



Contract Elements

You've successfully prepared and secured the project you worked so hard to get. The next step is to draft the arrangement into a formal contract. Are you covering all of the necessary components in your contracts? This article is not an essay on contract law, nor should it be substituted for professional legal advice.

What Constitutes a Contract?

Almost any written or verbal exchange between a contractor (or subcontractor) and an authorized representative of the owner (including an agent, architect or construction manager) that defines a clear scope of work and specific remuneration for such work can be considered a contract.

It is highly recommended that any and all work to be performed on a construction project be documented by way of a written contract.

According to West's Encyclopedia of Contract Law, a Contract is defined as follows:

“An agreement between two or more persons that creates an obligation to do, or refrain from doing, a particular thing.”

The **purpose** of a contract is to *establish the agreement which the parties have made* and to fix their rights and duties in accordance with that agreement. The courts must enforce a valid contract as it is made unless there are grounds that bar its enforcement.

The courts cannot create a contract for the parties. When the parties have no express or implied agreement on the essential terms of a contract, there is no contract. Courts are only empowered to enforce contracts, not write them, for the parties. A contract, to be enforceable, must be valid, subsisting contract between parties. The function of the court is to enforce agreements only if they exist and not to create them.

Scope of Work

This clearly identifies the work or service your company intends to provide. This can be in several forms. It can be in narrative form and explain the work being performed, or it can be in bullet points to identify the work being contemplated.

The scope section should cover the following:

- The scope of work must be thorough and very specific. This is the area where many companies get into trouble. You know what you intend to provide, but if it is not carefully communicated in a scope of work, the customer may have other expectations.
- The scope of work should also identify work that is not included in the proposal. This is especially true if your work is contingent on others providing a service. As an example, if an electrical contractor is pulling cable and providing power, your scope should identify that cable and electrical outlets are provided by others.

Types of Contracts

Express Contracts

In an express contract the parties state the terms, either orally or in writing, at the time of its formation. There is a definite written or oral offer which is accepted by the offeree (the person to whom the offer is made) in a manner that explicitly demonstrates consent to its terms.

Implied Contracts

An implied contract consists of obligations arising from a mutual agreement and intent to promise that has not been expressed in words. Implied contracts are as binding as express contracts. An implied contract depends on substance for its existence; therefore, for an implied contract to arise there must be some act or conduct of a party to be bound.

- An implied contract is not expressed by the parties but, rather, suggested from facts and circumstances indicating a mutual intention to contract. The implication of a mutual agreement must be a reasonable deduction from all the circumstances and relations contemplated by the parties when they enter into the contract or which are necessary to effectuate their intention.
- After successfully preparing and securing the project, the arrangement between owner and contractor must be drafted into a formal contract. This chapter is not an essay on contract law, nor should it be substituted for professional legal advice.

Elements of a Contract

The requisites for formation of a legal contract are:

- an offer,
- an acceptance,
- competent parties who possess the legal capacity to contract,
- lawful subject matter,
- mutuality of agreement,
- consideration, and
- mutuality of obligation.

1. Offer

- An offer is a promise that is by its terms conditional upon an act, forbearance, or return promise being given in exchange for the promise or its performance. It is a demonstration of willingness to enter into a bargain, made so that another person is justified in understanding that his or her assent to the bargain is invited and will conclude it. Any offer must consist of a statement of present intent to enter a contract; a definite proposal that is certain in terms; and communication of the offer to the prospective offeree. If any of these elements are missing, there is no offer to form the basis of a contract.
- An advertisement, *price quotation*, or catalogue is customarily viewed as only an invitation to a customer to make an offer and not an offer itself. In addition, the courts have held that an advertisement is an offer for a unilateral contract which can be revoked at the will of the offeror, the business enterprise, and prior to performance of its terms.
- An exception exists, however, to the general rule on advertisements. When the quantity offered for sale is specified and contains words of promise, such as "first come, first served," courts enforce the contract where the store refuses to sell the product when the price is tendered. Where the offer is clear, definite, and explicit, and no matters remain open for negotiation, acceptance of it completes the contract. New conditions cannot be imposed on the offer after it has been accepted by the performance of its terms.
- An advertisement or request for bids for the sale of particular property or the erection or construction of a particular structure is merely an *invitation for offers* that cannot be accepted by any particular bid. The bids submitted are, however, offers, which upon acceptance by the offeree become a valid contract.
- An offer continues until the expiration of its specified time period or, if there is no time limit, until a reasonable time has elapsed. A reasonable time is determined according to what a reasonable person would consider sufficient time to accept the offer.
- When the offer, either verbally or by conduct, clearly demonstrates that the offer is no longer open, the offer is considered revoked when learned by the offeree. Where an offer is made to the general public, it can be revoked by furnishing public notice of its termination equal to the publicity given to the offer.

2. Acceptance

- Acceptance of an offer is an expression of assent to its terms. This expression of assent must be made by the offeree in a manner requested or authorized by the offeror. An acceptance is valid only if the offeree knows of the offer, the offeree manifests an intention to accept, the acceptance is unequivocal and unconditional, and the acceptance is manifested according to the terms of the offer.
- An offeror who specifically states that there is no contract until the acceptance is received is entitled to insist upon the condition of receipt or upon any other provision concerning the manner and time of acceptance specified.
- Rejection of the offer or revocation of conditional acceptance is effective upon receipt. A late or defective acceptance is treated as a counteroffer, which will not result in a contract unless it is accepted by the offeror. If offers cross in the mail, there is no binding contract, since an offer cannot be accepted if there is no knowledge of it.
- An acceptance must comply exactly with the requirements of the offer, and omit nothing from the promise or performance requested. If a response to an offer purports to accept it but adds qualifications or conditions, then it is a counteroffer and not an acceptance.

3. Competent Parties

- A natural person who agrees to a transaction possesses complete legal capacity to become liable for duties under the contract unless he or she is an infant, an insane person, or intoxicated.

4. Subject Matter

- Any undertaking can be the subject of a contract provided it is not proscribed by law. When a contract is formed in restraint of trade, courts will not enforce it because it imposes an illegal and unreasonable burden on business by hindering competition. Contracts that provide for the commission of a crime or any illegal objective are also void.

5. Mutual Agreement

- There must be an agreement between the parties, or mutual assent, for a contract to be formed. In order for an agreement to exist, the parties must have a common intention or a meeting of minds on the terms of the contract and subscribe to the same bargain. An agreement is binding if the parties concur with respect to the essential terms and intend the agreement to be binding, even though all the details are not definitely fixed. The price and quantity of goods are usually essential terms of the contract that must be agreed upon if the contract is to be enforced.

6. Consideration

- Consideration is a legal detriment suffered by the promisee that is requested by the promisor in exchange for his promise. A valid contract requires consideration by both parties (i.e. payment of cash in exchange for services rendered). Love and affection are not consideration.
- The common-law courts refused to inquire into the adequacy or fairness of a bargain, finding that the payment of some price constituted legally sufficient consideration. If one is seeking to prove mistake, misrepresentation, fraud, or duress-or to assert a similar defense-the inadequacy of the price paid for the promise might represent significant evidence for such defenses, but the law does not require *adequacy* of consideration to find an enforceable contract.

7. Mutuality of Obligation

- Where promises constitute the consideration in a contract, they must be mutually binding. This concept is known as mutuality of obligation. If one party does not actually bind himself or herself to some performance or forbearance, it is an illusory promise and there is no enforceable contract.
- Where the contract provides one party with the *right to cancel*, there might be no consideration because of lack of mutuality of obligation. If there is an absolute and unlimited right to cancel the obligation, the promise of the party with the right of cancellation is illusory and the lack of consideration means there is no contract. If the power to cancel the contract is restricted in any manner, the contract is usually considered binding. A promise to do an act that one is legally bound to do does not qualify as obligation.

- Where the contract provides one party with the *right to cancel*, there might be no consideration because of lack of mutuality of obligation. If there is an absolute and unlimited right to cancel the obligation, the promise of the party with the right of cancellation is illusory and the lack of consideration means there is no contract. If the power to cancel the contract is restricted in any manner, the contract is usually considered binding. A promise to do an act that one is legally bound to do does not qualify as obligation.

More Information

NSCA provides its corporate members with access to Essentials of Systems Integration™ Online, a library of more than 650 industry-specific, customizable forms, documents and templates. These forms have been submitted by NSCA members and created specifically for NSCA member use by NSCA's attorney.

Select from estimating templates, sales and installation agreements, scope of work, work in progress, project close-out forms, maintenance agreements and more. To start, visit www.nasca.org/essentials. Log in and select Business Forms and Templates > External Forms and Agreements to access the resources available.

Note: You will need your NSCA member login and password to access the NSCA web site. This benefit is available to NSCA Corporate members only. For your login information or to upgrade from an individual to a corporate membership, call NSCA at 800.446.6722.

Disclaimer: Article contents obtained from NSCA BizSkills documents.