

Environmental Professionals of Arizona

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Top 10 Tips and Techniques for Crafting Effective Contracts

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The Basics

- **What does a contract do?**
 - **It establishes the private law between the parties.**
- **The words of the contract will govern the parties' relationships, rights, and duties, and potentially subject the parties to legal liability.**
- **Goals of the Drafter:**
 - 1. To induce the parties to perform their obligations as intended.**
 - 2. To protect your client by providing for the consequences of a potential breach.**
 - 3. To encourage a court to interpret the contract as intended.**

Top 10 Tips and Techniques

- 1. Clearly set forth the parties' rights and obligations.**
- 2. Use recitals to tailor the contract to the parties' circumstances.**
- 3. Use definitions to tailor the contract to the parties' circumstances.**
- 4. Avoid ambiguity.**
- 5. Use plain language.**
- 6. Incorporate meaningful boilerplate terms.**
- 7. Logically organize the contract.**
- 8. Plan for alternative outcomes: Hypothesize performance.**
- 9. Plan for alternative outcomes: Hypothesize non-performance and default.**
- 10. Plan for alternative outcomes: Consider the worst case scenario.**

1. Clearly set forth the parties' rights and obligations.

- **Be explicit. Draft in the active voice so the actor is clear.**
- **Words of choice:**
 - **Whenever a party has an obligation, state the obligation with the word “shall”. You should be able to substitute the phrase “has the duty to.”**
 - **Whenever a party exercises a right or privilege, state the authorization with the word “may”. You should be able to substitute the phrase “is entitled to.”**
 - **State conditional duties with the word “must”. You should be able to create an if/then statement.**
- **Be consistent. Do not use these words for any other reason.**
- **Reserve the word “will” for when there is no legal duty or right created, such as boilerplate provisions and housekeeping terms.**
 - **Example: This Agreement will terminate in 90 days.**

1. Clearly setting forth the parties' rights and obligations.

Examples from Contract for Professional Services:

X will begin work upon receipt of the executed contract.

Client agrees to pay a lump-sum compensation of \$500,000. X will invoice Client upon completion of the scope of services. Each invoice will indicate the percent of work completed, ...

X retains the right to engage subcontractors to perform portions of the scope of services.

Neither party may assign this Contract without the prior written consent of the other.

2. Use recitals to tailor the contract to the parties' circumstances.

- **Draft recitals to set forth the parties' background.**
- **Address the parties' intent behind entering into the transaction.**
- **Address the parties' intent behind specific terms that are of particular relevance to them.**
- **Use recitals to assist a court in interpreting the contract.**
- **Use recitals to buttress a contract term that a court may determine is unenforceable.**
- **Do not include operative terms in the recitals.**

2. Use recitals to tailor the contract to the parties' circumstances.

Sample Recitals section from a form contract for professional services:

- A. The City issued a Request for Proposals (the “RFP”), a copy of which is on file in the City’s Finance Office and incorporated by reference, seeking proposals from vendors for [describe type of services] (the “Services”).**
- B. The Contractor responded to the RFP by submitting a proposal (the “Proposal”), attached hereto as Exhibit A and incorporated by reference, and the City desires to enter into an Agreement with the Contractor for the Services.**
- C. The Contractor is specially trained, experienced, and competent to perform the special services which will be required by this agreement. The Contractor is willing to render such professional services, as herein defined, on the following terms and conditions. [You may include other, more specific recitals if you believe it will help provide a context and therefore correct interpretation or easier administration of the agreement.]**
- D. The parties desire to waive their right to a jury trial in an effort to reduce time and expenses associated with litigation.**

3. Use definitions to tailor the contract to the parties' circumstances.

- **Draft definitions if you are using the word or phrase in a way that differs from the standard dictionary definition or when there isn't one.**
- **Three types: precise definitions; enlarging definitions; limiting definitions.**
- **The drafted definition must be able to be replaced within the operative term.**
- **Follow the Golden Rule:**
 - **Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.**

3. Use definitions to tailor the contract to the parties' circumstances.

- **NOT: In this agreement, the word “Structure” shall mean an office building of no less than 20 stories.**
 - **“Structure” means an office building of no less than 20 stories. (Precise definition)**
 - **“Structure” means a building of no less than 20 stories, including but not limited to an office building, a residential apartment building, and a hotel. (Enlarging definition)**
 - **“Structure” means a building of no less than 20 stories, but does not include a residential building.**

4. Avoid ambiguity.

- **Ambiguity means that a word or phrase used in the contract is subject to more than one meaning.**
- **Ambiguity can be created by the use of the words, or the way in which the words are put together.**
- **Extrinsic evidence may be admitted to interpret ambiguous contract terms.**

4. Avoid ambiguity created by the words used.

- **Describing dates often results in ambiguity.**
 - **Common problem words are: by, within, from, and until.**
 - **Example: Consultant shall submit a summary of additional expenses by November 15th.**
 - **Example: Contractor shall notify Company of the results of its investigation within 30 days of receipt of X.**
 - **Some cures: before, on or before, no later than.**
- **Some words are ambiguous on their own.**
 - **Example: "... provided, however, that the alteration in character does not result in a material cost increase."**

4. Avoid ambiguity created by the way words are put together.

- **Connect modifiers to what they modify.**
 - **All inventory, including but not limited to agricultural chemicals, fertilizers and fertilizer materials sold to Debtor by Van Diest...**
 - **All work products including, but not limited to: plans, specifications,...and other related documents that are prepared in the performance of this Agreement...**
- **Million dollar punctuation problems:**
 - **In the event that Lessor's building is damaged by fire or other casualty and Lessor elects not to restore the building, or Lessor elects to demolish the building, Lessor may terminate the Lease...**

5. Use plain language.

- **Precision and clarity are vital to effective k drafting.**
- **Avoid use of legalese or legal jargon and unnecessary words. If the language doesn't add anything to the contract's meaning or the parties' understanding, omit it.**
- **Be clear and precise. Use simple sentence structure, and enumerate where helpful.**

5. Use plain language.

- **This memorandum of agreement, made this 4th day of May, 2022, by and between John Smith, of the city of Phoenix, county of Maricopa, state of Arizona, hereinafter sometimes referred to as the party of the first part and Mary Martin, of the city of Phoenix, county of Maricopa, state of Arizona, hereinafter sometimes referred to as the party of the second part, witnesseth the agreement of the aforesaid parties hereto, as follows, to wit:**
- **John Smith (“Buyer”) and Mary Martin (“Seller”) enter into this Sales Agreement dated May 4, 2022, and agree as follows:**

6. Incorporate meaningful boilerplate.

- **Recognize the purpose of boilerplate.**
- **Regularly evaluate boilerplate in forms.**
- **Evaluate the boilerplate in light of the proposed transaction.**

6. Incorporate meaningful boilerplate.

- **Sample Choice of Law Terms:**
 - **Current Choice of Law:** This Contract shall be subject to the laws of the State of Arizona.
 - **Revised:** This Contract will be governed by the laws of the State of Arizona, without giving effect to the principles of conflict of law.
- **Form Notice Term:**
 - All notices or other communications hereunder shall be given in writing and shall be deemed given if served personally or mailed by registered or certified mail, return receipt requested, to the parties at their addresses herein indicated.
 - When it is deemed given?
 - Do the parties really want or expect personal service? What about email?
 - Language: improper use of shall; legal jargon.

7. Logically organize the contract.

- **Draft useful headings.**
- **Organize the terms in a logical manner.**
- **Keep related terms together; use sub-parts when needed. Avoid long, dense paragraphs.**
- **Use a consistent numbering or lettering system.**
- **Do not refer back and forth to other provisions within the contract unless absolutely necessary.**

Plan for Alternative Outcomes.

- **8. Hypothesize performance. Provide sufficient detail.**
- **9. Hypothesize non-performance. Include damages provisions.**
 - **For example, default damages for breach of confidentiality vs. liquidated damages clause.**
- **10. Hypothesize the worst-case scenario.**