

## CONTRACTUAL QUESTIONS

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Contracts are the legal basis for business transactions. Contracts are particularly fundamental to the construction industry, since design and construction contracts typically need to address more or less complicated technical subject matter and relatively large amounts of money. Despite the importance of contracts to construction business, proper contractual procedures are frequently not followed. This may be due to lack of knowledge or lazy business practice. It should be the goal of owners, design professionals, contractors, subcontractors and material suppliers to continually look to improving their contracting practices.

When entering into any contractual relationship, the following questions should be answered:

1. Who or what am I contracting with?

Generally, business can be done by an individual in his or her own name, by an individual using a trade name (a proprietorship), through an incorporated company, by a partnership or by a joint venture (a partnership for limited purposes). It is not always immediately obvious which specific entity and which type of business operation you may be dealing with. Because of usually unintentional, and sometimes intentional, inaccuracy, the use of trade nicknames or inconsistent paperwork, even letterhead or other business documents may not correctly nor definitively identify the party with which you are negotiating.

The nature and identity of the party with which you contract affects who you can claim against and for what, if that party fails to perform its side of the contractual bargain. It is therefore essential that any party intending to enter into a contract properly identify in the contract both itself and the other contracting party or parties.

2. How am I contracting with that person or entity?

In order to evidence what was and was not agreed to, written contract documents are obviously preferable to verbal agreements, and should be considered essential. The level of sophistication of construction-related contractual documents often depends on the nature or value of the contract or the level of the relationship on the design/construction contract pyramid (eg. detailed standard form general contract vs. simple purchase order for the supply of material to a subcontractor). Contractual forms should be periodically reviewed as to the adequacy of the contractual format used, particularly since changed circumstances or inertia sometimes result in the use of obsolete or inapplicable provisions or forms.

3. What am I contracting for?

Whether it is a detailed standard or customized form contract, a purchase order or a letter agreement, every contract should include at least the basic components of proper identification of the parties, the scope of the work, the price to be paid, the procedures for payment and the time for performance, and will preferably also address the issues of termination and dispute resolution. The sufficiency of the contract document should be considered in light of its critical role as the agreed “bible” of the parties' rights and responsibilities.

4. Do my paperwork and procedures reflect the contractual relationship?

A contract is not just for show. Its operation and effectiveness should be reflected by close compliance with the procedures which it calls for, such as the methods of claiming for and making payment or claiming for and authorizing extra work. This includes ensuring that the correct entities as identified by the contract perform those procedures (e.g. the owner makes direct payment to trade contractors, rather than falling into the convenient practice of passing those funds through its construction manager). This also includes ensuring that letters, invoices, cheques and all other documents are issued by the proper parties, not by related companies or by an individual who is not a contracting party.

Contracts are an everyday feature of carrying on business in the construction industry. Applying proper contracting practices and procedures is simply good business sense.