

CALIFORNIA COMMERCIAL SERVICE AGREEMENT AND TERMS AND CONDITIONS

January 5, 2021 Update

INSTRUCTIONS FOR USE

(This form is not to be given to customers.)

DISCLAIMER: Non-lawyers should seek the advice of a licensed attorney in all legal matters, including verification of the fitness of this material for your particular purpose. Edward H. Cross is licensed to practice law only in the States of California and Hawaii. All documents in this package are based on California law and must be reviewed by an attorney licensed to practice law in the jurisdiction where they will be used. You have received these forms and other material with the understanding that we are not rendering legal, accounting, or other professional services. This material complies with California law as of the date stated above. Although we may periodically furnish updates, the law changes rapidly and without notice. We do not attempt to distribute updates to comply with every change in the law, so we do not warrant that any material in this package complies with the law past the date set forth above. We do not warrant that the accuracy of the presentations, materials or communications, or represent them to be completely free of errors when delivered. You use everything in this package at your own risk, and should verify statements before relying on them. Your use of this material confirms your agreement to these terms. If you do not agree, do not use these forms.

Introduction: This is a basic commercial service agreement which replaces the traditional “Work Authorization,” but does much more! It is intended for use on all commercial jobs, from cleaning to emergency service to reconstruction.¹ Do not use this Agreement for *any* residential work, even if it is investment property, an apartment building or the customer is a homeowners association. If the structure is designed to be a residence, California deems the work “home improvement,” even if it is only mitigation or drying. On all California residential work, use the Home Improvement Agreement provided with this package, instead of the Commercial Agreement.

This is the primary contract document, and should be presented first. A contract is much more than a legal formality. It is a selling tool. It fosters good communications and provides an opportunity to fine-tune the customer relationship. Use your contract to educate the customer about what you expect from the customer, and what the customer can reasonably expect from you. This is a great way to establish boundaries. In some instances, the discussion about expectations will reveal that you should decline the work!

¹ We recommend customizing contracts with the assistance of a licensed attorney, especially on high risk or high stakes projects, or where the project entails complexities, conflicts or unique circumstances. A small investment in legal services at the inception of a complex project can save tremendous amounts of money later by resolving areas of ambiguity and reducing confusion. Call (760) 773-4002 or email edcross@edcross.com for help.

All forms should be evaluated and updated as necessary at least once per year. For more information about updates, see www.edcross.com/contracts.

Icons: As you read, watch for these helpful icons:



The help button explains where to go for additional information or assistance.



Clever tips help you make the most out of your forms.



The caution sign reveals a significant legal issue.



Our forms are designed with your commercial success in mind. We strive for a balance between strong legal protection and customer-friendly terms. We know that at the end of the day, you must get jobs to stay in business. However, many veteran business people understand that the best jobs are often the ones you turn away. For that reason, in certain limited circumstances, we identify **DEAL BREAKERS** which, if unresolved, could be good cause to decline a job.

Get Educated: Before you proceed, familiarize yourself with the essential construction law in your jurisdiction, and call Cross & Associates if you have questions about California law.

Presentation: We find that one-page forms are the most user-friendly and easiest to present. Experience has shown that customers respond more favorably to one-page forms presented individually, as they are less overwhelming. We recommend presenting each document individually, then encouraging the customer to read it, giving the customer an opportunity to ask questions before signing it. Check to see if the law in your jurisdiction requires your contract to be printed in the same language used in the principal sales presentation (e.g., Spanish). But as of the printing of this update, the state of California has no such requirement for commercial contracts, only residential ones. Nonetheless, it is a good business practice to present contracts in a language understood by the customer.

Editing and formatting: This form can be edited to suit your purpose and to comply with your local law. The fields can be filled in with little or no formatting problems. To check a box using your computer, double-click on the box and click “checked” under “Default Value.”



These forms will all fit on one page on most computers. Due to

formatting variations with certain printer drivers, a small amount of text may carry onto a second page on your computer.

Top box: Fill in your company name, and contact information and contractor's license number, if any, in the upper left corner and your company logo in the center field. We recommend a numbering system for your contracts starting with "SA" (for "Service Agreement").

Cancellation: There is no "cooling off period" or right of rescission for commercial projects. If the agreement is legally sound, the customer is bound the moment it is signed. And if the customer wrongfully ejects a contractor from a project before the work is done, the contractor may be entitled to recover the lost profits that *would* have been earned if the customer had not ejected the contractor. If you intend to use the form outside California, have it reviewed by a lawyer to confirm that it complies with the laws in the jurisdiction where you intend to work.

"Customer": This is probably the most important field on the form, and one that leads to the most litigation. Make sure every member of your staff involved in contracting and A/R understands this important definition: **"Customer": the party who will be ultimately responsible for payment of any amount not covered by insurance.**

The First Call: On many projects, especially emergency service, the identity of the customer may be unclear. This must be determined in the very first phone call ("Who will be responsible for payment of any amounts not covered by insurance?"). The file should be named after the party identified in response to that question. If the caller does not know, insist that this be determined before the contract is signed and before work begins, or seriously consider this as a deal breaker. Collections problems are common where the service provider presumes that the person who placed the original call will be the "customer." The provider is disappointed to later learn that the person who signed was just the owner's neighbor, or had no ownership interest in the property, no authorization to sign and no intent to pay for the work. If the contractor files suit against the owner, the owner denies being a party to any contract and refuses to pay. The party who signed refuses to pay on grounds that it was not his or her property. When this arises, you have several options, based on the circumstances. If you work in California, call us at (760) 773-4002 for an explanation of your options.

**DEAL
BREAKER**

Agency: The customer, or an authorized agent of the customer, must sign the Agreement. If an agent signs, take sufficient steps to confirm the person's authority to bind the customer to a contract. The customer may or may not be the owner of the property. If the customer is available only by telephone, call the customer, explain the nature of the damage, the type of work that will be done, the price of the work, and then confirm that the agent is authorized to sign. Then try to get an email address or fax

number for the customer and transmit the same agreement to the customer for signature. Don't start a new contract. If there is a problem in an original contract, fix it with a change order, rather than a new contract. Executing new contracts can create issues about whether they supersede the original contract.

Engagement: The first paragraph of text is the "engagement" paragraph. Replace the italicized text with your company name. Check either the "General Cleaning" box or the "Damage" box and then check the appropriate box to identify the type of damage and the date (or estimated date) of the damage. Edit the paragraph as necessary to suit the job. Check the appropriate boxes to indicate the type of work, type of damage and type of structure.

1. **Contract Documents:** Check the appropriate boxes for all documents you intend to make part of the agreement. Be especially cautious about incorporating anything written by a consultant, architect or hygienist because it may describe work you do not wish to perform, or information that is incorrect. Anything incorporated into the contract may become "law" for the project unless explicitly excluded.

The "Terms and Conditions" box is pre-checked because that document should accompany all Service Agreements (it is essentially the second page of the contract).

After the list of contract documents is a list of disclosures, such as a Mold Notice and the EPA's *Renovate Right* Lead Notice. The inside cover of the Lead Notice explains when it must be provided: when the work involves the disturbance of painted surfaces in schools, daycare centers and residential buildings built before 1978. The restorer must provide a copy of the Notice to child care facilities and general renovation information to families whose children attend those facilities. Unlike the Service Agreement and Terms and Conditions, the customer need *not* read the Lead Notice while you are standing there. It is for their information to read later.



To **uncheck** a box in any form, double-click on the box and de-select "Checked" under "Default Value."

2. **Scope of Work:** The scope of work is usually the most important part of any contractor's contract, and is often the most overlooked. The scope provides important protections to both the customer and the service provider and is an excellent way to resolve misunderstandings and prevent legal conflict. Use as much detail as reasonably possible in stating the scope of work, being sure to exclude anything of potential significance that will be performed by others, or services that the customer declines. If the customer declines any work you recommend, present the customer with a Refusal of Recommendations and Release of Liability, available with the Deluxe Package at www.edcross.com/contracts (upgrading is easy!). The form includes a handy section to check boxes to identify the

affected areas. This is an important risk management tool, as many environmental claims are made for damage originating from areas not affected in the subject loss.

3. **Contract Price:** This clause gives you the option to price the job on a time and materials basis or a lump sum. California does not require fixed price (lump sum) contracts for commercial work, but it is a good business practice and will help avoid the “sticker shock” that can impede collections. The best practice is to state the price of the in “dollars and cents” in writing before any work may begin (check the second box). Of course, it can be altered at any time by Change Order. We highly recommend the liberal use of Change Orders any time there is a change in scope, price, payment terms, completion time or any other substantive term. Note that the price clause states that the price is an approximation made in good faith based on currently available information from an initial visual observation and is subject to change. Don’t procrastinate on executing change orders.

4. **Approximate Start Date:** / /202 ; **Approximate Completion Date:** / /202 : Accurate start and completion dates foster good customer relations and help to prevent some very problematic collections issues. But the completion date is not cast in stone. If the completion date changes, the change should be documented in a change order signed by the customer, well in advance of the original completion date.

5. **Right to Cure:** Make sure the customer knows you stand behind your work, so if there is a problem, the customer must give you notice and an opportunity to address the issue. This section states that the customer waives the right to recover attorneys’ fees if a lawsuit is commenced before the customer gives the contractor an opportunity to address an alleged deficiency in the work.

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1. **Release for Third Party Professionals; Indemnity:** This clarifies that the contractor is not performing the services of an indoor environmental professional and is not responsible for errors of the customer’s consultants.

2. **Personal Liability:** The customer is responsible for paying any sum not covered by insurance. Get the customer’s (or agent’s) initials on this paragraph if insurance is involved. If the customer is an organization, the organization is “personally” liable (not the person who signs on its behalf). If you wish, you may delete this paragraph if the agreement is being used for routine carpet cleaning or projects that do not involve insurance.

3. **Down Payment and Schedule of Progress Payments:** This provision helps avoid confusion about when payments will be due. If there will be no down payments or progress payments, write “none” in the table. Do not leave the table empty. Changes in payment schedules should be documented in change orders signed by the customer.

4. **Payment:** This provision states that the customer is responsible for paying the restorer’s attorneys’ fees if one must be hired to collect a past due balance. California courts hold attorneys’ fees to be reciprocal, which means that customers would be entitled to recover *their* fees if they win in court.

7. **Extra Work and Change Orders:** Make liberal use of change orders any time there is a change in price, scope, completion date or other terms. The change order should be signed *before* the change order work is performed. Giving the customer the power to control the project in this way will help avoid some common collection problems.

10. **Workers Compensation Insurance:** Workers Compensation Insurance is required of all companies that have employees. If you have no employees, replace this paragraph with this statement: “This Contractor has no employees and is exempt from Workers Compensation Requirements.”

Execution: Fill in every blank on the form (use “n/a” where the subject matter is truly inapplicable). Initial the bottom of the page, get the customer’s initials on the bottom, and give the customer a copy of the completely filled-in and initialed form. You have a number of options if the customer or agent refuses to sign, based on the circumstances; call Cross & Associates at (760) 773-4002 or send an email to edcross@edcross.com to discuss your options.

Strikeouts and Deletions: Some customers will take the liberty of deleting portions of the Agreement. *Never* tell a customer the terms are “not negotiable.” The decision of whether to accept such changes or decline the work should be made on a case-by-case basis, considering the value of the opportunity, the referral source, and any red flags indicating future troubles with the customer. When this occurs, you have several options, depending on the circumstances, which we can explain.

Execution: Fill in every blank on the form (use “n/a” where the subject matter is truly inapplicable). Consider every empty blank as a point of legal vulnerability. In many instances, it is preferable to have the owner of the building sign the agreement, but see the detailed discussion above about identifying the “customer.” Where there are multiple owners (e.g., husband and wife), we highly recommend getting signatures from both, even if the two cannot sign simultaneously. Each party who signs is potentially liable. Give the customer or customer’s agent a copy of the completed, signed form. You have a number of options if the customer or agent refuses to sign, based on the circumstances; call Cross & Associates at (760) 773-4002 or send an email to edcross@edcross.com to discuss your

options.

WE ARE HERE FOR YOU



Cross & Associates provides broad-based legal and consulting services to the cleaning and restoration industry. Please call (760) 773-4002 or email edcross@edcross.com for help with collections, customizing your contract forms, litigation and for all your legal needs.