



GENERAL CONTRACTOR AGREEMENT (COST PLUS FEE) & GUIDE

Included:

Overview

Dos and Don'ts Checklist

General Contractor Agreement (Cost Plus Fee) Instructions

Sample General Contractor Agreement (Cost Plus Fee)

1. Overview

Hiring a general contractor is a nerve-wracking experience for any home or property owner. This company or individual will be in charge of your entire project, whether it be completely new construction or a major remodeling, and the owner is putting one of its most valuable assets in someone else's hands.

A good general contractor agreement outlines the rights and responsibilities of the contractor and the property owner. Vague, verbal agreements can lead to disputes and ill will. It's best for all parties to detail their respective roles in writing before starting work. Your property is your haven. With the enclosed agreement, you can make sure it's in the hands of the right contractor.

The enclosed document can provide a good starting point for your general contractor arrangement. You and your contractor must continue to discuss the terms of your agreement, settling questions about work parameters, payment, and responsibilities. Once you have agreed on contract terms and have signed the attached form, each party can focus on its area of expertise—the company on the development of its business and the consultant on the services to be performed.

2. Dos & Don'ts Checklist

- Not all states permit the use of cost-plus fee contracts. Review your state and local regulations to make sure using this type of agreement is permissible in your area.
- State laws governing general contractors vary widely, and can have a tremendous effect on your contracting arrangement. In some cases, specific information must be included in the contract and in others, language must be excluded from your agreement. For example, certain states require that general contractor agreements entered into for home improvement purposes include information about how to file a complaint against the contractor with governmental bodies. In others, the contract may not waive your right to a jury trial or any provision of a relevant statute.
- Approximately thirty-six states prohibit certain contractor acts, including the following:
 - Abandoning a project
 - Failing to perform as promised
 - Misrepresenting essential facts
 - Demanding or receiving payment before the contract is signed.

Consequences for these behaviors will vary from place to place. If you feel that your contractor has or is violating your agreement, contact a lawyer in your area immediately.

- If you are hiring a contractor to perform work around your home, you should do some preliminary research about necessary permits. Contact your county or city building department for details about building permits. Make sure you and your contractor are on the same page about the permits needed and who will be obtaining them.

- Before selecting your contractor, you should get at least three bids on the project and compare them. Have these prospective contractors create a line-item estimate, which breaks down the construction into all of its components. Be picky – find out how much each item adds to the total cost, what the labor costs will be, and how long each contractor estimates it will take. Take your time in your evaluation. The lowest bid might be from an inexperienced or careless company. The highest may include unnecessarily expensive items.
- Although all elements of a contract are negotiable, do not delete provisions governing start and end dates, change orders, and lien waivers.
- The enclosed document is a “cost-plus-fee contract.” The contractor under the agreement receives compensation equal to his or her expenses plus a bonus fee when the agreed-on work is completed. This is quite different from a “fixed-price contract,” in which the contractor is paid the agreed-on amount, regardless of any added expenses that were incurred (unless otherwise agreed). There are pros and cons to each type of contract. A contractor under a cost-plus agreement has little incentive to cut costs – if that contractor will be reimbursed for every penny he or she spends, he or she might look for the highest-quality item without regard to its cost. On the other hand, with a fixed-price contract you will not need to micromanage your contractor, keeping an eye to make sure only permissible costs are being incurred and billed.
- An essential element of cost-plus fee agreements is monitoring and documentation. Make sure the contractor accounts for all expenses, and that the expenses it submits for reimbursement are permitted under the agreement.
- Note that many contractors have standard form agreements they use for every job, but an owner can still write in changes to create a workable agreement. If a contractor insists on using its own form, use the attached guide for information about what the clauses mean and whether or not they will work for you. Delete any clauses that are too restrictive or otherwise not in your best interests.
- Allow each party to spend time reviewing the agreement. This will reduce the likelihood, or at least the efficacy, of a claim that a party did not understand any terms or how those might affect the agreement as a whole.
- The enclosed document is drafted in a way that elevates the owner’s interests over those of the contractor. If you believe this agreement is too imbalanced for your purposes, or too restrictive to allow the contractor to perform its duties, revise or restructure the provisions to fit your goals.
- Review your state’s laws governing general contractors. Certain provisions in the enclosed agreement may need to be strengthened or adapted to fit your state’s rules.
- Check with your local Better Business Bureau to make sure that the contractor does not have a history of dissatisfied customers. Ask for current references. Since both subcontractors and employees change over time, this gives a better measure of current capability and performance.
- Before sitting down to sign, decide exactly what your goals are for the agreement. Clarify the terms and conditions of your agreement before memorializing them in writing.

- Both parties should review the completed agreement carefully to ensure that **all relevant deal points** have been included. It is better to be over-inclusive than under-inclusive. Do not assume that certain expectations or terms are agreed to if they are not stated expressly on the document.
- If the general contractor is providing you with a copy of their form agreement, review it carefully. The following types of clauses should be deleted, if possible, or revised to be less limiting for you:
 - “The Owner agrees to pay any increases in labor or material costs that may arise after the Effective Date of the Agreement.”
 - “If any of the specified materials are not available for any reason, the Contractor reserves the right to substitute with similar materials.”
- Sign two copies of the agreement, one for you and one for the other party.
- Depending on the nature of its terms, you may decide to have your agreement witnessed or notarized. This will limit later challenges to the validity of a party’s signature.
- If your agreement is complicated, do not use the enclosed form. Contact an attorney to help you draft a document that will meet your specific needs.

3. General Contractor Agreement (Cost Plus Fee) Instructions

The following provision-by-provision instructions will help you understand the terms of your agreement.

The numbers below (e.g., Section 1, Section 2, etc.) correspond to the provisions in the agreement. Please review the entire document before starting your step-by-step process.

- **Introduction.** Identifies the document as a general contractor agreement. Write in the date on which the agreement will become effective (often the date on which it is signed). Identify the parties and, if applicable, what type of organization they are. Note that each party is given a name (e.g., “Owner”) that will be used throughout the agreement. The hiring party is called the “Owner” and the contractor is called the “Contractor.”
- **Recitals.** The “whereas” clauses, referred to as recitals, define the world of the agreement and offer key background information about the parties. In this agreement, the recitals include a simple statement of your intent to enter into a general contractor arrangement.

There is an optional clause in the recitals, which asks you to provide the Contractor’s registration number and its date of expiration. In some states, home improvement contractors are required to have this number and to include it in all agreements to do home improvement work. If you hire a contractor who is not properly registered, you may forfeit your rights under certain consumer protection and other laws. Review your state’s regulations for additional details.

- **Section 1: Scope of Work.** The parties' agreement that the Contractor will be providing services on the property described, and that the specifications of this work will be more specifically set out in Exhibit B. Insert a description of the property on which the work will take place (e.g., address and area on the property, if relevant). Attach a list of the work that will be done by the Contractor as Exhibit B to the Agreement.
- **Section 2: Time of Completion.** This is a provision that is essential in contractor agreements. Certainly, everyone is familiar with the experience of having a project drag on and on (for legitimate and illegitimate reasons). Setting time boundaries up front is a good way of ensuring your project will remain on track.
 - In the first subparagraph, enter the date you want work to start and end. The bracketed word "substantially" allows for some leeway in the completion date. In other words, it means that all important work has been done. If this doesn't describe your arrangement, delete the word "substantially."
 - The second subparagraph is optional, and allows the Owner to assess a penalty against the Contractor for finishing work behind schedule. For obvious reasons, contractors will generally oppose the inclusion of this subparagraph.
 - The third subparagraph is also optional, and is the flip side of the second subparagraph. It provides for a bonus payment if the Contractor finishes ahead of schedule. If you decide to include the penalty subparagraph, it's a good idea to include the bonus one as well.
- **Section 3: Compensation.** The provisions governing compensation are the most complicated in a cost-plus fee agreement, since both parties must agree on what is and is not an included cost to be reimbursed. To limit future arguments about intent, it's a good idea to try to spell this out in the Agreement.
 - (a) Contract Sum; Payments. Establishes that the Contractor will be paid for the actual costs it incurs plus an additional fee. Enter the amount of the additional fee that you intend to pay the Contractor.
 - (b) Actual Cost of Construction. Allows you to specify what will be included in "cost." Review all of the listed items – by including these in this section, you are agreeing to repay the Contractor for its costs in these areas. The references to "overhead expenses" are bracketed, as some jurisdictions specifically prohibit the inclusion of these expenses as costs of construction. Review your state's laws for additional details.
 - (c) Restrictions on Payment. The exceptions and clarifications to the general rule set forth in subsection (b). In other words, this subsection allows you to limit or explain further what you will consider costs.
 - Staff Charges. Indicates that the Owner will reimburse only for employees actually working on the Property, and only for the time that they are there. There is also a section allowing you to list what salaried employees (if any) will be eligible for reimbursement.
 - Overtime Wages. Provides that overtime wages will be reimbursed only to the extent that they are actually paid out to the workers who earned them.

- Overtime Premium Charges. States that the Owner will be responsible for any premium charges related to overtime (e.g., time and a half, etc.) only if he or she approves those charges in advance. In addition, if the reason for the overtime is because of the Contractor, the Owner will not be responsible for the premium.
 - Taxes. Limits the Owner's liability with respect to taxes, and requires the Owner's prior approval before it will reimburse for employee benefits.
 - Direct Charges. Provides that they will be reimbursed at reasonable rates and to the extent necessary to perform the Work.
- **Section 4: Progress Payments.** Although you and the Contractor have already agreed on the estimated full contract price above, you must still decide how these payments will be made. There are no absolute rules about how a contractor will collect its fees. Some don't collect anything until the work is completed. Others will ask for a 50% deposit before beginning work.
 - (a) Payments; Invoices. Relates to the timing of payments. Enter the number of days after invoicing that you intend to make payment.
 - (b) Affidavit of Contractor. Indicates that before any payments will be made, the Contractor must provide an affidavit that there are no liens on the materials it has provided. If you want to include other requirements in this affidavit, you should feel free to do so here.
 - (c) Withholding of Payments. Lists the circumstances under which payments will be delayed or withheld. These include poor work product and failure to make payments to subcontractors.
 - (d) Final Payment. The parties' agreement about when final payment of the Contract Price should be made. Enter the number of days after completion that this payment will be made.
 - (e) Waiver of Owner's Claims. Statement that once the final payment has been made, most of the Owner's claims are automatically waived (in other words, can no longer be made). There are specific exceptions carved out for poor work or unsettled liens.
 - (f) Waiver of Contractor's Claims. Statement that once the final payment has been made, most of the Contractor's claims are automatically waived (in other words, can no longer be made). There is an exception made for claims the Contractor made and listed in writing before it received the final payment.
 - (g) Maintenance of Financial Records. Good recordkeeping is an essential element of a cost-plus fee arrangement. Since you will be paying for the Contractor's costs, having a paper trail confirming those costs is important. Enter the number of years after the end of work that you will require the Contractor to maintain these records. This may prove useful for audits or other questions that may arise.
 - (h) Maximum Amount Payable. A reiteration that the Owner will not pay for amounts above a certain maximum. Enter in the same number you entered above.
 - (i) Audit Rights. This is the other side of subsection (g). You'll want to keep the right to look at the Contractor's books, in addition to ensuring that it retains those books.

- (j) Requirement on Subcontracts. Extends the documentation requirement to any subcontractors or other contract holders who enter agreements with the Contractor. Essentially, they are also required to maintain careful records, especially where the Owner thinks that the relationship between those companies and the Contractor is a close one.
- (k) Payment Failure. If the Owner does not make any of the required payments (except as set forth earlier in this section, i.e., if the Contractor provided inadequate work), the Contractor is here given the right to stop working until it is paid.

- **Section 5: Licenses and Permits.** Requires the Contractor to obtain any necessary permits and/or licenses to perform the work under the Agreement. In many cases, this will not be a difficult task. Your Contractor should already have many required licenses and permits, and should be familiar with local procedures for obtaining those it does not.

Be careful of taking matters into your own hands and obtaining building or other permits on your own. In some states, if you secure your own building permit, you may forfeit certain consumer protection and other legal rights.

- **Section 6: Representations and Warranties.** Lists each Party's promises under the agreement. Note that this is not a detailed list of services to be provided. Rather, these are the Parties' assurances that they have the right to enter the Agreement and that each will perform their obligations with adequate attention and care.
- **Section 7: Waiver of Liability.** If the Contractor is injured while performing the work under this Agreement, this clause exempts the Owner from liability for that injury. Note that in some jurisdictions, this liability cannot be waived entirely. The last clause of this section provides that the waiver will be given insofar as legally possible.
- **Section 8: Surety Bond.** A surety bond is a contract among (at least) three parties. The first (called the principal) is the person who will be performing an obligation. The second (called the obligee) is the person who will be receiving that performance. The third (called the surety) is the person who makes sure that the principal will perform its obligations. In this case, the Contractor is the principal and the Owner is the obligee. The surety bond makes sure that the Contractor will perform its obligations under this Agreement. Enter the amount of the surety bond that you will require the Contractor to obtain.

Before deciding on a number, note that the amount of money you can be awarded via a bond will differ depending on your jurisdiction. In some places, you can be awarded as much as \$12,000 if a court finds that your contractor defaulted on his obligations to you. In others, the maximum collectible amount is \$2,500. Review your state's rules for additional information.

- **Section 9: Indemnification.** This provision allocates responsibilities between the parties if problems arise in the future and protects each party from the financial consequences of the other's illegal or harmful conduct. Specifically, here the Owner is protected from the Contractor's negligence in performing its duties or its failure to complete other required elements of the Agreement.

- **Section 10: Warranty.** The Contractor's promise that the work it performs will meet certain standards.
 - (a) Correction of Defective Work. Indicates that any defects found in the work within a certain period of time will be corrected or otherwise fixed by the Contractor at its own cost. Enter the number of years this warranty will last.
 - (b) Normal Wear and Tear Only. States that the Contractor will only be responsible for damage occurring from usual events. In other words, if you are doing destructive or dangerous things to the property, the Contractor won't be responsible.
- **Section 11: Termination.** Explains that certain actions or events, including written notice or material breach, will cause the agreement to end out of time (i.e., before the work is completed or the end of the term, if any). Write in the amount of notice a party must give of its intent to terminate or to notify the other of a breach.
- **Section 12: Access to Work.** Allows the Owner and his or her representatives access (and the right) to review the work as it's being performed. This allows you the opportunity to check on your Contractor's progress in person, rather than relying on reports of accomplishments or setbacks.
- **Section 13: Notice of Right to Cancel.** In many states, this language (or similar state-specific language) must be included in all home repair or remodeling contracts. Review your state's laws to see if there are specific terms or a longer cancellation period that is allowed.

Consider what this means for your agreement: you have an absolute right to cancel this contract for several days after you have signed it. This is meant to avoid difficult situations in which contractors – in the homeowner's house – pressure that person into entering the agreement. This doesn't mean that you should enter into contracts lightly thinking that you can cancel at any time. In fact, there are exceptions to its applicability in many instances (e.g., if the negotiations took place at a different time at the contractor's office). It does, however, provide you with some protection from hard-sell tactics that take place in your home.

- **(Optional) Section 14: Additional Agreement Terms.** If there are additional terms you'd like to add to the form, enter those in the space provided. Use this area to include items that you consider important, no matter how trivial you think they are. If you don't spell it out, you can't guarantee it will happen. For example, consider including answers to questions like these (if they matter to you):
 - Can the Contractor and its employees use your bathroom and phone?
 - Can the Contractor and its employees keep their lunch boxes in your refrigerator?
 - Do you care if the workers arrive at 8:30 a.m. instead of 8:00 a.m.? If you do, what are the consequences?
 - Where will the workers park?
 - Where will the incoming materials and trash piles be situated on your property?
 - How often will you expect the Contractor to contact you about the progress of the work?

This is not an exhaustive list: think carefully about what will matter to you during this work. If you do not wish to include any additional requirements, delete this section. If you do remove the provision, correct the section numbers and references in the agreement.

- **Section 15: Assignment.** Explains that each party must obtain the other's written permission before assigning its obligations and interests.
- **Section 16: Successors and Assigns.** States that the parties' rights and obligations will be passed on to heirs or, in the case of companies, successor organizations or organizations to which rights and obligations have been permissibly assigned.
- **Section 17: No Implied Waiver.** Explains that if either party allows the other to ignore or break an obligation under the agreement, it does not mean that party waives any future rights to require the other to fulfill those (or any other) obligations.
- **Section 18: Nature of Relationship.** Explains that the Contractor is not an employee or partner of the Owner. This is an important distinction for legal reasons, including requirements of insurance coverage, liability, and taxes. The agreement seeks to emphasize this divide, but both parties should take care not to blur the line between independent contractor and employee in the performance of their duties. Review your state's laws governing independent contractors to make sure that the enclosed agreement follows local restrictions.
- **Section 19: Notice.** Lists the addresses to which all official or legal correspondence should be delivered. Write in a mailing address for both the Owner and the Contractor.
- **Section 20: Change Orders.** Over the course of the project, you may change your mind about what you want, or may have a more specific idea for an improvement. Under this provision, if this is the case, you will submit your specifications to the Contractor and it will submit back to you an increased (or decreased) Contract Price based on those specifications. You and the Contractor should discuss what amounts will apply before any new work begins. A form of change order is attached to the Agreement as [Exhibit C](#).
- **Section 21: Ownership of Drawings and Other Items.** Gives ownership of the drawings and materials constituting the Property to the Owner, although the Contractor is given a right to keep a copy for its records. The Contractor may resist inclusion of this section, but it is something you should try to keep in if you can.
- **Section 22: Types of Materials.** Requires that the materials used in the construction be new and under warranty. There is an optional clause that allows you to insert any exceptions to this general rule. Delete this clause if you want the rule to be absolute.
- **Section 23: Ownership of Materials.** Provides that the Contractor owns the materials that are delivered until the Owner pays for them. This is a fair provision, considering that the Contractor will be paying the upfront money for the property.
- **Section 24: Materials in Short Supply.** In every project, there are unanticipated snags or delays, and common in the realm of construction is the possibility that the materials or items you wanted are unavailable. You certainly have the option of holding off until your preferred items become available, but this will delay the project and increase its total cost. Under this provision, if the materials become unavailable, the Contractor will make suggestions of substitutions, and you will have the right to select the next best thing. The last sentence provides that the Owner will cover any difference in price between the original materials and the newly purchased. You can delete this sentence if you like, but you may have a hard time convincing the Contractor to agree.

- **Section 25: Modification.** Requires any changes to the Agreement to be made in writing and signed by both parties. Any changes that are made that either aren't in writing or signed will not be effective.
- **Section 26: Governing Law.** Allows the parties to choose the state laws that will be used to interpret the document. Note that this is not a venue provision. The included language will not impact where a potential claim can be brought. Write in the applicable state law in the blanks provided.
- **Section 27: Counterparts / Electronic Signatures.** The title of this provision sounds complicated, but it is simple to explain. It says that even if the parties sign the agreement in different locations, or use electronic devices to transmit signatures (e.g., fax machines or computers), all of the separate pieces will be considered part of the same agreement. In a modern world where signing parties are often not in the same city - much less the same room - this provision ensures that business can be transacted efficiently, without sacrificing the validity of the agreement as a whole.
- **Section 28: Severability.** Protects the terms of the agreement as a whole, even if one part is later invalidated. For example, if a state law is passed prohibiting choice-of-law clauses, it will not undo the entire document. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the agreement enforceable.
- **Section 29: Entire Agreement.** The parties' agreement that the document they're signing is "the agreement" about the issues involved. Unfortunately, the inclusion of this provision will not prevent a party from arguing that other enforceable promises exist, but it will provide you some protection from these claims.
- **Section 30: Headings.** Notes that the headings at the beginning of each section are meant to organize the document, and should not be considered operational parts of the note.
- **Exhibit A: Drawings and Specifications.** Exhibit A is the physical representation of the work that will be done on your property. This will need to be prepared by a professional, and you and the Contractor will need to reach an agreement on the items that are provided. Once you and the Contractor agree, you should both sign those drawings and specifications and attach them as Exhibit A to this Agreement.
- **Exhibit B: Scope of Work.** This is the description of what work will be done and how it will be done. The actual form of a "scope of work" document will vary according to the project and individual preferences. Although this is by no means an exhaustive list, these are a few things to consider when drafting your document:
 - Document the work in phases, and ensure the work is detailed chronologically or sequentially.
 - Identify any dependencies or timing issues (e.g., does a certain phase have a deadline? Can one thing happen only if specific tasks are completed?).
 - Identify and describe any specific milestones that must be reached (e.g., at what point is the project "half completed"? What is "substantial" completion?)
 - Will progress reports be required? How often?

- Will the Owner make assessments during the construction? How often?
- Are there specific brands or product types you want used? Types of materials?

Listed on [Exhibit B](#) are a few general categories that you may want to address when drafting the document. Once you and the Contractor agree on the scope of work, you should both sign the exhibit.

- **Exhibit C: Form of Change Order.** An example of the type of document you should use to agree on changes with the Contractor. This is provided for illustrative purposes only, and you should adapt this form to meet your specific needs.

DISCLAIMER

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GENERAL CONTRACTOR AGREEMENT (COST PLUS FEE)

This General Contractor Agreement (the "Agreement") is made and effective as of _____, 20__ ("Effective Date") by and between _____, [an individual] [corporation] [etc.] (the "Contractor") and _____, a _____ [corporation][limited liability company] [etc.] (the "Owner"). The Contractor and the Owner may be referred to individually as a "Party" or collectively as the "Parties."

RECITALS

WHEREAS, the Owner is the owner of the Property (as defined below); and

WHEREAS, the Owner wishes to engage the Contractor as a general contractor to perform certain Work (as defined below) on the Property for the Owner in accordance with the drawings and specifications attached as Exhibit A hereto and on the terms and conditions set forth below; and

[**WHEREAS**, the Contractor is registered with the state as a contractor, and has a registration number of _____, expiring on _____;] and

WHEREAS, the Contractor wishes to perform the Work on the Property in accordance with the drawings and specifications attached as Exhibit A hereto on the terms of this Agreement; and

WHEREAS, each Party is duly authorized to enter into this Agreement.