the project is being performed. Alternatively, the parties may wish to avoid the costs and expense of a lawsuit, and require that all disputes between them are to be resolved by arbitration. If so, where will such an arbitration take place and who will administer it? Will the parties share the costs of the filing fees and arbitrator’s fee, or must those be paid by the party seeking arbitration? There are a number of local and national organizations that provide arbitration and mediation services, and the parties may wish to

identify them in advance in their contact.

These are just a few of the considerations that should go into developing a contract. A written contract is not just a bunch of legalese and legal boilerplate. Properly written, a contract will help the businessman understand and anticipate many potential pitfalls before they occur, by providing an outline of the responsibilities each party has to the other. Gaining a full understanding of all of the responsibilities, obligations, and potential liabilities of a potential contract increases the probability that the relationship will work as planned, and avoid the need to call upon an attorney to sort out rights and responsibilities that are unclear because of an ambiguous contract, or no written contract at all.

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