

Small Business **CONTRACT BASICS**

Understanding Legal Language
Buying and Writing Contracts
Customizing Contract Templates
Negotiating & Executing Contracts
Settling Contract Disputes



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Introduction

If you're reading this booklet, it's because you're either thinking of buying a contract template, or you've just purchased a contract template from Joelle Steele Enterprises (joellesteele.com), and you're getting ready to customize it. This booklet is designed to answer any general questions you may have about small business contracts and to explain how to best customize your contract template.

Most small business, even small owner-operated ones, need great contracts (agreements). These documents should never be intimidating. Contracts should be reassuring because they are written for the sole purpose of clarifying your agreements and preventing misunderstandings. Most small business contracts are fairly simple agreements between two or more people (or "parties") or two or more businesses (or "entities").

A great contract generally defines and outlines all the details of what the parties are going to do. For example, if you remodel kitchens, your contract would list all the various kinds of cabinets, countertops, appliances, wall coverings, etc., that are to be installed; how much it's going to cost and how it's to be paid; and the time frame in which the work is to be completed. It should also include a lot of language to explain what happens if something goes wrong along the way, who's responsible, and how it is to be remedied. People used to refer to the latter as the "fine print," but it's not really fine print at all in modern contracts.

Contract Language

The following explains some commonly-found legal language (paragraphs, clauses) in small business contracts. These paragraphs are written differently according to the type of contract, and they are listed below in roughly the order in which they normally appear in a contract.

Preamble or Introduction. This briefly describes the general nature of the agreement being made and who is involved in that agreement.

Products, Services, or Scope of Work. This describes everything you are going to offer in the way of a service or product and how that service or product is to be performed or delivered. This paragraph always requires the most customization each time you use your contract in order for it to be as comprehensive as possible and to fit the specific needs of your individual clients or projects.

Approval of Prior Task. This is important because it states that when the client authorizes you to continue working, it means they have approved whatever else you have already done up to that point.

Additional Services. This should normally include the items that you don't offer as a standard or ongoing service, but which are available for an additional fee should the client request them.

Completion and Delays. This states how long it will take to complete a project and what kinds of delays are considered beyond your control.

Supervision. This assures the client that you will supervise all of the work that is done on their project site, including the work of subcontractors, and that you will schedule the work and make sure it is completed in a timely manner, and that you will enforce professional workmanship.

Workmanship. This assures the client that you have a professional approach to your work.

Title to Material. This explains that anything you ordered that is on the job site belongs to you until it is used or built for the client.

Ownership of Instruments of Service. This defines any designs or specifications that are written or drawn by you for a particular project, that are owned by you and your company, and that can be used only by you now and in the future. It further states that the client waives any damages that might occur should anyone else attempt to use those documents without your permission.

Guarantee. This may include your policy for guaranteed plant replacements, and/or it may include information about the warranty for an entertainment room device you provide.

Exclusions and Limitations. This is one of the most important paragraphs in your contract. It specifically states all of the potential types of damages for which you are not liable or responsible in any way.

Licensing, Certification, and Insurance. This can include several types of insurance and licensing depending on what kind of work you perform. It is required in most states and may vary by county as well. It is an assurance to your client that you are adhering to whatever laws prevail in your jurisdiction with regard to required insurance and/or any professional licenses or certifications you hold.

Client Responsibilities. This may be a series of paragraphs, or it may not be necessary at all and will therefore not appear in some contracts. If it does appear, it is because the client must bear some of the responsibility for the successful fulfillment of whatever service you provide.

Term of Agreement. In service contracts, this defines the length of time for which the contract is valid. It will likely contain cancellation and renewal language in it as well.

Fees and Payment. This is often divided into two to six paragraphs or subparagraphs that say how much is owed, when it is payable, and what happens if it is not paid or is paid late. It will also include language to explain any deposits, late charges, finance charges, or bad check fees.

Reimbursable Expenses. This includes any items that you pay for on behalf of the client, who then reimburses you, possibly after you have marked up the items slightly. Usually there is a stated limit on the total amount of reimbursable costs so that the client knows in advance that they are not going to be paying more than a certain dollar amount without first giving you their written approval to do so.

Lien Releases. This states that each time payments are made and a contractor pays subcontractors or other suppliers, that the contractor will provide a lien release to the client.

Retention. This states that a contractor may not withhold money from payment received from the client that is intended for subcontractors, suppliers, or other persons or entities.

Suspension of Work. This allows a contractor to stop work if payment is not made by the client as per the terms stated in the contract.

Notice of Lien. This allows a contractor, subcontractor, laborer, or supplier to file a lien against the client if they are not paid by the contractor or if the client has not paid the contractor.

Notice. This explains that a contractor can be served any kind of legal notice or notification by, most commonly, registered mail or in person. E-mail and faxing is sometimes allowed but is not recommended.

Termination of Agreement. This describes the terms and manner in which the contract can be terminated by the client.

Assignment. This states that neither the contractor nor the client can turn the job over to a different contractor without written consent.

Bankruptcy. This ensures each party that if one goes bankrupt, the other can cancel the contract.

Statutes of Limitation. This notes which state laws are in effect as far as statutes of limitation are concerned. This information may be covered by the Jurisdiction paragraph instead (see below).

Arbitration. This is for a company that either desires or is required by state or local law to settle disputes by arbitration.

Attorneys Fees. This essentially says that if either you or your client files a lawsuit regarding the contract, whoever wins will also be entitled to recover all their legal costs.

Jurisdiction. This states which city and state laws are used to interpret and enforce the contract. It is required in most contracts and is most useful when your business is located in a city that borders another state or county and you work in that state or county too, but are also governed by the laws in the state or county where your office is located.

Entire Agreement. This states that the agreement between you and the client consists only of what is in the contract, and that anything you said or promised or that they requested that is not written in the contract, is not included in the agreement.

Severability. This basically says that if either you or the client decide, after signing the contract, that you are not going to do a particular thing, such as install sprinklers on the north side of the property, that everything else in the contract still stands.

As you can see, there is a lot included in a basic, legally-binding contract. But, that said, you don't have to be a lawyer to write such a contract. It's a fact. Anyone can write a contract. No special licenses or certifications are necessary. So, you have options when you need a contract:

- buy a contract template online and customize it yourself.
- hire an attorney, legal writer, or paralegal to write a contract (they often use templates bought online and customize them).
- write a contract yourself.

The question is, which should you do? Let's look at your options.

Buying Contracts Online

There are many places online where you can purchase a contract template that is written specifically for your kind of business. The prices for the better contracts can range from \$20 to \$45. Some online services offer start-up packages ranging from \$150 to \$350 that contain many, if not all, of the contracts you could possibly need for your type of business, and sometimes many contracts you will never need.

Shop carefully for contract templates. Many of the ones that are floating around the Internet these days are from someone's lawyer-grandfather's files and they are written in archaic language that is difficult for the average person to understand, let alone rewrite to customize for their own use. You don't need or want a contract that is littered with old-fashioned terms such as "whereas," "wherefore," "heretofore," "ergo," "insomuch," etc. Those fancy words won't make a contract any more legal or binding, but they can quickly make a document unintelligible. Many online contract sellers have a sample contract or a sample page of a contract for you to look at so that you can see how their contracts are written. Look for contract templates written in modern everyday English.

If you purchase a contract template online, you will find that it is in "boilerplate" or template form. Most templates have several paragraph options from which to select, and will probably include far more than you will need. That's okay. Better to have more than you need than not enough. So don't be intimidated by the length of a template. Your finished contract or document might turn out much shorter, or it might be much longer. It all depends on how complex it needs to be for your business.

The part of a contract template that requires the most customization will almost always be the part that outlines the products or services you sell. Most contract template writers leave this section blank because no two companies in the same type of business are run the same way or provide the exact same products or services. So, you may want to alter some existing language to suit your needs, or you may have to write that section from scratch. You can write it in paragraph form, or if you have a lot of items in that section you might want to put them in a bulleted or lettered list.

The following is a step-by-step guide to customizing some of the most common contract templates:

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- Save the original template that you received/downloaded to your hard drive. Back it up to an external hard drive, flash drive, or CD.
- Open the template on your hard drive, usually using Word. Go to the File Menu and click on “save as.” Give the file a new name and save it. That is the document you will use to create your customized contract.
- Type in your name, your company’s name, etc., wherever it is indicated, usually in the introductory paragraph and at the signature lines.
- Some contract templates use generic nouns throughout the document, such as “contractor” and “client,” but you can use the search and replace function in Word to replace these with other nouns you prefer or with the name of your company and your client.
- Edit and/or rewrite any of the descriptions of services and products you sell, or the way in which you provide services or make deliveries.
- Delete any services or products that you never provide. For example, if you’re in the horticultural industry and you don’t ever do cut flower services or you don’t ever install sod lawns, remove all language that pertains to those services.
- Add every possible service or product you can think of that you do provide that is not already included in the contract. Make this section as comprehensive as possible to make your customized contract template as complete and easy to use as possible for all your future clients.
- Type in your own hourly rate and payment terms. Follow the existing language for this because payment issues are often challenged in court due to missing, vague, or ambiguous language.
- Type in the name of the city, county, and state in which you do business in the Jurisdiction paragraph.
- Type in the information for the Licensing, Certification, and Insurance paragraph, if these are required in your city, country, state, or industry.
- If you have added or deleted paragraphs, be sure to renumber them and also to change any references to a particular paragraph number so that they are correct.
- Back up your customized contract to an external hard drive, flash drive, or CD for safekeeping. If you further customize it in the future, always make a backup copy.

- Take your customized contract to an attorney for review. This last step is the most important, because during the customization process, some people rewrite or entirely delete important language, or they add language that is not legal. An attorney will catch those things and will also advise you of any language that should be added to ensure that the contract is fully enforceable in your jurisdiction. Remember, there is no online contract template provider that can anticipate all of the tens of thousands of laws at the city, county, or state levels, or that are peculiar to every industry. Only a local attorney can do that.
- Use your contract. Once your attorney has either approved your contract or has made changes that you have entered into your template, you can save it and use it. Every time you want to make a contract for a new client, you will simply open up your customized contract in Word, go to the File Menu, click on “save as,” and then name the contract file something like:

Contract-Maint-Harrison.doc

The above example would be for a maintenance services contract for a client named Harrison.

- Customize this newly-made contract to specifically meet the needs of the client (in this case, the maintenance services for the Harrisons).

Hiring An Expert To Write A Contract

If customizing a contract template sounds like it would be too much for you, perhaps an attorney, legal writer, or paralegal can help you customize a template (or write a contract from scratch). Some legal professionals have their own contract templates, or they download them as needed from the Internet and customize them for you.

If your business is a highly complex one or requires many different kinds of contracts, you should probably hire an attorney. In fact, hiring an attorney is always best if you require legal advice in addition to a contract. For example, if you are incorporating or doing a corporate merger, a lawyer should always be advising you.

Aside from obtaining legal advice, the writing of a contract by an expert is going to be costly. No matter how skilled the expert is, writing, editing, and customizing contracts is very time-consuming, and time is money. Depending on where you live, the complexity of the contract(s)

you need, and what needs to be done (writing, editing, or customizing), you will probably pay anywhere from \$250 to \$1,200 (or more) for the expert to write the contract. In most cases, legal writers and paralegals are not that much less expensive than attorneys when it comes to contracts.

While this seems like the least amount of work for you, it doesn't let you off the hook entirely. You can expect to spend a significant amount of time discussing your business and contract needs, any special services you provide, your work methods, your payment terms, etc. Someone else may be doing the writing, but you have to give them the information in order for them to do it correctly.

Writing Your Own Contract

In most cases, you should not - and possibly cannot - write your own contracts. Doing so can put you at risk should that document ever be challenged in a court of law. Most people simply do not possess the legal knowledge or the writing ability to create an enforceable contract. In fact, most self-written contracts are poorly written, are ambiguous or unethical, have conflicting language, and are also missing some of the key language and clauses that will provide the most protection. These documents are often difficult to negotiate and rarely hold up if challenged.

However, if you are an above-average writer and have some legal knowledge, you might be able to tackle such a document. And if you do, be ready to spend at least ten hours writing it. And once you are done, be sure to take it to a lawyer for them to review. You'll save money this way, but don't be surprised if your attorney advises you to make changes.

Here are some tips for those who want to write their own contracts or legal documents:

- Learn about the laws that govern your type of document. Go to the library and do research online to find out what is usual and customary in your industry and in your state. Not knowing the laws can affect the enforceability of your document should it ever be challenged or broken.
- Be sure you understand your industry inside and out. If your contract involves an agreement with another industry, learn as much as you can about that industry as well. Contracts are written for two parties, and everyone's needs must be outlined equally well.

- Organize the information in your contract so that it makes logical sense. Put similar things next to each other. For example, put all the paragraphs for fees and terms listed together one after another. It can be most helpful to make a list of what you want to include based on the process itself. For example: meet with the client to discuss their needs in detail; collect deposit of \$1,200 from client to begin work; do six rough sketches of work to be done; submit rough sketches to client for review and approval; make any client changes to the work; submit changes to client for approval; do final design; schedule work to be done; deliver work to client; collect final payment from client. With this kind of a list, you can then examine each step more closely and determine what should be written for it to ensure it is carried out correctly and what the consequences are if it isn't.
- Always prepare for the worst-case scenario. Every legal transaction has some risks involved. Think ahead to what yours might be and how they can be prevented by what you and the other party do and how that can be written into your contract. For example, if you are a contractor, you will have the need to protect materials stored on a client's property from vandalism, fire, flood, etc. But, if you're a veterinary hospital, you'll need a clause to protect boarded pets from fire or flood. Almost any "force majeure" or "casus fortuitus" (acts of nature or chance) clause will work with most contracts, but every industry has certain risks that should be spelled out.
- Be prepared for breaches (breaking) of a contract. These are inevitable. You want to avoid lawsuits by including language that will prevent a breach before it happens. This can be done by using carefully-written instructional language that says a party has a certain number of days or ways to make good on whatever was done that caused the breach. Usually, when something goes wrong in a transaction, it is because something was left out of the contract, and one party is expecting something that the other is not, and never was, prepared to give.
- Put aside your fears and prejudices and always be fair. A good contract is one that is equitable. No one should ever feel forced to sign a contract that is not fair to them. Do not ever use "punishing" clauses or try to slant a contract in your favor, because if the other party signs it, they may later be able to legally break the contract on the grounds that they signed under duress.

- Write clearly and simply. Be straightforward. Use ordinary English. Write in short sentences. Check your spelling by eye and with the spell checker on your word processor. Be very careful about punctuation and the use of “and” and “or,” as they can change the meaning of a sentence. Make sure nothing can be interpreted in more than one way. No matter how honorable your intentions or how well you know the law, sloppy writing will prevent anyone from understanding your contract, may prevent them from signing it, and may ultimately result in a broken contract.

Free Contracts

The one thing you do not ever want to do under any circumstances is to use a contract you didn’t pay for. You may find one online that is free, or you may be tempted to “borrow” someone else’s contract and either use it “as is” or use it as a model to customize for your own use.

Using “free” contracts, whatever the source, is probably the single biggest mistake you can ever make as far as contracts are concerned. Even if a website or a person tells you that they got their contract from an attorney, you have to remember that no two businesses - even ones in the same industry - are ever exactly the same. You don’t know who their lawyer was and how much experience he or she has in writing contracts or what their knowledge of your kind of business might be. You also have no idea what may be missing from their contract or how much it may have been changed, possibly with added language that is not ethical, let alone legally binding and enforceable.

Don’t pinch pennies when it comes to contracts. You get what you pay for, and when you pay nothing, that’s what you’ll usually get.

Negotiating Contracts

Once you have submitted your contract to a client or other entity for signature, you can expect that the other party might want to negotiate. And it doesn’t matter who presents the contract. Negotiation is part of the process whenever you are establishing a work relationship with someone.

Negotiation is not and should not be an intimidating process. And, it’s a lot easier than it seems. It’s all about reaching a compromise by being ethical, fair, and reasonable; by setting your emotions aside; by asking questions and listening carefully; and by putting yourself in the other

person's position to better understand their needs. That's how you will both ultimately get what you want. Remember, you are entering into an agreement with someone, and trying to play it heavy-handed is hardly the way to ensure success or longevity in any business relationship.

What's negotiable in a contract? Just about everything. But some things are more negotiable than others and make a bigger difference overall to both parties, namely money (usually how much), payment terms (e.g., deposits, progress payments, ongoing payments, invoices, statements, work change orders, final billings), responsibilities of the parties (e.g., who does what and when they do it), the duration of the contract (e.g., one-time only, a year, open-ended), and how a contract can be terminated (e.g., in writing, orally, with 30 days notice).

A contract has to be acceptable to all parties who enter into it. Negotiation is what makes that happen. So negotiate your contract carefully - usually by making changes and sending it back and forth by E-mail - and enjoy a smooth and profitable business relationship.

Notarization Of Contracts

Having a contract or other legal document notarized is a way to have an independent person, the notary public, verify the identities of the people signing it. Notarization is always done in person in front of the notary public at the same moment that the document is being signed.

Most contracts or agreements do *not* require a notary, but it is not impossible for someone to deny having signed a contract, so having a contract notarized can eliminate that hurdle if an agreement is ever breached (broken). Some state courts automatically accept a notarized signature as authentic.

Notarization does not convey legitimacy or any kind of legal status to a contract or other legal document. All it does is provide verification by an independent party that the people who signed the document are who they say they are. The only way a contract can be legally binding is if the contract itself is well-written with all the appropriate language in it to cover the agreement between the individuals.

To get your contract notarized, contact a local notary and find out the requirements in your area for any language to be included in the signature area of the contract so that you can insert that language before visiting the notary public and signing the document.

Contract Dispute Resolution

Most people are familiar with litigation as a means of resolving a dispute. You go to Small Claims Court or you hire a lawyer and file a lawsuit in Superior Court. But as court dockets fill and delay trials for years, other alternatives have come to the forefront of conflict resolution, the most common being mediation and arbitration. Both options rely on the intervention of a neutral third party and can be binding or non-binding. The following is some background on arbitration, mediation, and litigation to help you decide which option is best for your needs.

- Mediation is private, confidential, and usually non-binding. It is faster than arbitration and far less costly than litigation. The mediator is a neutral third party who helps negotiate and facilitate a compromise and settlement. Most mediators are attorneys or accountants. They do not provide legal advice, draw legal conclusions, or make decisions or awards. If the parties arrive at a settlement, a new agreement is written, sometimes with the mediator's assistance. The settlement can be filed with the Court to enforce the new contract if a party ever tries to breach it.

- Arbitration is next if mediation fails or the case is too complex for mediation. Arbitration is more costly than mediation, and the arbitrator's decision or ruling is usually, but not always, binding. Arbitrators are often experienced attorneys or judges who are familiar with the kind of dispute in question and the branch of law necessary to arbitrate it. They have powers like a judge which are limited to the case at hand. They listen to testimony and question the parties and any witnesses or experts. There are no out-of-court settlements. Arbitrators arrive at a final written decision or ruling that both parties must adhere to. If the arbitration is agreed in advance to be non-binding, then either party may reject the ruling and proceed with litigation. Arbitration is private and any documents used in the process are not made public.

- Litigation is the process of discovery, pre-trial actions, motions, settlement attempts, and the trial itself. In general, litigation should be used only as a last resort when it comes to conflict resolution. It is very expensive, time-consuming, emotionally and psychologically debilitating, and, worst of all, it is really just one giant crap shoot. You have no idea what to expect in the way of an outcome because you are at the mercy of lawyers, a judge, and a panel of jurors who may not necessarily be your peers. Everything that is revealed during litigation is a matter of

public record. That means anyone, anywhere, including the press, can access it. Once a trial has ended and a verdict or judgment has been rendered, it is binding on both parties. But, if the losing party wants to pursue it further, they can always appeal to a higher court. Litigation can, in this way, drag on for years.

- Small Claims Court is a form of litigation for cases involving small amounts of money. These courts have monetary limits, so you need to check with yours to find out what the limit is in your city or county. Small Claims Court judges are very sharp. They have heard it all and then some. Don't make lame excuses or lie to the judge. They'll see right through it. All they are interested in is the evidence that supports your case: photos, diagrams, correspondence, cancelled checks, invoices, eye-witnesses, and a signed contract. In general, the person with the most evidence wins. Once you get a judgment in your favor, you have to collect the money. Sometimes you'll get it while you're still in the courthouse. Other times you will need to ask the judge for a writ of execution. The writ goes to the marshal's office and they collect the monies for you.

About Joelle Steele and Joelle Steele Enterprises

Joelle Steele has been writing contracts since the mid-1970s. She has written as many, if not more contracts, than most lawyers, and many of her customers are attorneys. She has been the leader in small business contracts since 1983 when she first began selling her contracts through forms houses as three-part forms. She began selling her contract forms from joellesteele.com in 1994, and in 2002, she began selling them at joellesteele.com as customizable Word docs. Today, her contract templates are still downloadable at joellesteele.com, where you will find more than 100 different contracts for small businesses, all reviewed by an attorney to ensure that they are accurate and legally binding. And she has kept the price at \$24.95 for more than 30 years!