

Surviving a Down Market

This column is the ninth in a series that will answer the most pressing questions we receive from members struggling to stay afloat.



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CONSTRUCT | MARKET | PROTECT

Q: I've got a contract, but how do I know if it's good enough to protect me from a lawsuit?

A: Even the best builders have loopholes in their contracts. Of the construction contracts I have reviewed, here are some of the most common mistakes...and how to fix them.

1. Limit the Time to Sue

Most construction contracts have a warranty section with a defined time limit, usually one or two years. Many contractors feel assured that once this period passes, they can't be sued. This is not true. A clever homeowner's attorney will sue you for breach of contract instead of breach of warranty. Although they are similar, courts consider breach of contract and breach of warranty separate legal claims. Unless your contract specifically states otherwise, a customer has six years from the date of substantial completion to file a breach of contract lawsuit. To fully protect yourself, include a provision—outside of the warranty section—that specifically limits the time period for any lawsuit to be filed to enforce the contract.

2. Give Proper Notice to Customer

When your construction contract is with a property owner, you are required to provide a one-page notice called the "Notice to Customer" as described in RCW 18.27.114. The owner must sign the notice before you start work. Otherwise, you forfeit your lien rights and violate Washington's Consumer Protection Act. The statute requires the notice to be "in lower case and upper case twelve-point and bold type where appropriate." Often, I see contracts with the

font too small, not correctly bolded or capitalized, or without the notice altogether. For the proper format, get a copy of the "Notice to Customer" at www.lni.wa.gov. Click "get a form or publication," and in the search box type in the words "notice to customer." Some contractors get this form but then forget to fill in the blanks before giving it to the customer. Make sure you enter your license number, expiration date, and the amount of the bond or deposit. Putting the notice in your contract is not required, but a good idea. That will help you remember to mail or personally give it to the owner.

3. Be Clear About Labor Rate Markups

When you contract on time and materials, rather than fixed price, your contract must be clear about whether markups are applied to your stated hourly labor rates. Most contractors mark up materials, subs, and other costs, but don't mark up hourly rates. However, if you do, be sure to clearly spell out the labor markup in your contract. If your contract is not clear, a court will easily rule against you in a dispute because your contract will be seen as misleading the customer. This problem, and the resulting customer frustration, can be avoided if you do not mark up your labor rates. As an alternative, if your labor rate is \$40 per hour and your practice is to mark up materials and labor rates by 15%, you can set your labor rate at \$46 per hour and not apply a labor markup. However, if you insist on setting a lower labor rate and marking it up along with the cost of materials and subs, your contract must clearly state this to the customer. 🏠