

10 Questions to Ask to Avoid Common Mistakes in Drafting Contracts

Many of the relationships of a small business- with customers, vendors, contractors, business partners, employees and others- are governed by contract. These do not have to be overly complex documents, but you can help avoid some of the more common omissions or mistakes in contracts by asking yourself, and your attorney, the following questions:

1. ***Have you clearly identified the product or service at issue?*** Clarity is the best defense against litigation. If you intend a product to be delivered along with associated software or other accessories, the contract should set that out clearly. If you are contracting for services, either as the client or the contractor, you should be as specific as you can about the scope of the services, and any work product expected to be delivered.
2. ***Have you clearly identified the agreed price and method of payment?*** This can be more complicated than it appears, particularly if the contract concerns services over a period of time. You want to be clear, for example, if a contractor is billing you for time spent, what the timing of the invoices should be, what your rights are to dispute or question the invoices, and when payment on each invoice is due. If you have an arrangement involving installment payments, you need to be clear about when installments are to be made and whether they are tied to specific stages of the project.
3. ***Have you clearly identified the parties to the contract?*** Ordinarily, your rights under a contract run only to the entity that is a party to the contract, and not shareholders, parent entities, affiliates, or subsidiaries. You want to satisfy yourself that the entity you are contracting with is the one with the ability and authority to perform under the contract. Conversely, if you are a sole proprietor, you need to be careful that the contract is signed by your corporate entity and not yourself individually, if it is your intent that the corporate entity is the one that will be receiving the benefits of and responsible for the performance under the contract.
4. ***Have you clearly identified the effective date of the contract?*** This is a simple but sometimes overlooked detail. Making the start date clear can avoid unnecessary disputes about when a party's obligations arose under the agreement.
5. ***Have you clearly identified the timing or method of termination?*** Sometimes this is clear from the very nature of the transaction- for example, a single purchase of a specific item. Many other business relationships are ongoing, however, and it is important to be specific about whether it is a contract for a definite term, who has the right to extend and by what procedure, and under what circumstances other than mutual agreement a party can terminate the contract and be relieved of responsibility for ongoing performance.
6. ***Have you anticipated possible future changes in the ownership or organization of the other party?*** You may not always care whether you continue to do business with the particular entity with whom you contracted, but should be aware that ownership and organization frequently change, particularly in larger, more complex corporate families. If the relationship is important to the purposes of the contract (compare a joint venture that relies upon the reputation of both parties to succeed with an order to purchase goods

or services that is unlikely to be affected by a change in ownership or control), you should consider inserting a clause that prohibits assignment of the contract without your approval, or allows you a way to exit the relationship in the event of a change in ownership or control.

7. ***Have you considered how disputes will be resolved in the event of a breach?*** It is not necessary to set forth specific procedures and remedies for breach, as the law will supply a remedy. It can, however, substantially simplify matters if the parties have considered this question and agreed to certain procedures. For example, you could consider a “notice and cure” provision allowing the breaching party a set amount of time to cure the breach before any action is commenced. This could protect you, in case of an inadvertent or otherwise curable breach from termination of the contract or expensive litigation. You should also consider whether you want to agree to dispute resolution procedures, including arbitration or mediation, that can make resolution of any disputes less expensive.
8. ***Have you considered where disputes will be resolved in the event of a breach?*** Modern business relationships span many jurisdictions, and litigation can be unnecessarily complicated by disputes about which law applies and which courts have jurisdiction over the parties. If the parties can agree, you should consider agreeing to the applicable law (i.e., the laws of the Commonwealth of Massachusetts), and agreeing to jurisdiction of the courts within a specific state. Counsel can help you assess whether there are advantages or disadvantages to one state’s laws over another, but even if they are substantially the same there is value in having this agreed ahead of time.
9. ***Have you considered an attorneys’ fee recovery provision?*** Ordinarily if you bring suit and prevail you will not be entitled to recover your costs and attorneys’ fees, but the parties can agree otherwise. Having an agreement that the prevailing party is entitled costs and attorneys’ fees can help make it economically reasonable to enforce your rights under the agreement, and also act as a deterrent to breach by either party.
10. ***Have you made it clear that the written agreement represents the entire agreement between the parties and cannot be orally modified?*** Often known as an “integration clause,” this statement in a contract precludes either party from later claiming that there was some unwritten understanding that conflicts with the written contract, or some later agreement to waive or modify a term. If a dispute turns on whether or not there was an oral modification or side agreement, the litigation will be time consuming and expensive, because these are factual issues that will not be resolved short of trial. If you can forestall this possibility by including an integration clause, it should at least simplify any disputes you might later have.