

HOME IMPROVEMENT CONTRACT AND TERMS AND CONDITIONS

January 11, 2021 Update

INSTRUCTIONS FOR USE

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

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"Where is the Work Authorization?" One of the main reasons restorers have trouble collecting money is because they use "Work Authorizations" instead of *contracts*. To be enforceable, contracts must include reasonably definite descriptions of the parties' obligations. Courts do not engage in mind-reading. They will only enforce terms that were outwardly expressed. If you want the customer do to something, get it in writing! The traditional work authorization lacks the essential terms to bind the customer to payment obligations. A Work Authorization that simply says that the customer authorizes the restorer to perform work, binds the customer to nothing! This Home Improvement Contract is a full blown payment contract that is intended to include legally enforceable terms. This contract *includes* the key points of the traditional "Work Authorization," but does much more! This Agreement is intended for use on everything from cleaning to emergency service to reconstruction.¹

Use the right name. The document should be referred to as "the contract," and

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.

never as a “Work Authorization,” because that term is outdated, misleading, and legally problematic. We want more than authorization, we want a promise to pay money!

What is “home improvement”? California’s definition of “Home Improvement” is very broad; it includes nearly every conceivable type of restoration and repair work performed in residential property, whether it is occupied or unoccupied. The State of California looks to the nature of the property rather than the nature of the customer to make this determination. If the property was built to be used as a residence, California may consider any work done there to be “home improvement,” even if the customer is a developer, real estate investor, or landlord and not the consumer! This is where many restorers get tripped up. Do not assume that just because you are not dealing with the consumer that the consumer protection rules do not apply.

What type of property is considered a “home”? It does not mean that someone is actually living there. To avoid potential legal complications and disciplinary action against their contractor’s licenses, California restorers should consider work in residential investment property, apartment buildings, and homeowners associations to be “home improvement,” and to use this Contract, instead of the Commercial Contract, which does not contain the required elements for residential property.

Why does it matter if work is “Home Improvement”? If the work is considered “home improvement,” it triggers a long list of complex rules, many of which are in the Selected Statutes included with this package. Two of the most important ones are [Business & Professions Code § 7159](#) and [Business & Professions Code § 7159.5](#). They set out many components which must be included in a residential restoration contract verbatim from the code, even if the contract is only for emergency service. The State of California requires a “Home Improvement Agreement” for all residential work in California, even if it does not involve construction or repairs. One of the most important rules is that “time and materials” price models are illegal, as explained more below. The ramifications for violating the rules are harsh.

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

Structure of the Agreement. This is a two-part California Home Improvement Agreement. To make the files easier to work with, we have merged the Agreement and the Terms into one WORD file, but they are two forms that can be presented one at a time.

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. If you are in California, call us at (760) 773-4002 for an explanation of your options.

Execution: Fill in every blank on the form (use “n/a” where the subject matter is truly inapplicable). **Every empty blank space is 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 if you are working in California.

Home Improvement Sales: In California, home improvement salespeople must be registered with the State, unless the salesperson is an officer of record of a corporation that carries a California contractor’s license, or the negotiations or sale were initiated by the buyer. If those exceptions do not apply, the salesperson must write his or her registration number on the home improvement contract.

California Contractors: Before you proceed, familiarize yourself with the selected California Home Improvement Statutes provided with this package, and call Cross & Associates if you have questions. **Be especially familiar with Business & Professions Code sections 7159 and 7159.5.** Those sections are very important. Violations of the Home Improvement laws can lead to **criminal prosecution** and disciplinary action by the Contractor’s License Board, regardless of whether the contractor or its owners had actual knowledge of or participated in the violation. It is a **misdemeanor** for any California home improvement salesperson to fail to account for or remit to his or her employing contractor any payment received in connection with any home improvement transaction or any other transaction involving a work of improvement. It is also a misdemeanor for any person to use a contract form in connection with any home improvement transaction or any other work of improvement if the form fails to disclose the name of the contractor principal by whom he or she is employed. Other violations of 7159.5 have criminal ramifications as well, so beware! If you have questions, contact a qualified lawyer to assist you.



Presentation: We find that one-page forms are the most user-friendly and easiest

to present. Explain the principal terms of a home improvement contract orally before offering the contract for signature. The contract must be signed by the customer and a copy provided to the customer before any work begins. Experience has shown that consumers 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. This is the primary contract document, and should be presented first. Some of the language was written by the California legislature and may look cumbersome, so we have developed an easy-to-follow *script* for smooth presentation of the form. 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).

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 in the upper left corner and your company logo in the center field. California law generally requires a contractor’s license for work that involves demolition, including removal of baseboards and cabinets, for more than \$500. Contact the Contractors State License Board for more information.

Cancellation: The State of California provides home improvement customers the right to cancel a contract within three days. The right functions like a three-day “cooling off” period to cancel contracts entered anywhere other than in the contractor’s place of business. Customers age 65 or older get five days to cancel. The contractor must give written notice to the consumer of the right to cancel.

“Customer”: This is one of the most important fields on the form, and one that leads to lots of expensive lawsuits. 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. Call us at (760) 773-4002 for an explanation of your options.

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.

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.

[See next page.]

SECTIONS OF THE CONTRACT

The highlighted sections call for information that will be the same for all contracts. Fill it in order to create a template to use for all projects.

Engagement: The first paragraph of text is the “engagement” paragraph. Replace the italicized text with your company name. Check either the “Cleaning” box or the “Damage” box and then check the appropriate box to identify the type of 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, and be certain the customer receives a copy of each. 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.



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

The “Terms and Conditions” box is pre-checked because that document must accompany all Service Agreements (it is essentially the second page of the contract). The box for the “Blank Change Order Form” is also pre-checked because California law requires home improvement contractors to provide a sample change order form to all customers. 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 Lead Notice is required on many residential jobs and determining when it is required can be difficult. For simplicity, our standard recommendation is to provide the Notice on *all* residential jobs.

Unlike the Agreement and Terms and Conditions, the customer need *not* read the *Renovate Right* Notice while you are standing there. It is a disclosure, rather than bona fide contract document. It is for their information to read later.

As explained above, California gives home improvement customers a special right of cancellation. Please see the WORD files entitled “CA Residential Notice...” One of those two Notices must be provided with all home improvement contracts, so the box for the Notice is pre-checked. If you are operating outside California your lawyer can

determine if there is a right to cancel and should edit the form accordingly.

A Special Note About Assignments of Benefits

This package does not include an Assignment of Benefits. One of the best ways to protect a contractor's right to collection on an insurance claim is to obtain an Assignment of Insurance Rights. It allows the contractor to step into the shoes of the policyholder and collect directly from the insurance company, just as doctors collect directly from health insurance companies.

Many contractors falsely presume that their agreements include an assignment, when in fact, they only contain a direction for payment. A direction for payment instructs the insurance company to pay the contractor, but it does not transfer legal title to the insurance proceeds to the contractor. Only an assignment can do that. But contractors should get more than an assignment of benefits, they should also get an assignment of insurance *rights*, so that in the event of an impasse, they can pursue legal claims directly against the insurance company. This creates great leverage that can dramatically accelerate collections and increase the amount collected.

We highly recommend obtaining a detailed Assignment for every job that potentially involves an insurance policy. If the insurance company pays the policyholder but the policyholder does not pay the restorer, the restorer may be able to force the insurance company to pay a second time. We have done this successfully with a number of major insurance companies. We have a very refined Assignment of Insurance Rights Package with detailed instructions and robust guidance material available separately at EdCross.com/contracts.

2. Scope of Work: One of the most common contracting errors by restorers is failing to write a good 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, determine if you should present the customer with a Refusal of Recommendations and Release of Liability.) The Agreement also 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. Just because the work is being performed in an emergency does not mean that a detailed scope of work cannot be written. Explain what you plan to do, and where you plan to do it, and get it in writing in section 2! See the important information regarding prices for emergency service under

section 3, below.

3. **Contract Price:** This clause does not provide the option to price the job on a “time and materials” basis because California residential contracts must be priced on a lump sum basis and time and materials contracts are illegal. This is why 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. It is often best to avoid committing to return the property to pre-loss condition for a fixed price for emergency service. The safer route is to set a price for a fixed scope of work that specifies a certain number of labor hours and a certain number of days of equipment use but without committing to return the property to pre-loss condition. When the scope is nearly complete, a change order should be executed for additional charges, as needed. The price of home improvement work to be stated in “dollars and cents” in writing before any work may begin. Of course, it can be altered at any time by Change Order. We highly recommend the liberal use of Change Orders. They are required by California law any time there is a change in scope, price, payment terms, completion time or any other substantive term. **Do not procrastinate on executing change orders.** California and other states require a signature on a change order before any change work can be performed on a home improvement project.



4. **Approximate Start Date:** / /202 ; **Approximate Completion Date:** / /202 : California law requires contractors working in residential property to state the approximate start date and end date in home improvement services. It is also highly recommended to discuss the necessary completion times with the customer and reach a meeting of the minds before the Contract is signed.



5. **Right to Cure:** Many contractors face unpleasant surprise when they are served with a lawsuit for workmanship claims. They falsely assume they have a “right to repair.” California’s statutory right of repair applies to developers when they sell newly-constructed homes. Restorers have no legal right to notice of workmanship issues unless it is set forth in a binding contract. This provision is designed to create that right.

6. **Performance and Payment Bond:** This provision is required by California law. It is extremely rare that restoration customers request bonds. This provision memorializes the customer’s waiver of a bond.

*Be sure to get the customer’s initials at the bottom of the first page to confirm the customer received a Notice of the Right to cancel, even if the project involves emergency service. See the instructions that accompany the Notices of the Right to Cancel, provided with this package.

[See next page.]

HOME IMPROVEMENT TERMS AND CONDITIONS

January 5, 2021 Update

INSTRUCTIONS FOR USE

Introduction: This is essentially the second page of the Home Improvement Agreement, to be presented and executed after the Agreement. For convenience, the two forms have been combined into one WORD file which has the file name “CA Home Improvement Contract” but as explained before, the phrase “work authorization” should be removed from the restorer vocabulary because it is confusing and legally problematic.

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:** Get the customer’s (or agent’s) initials on this paragraph if insurance is involved. If you wish, you may delete this paragraph if the agreement is being used for routine carpet cleaning.

3. **Down Payment and Schedule of Progress Payments:** This provision complies with California’s statutory requirements for home improvement contracts. Strictly comply with the rules stated in this paragraph, as this is ripe for disciplinary action against contractor’s licenses. If there will be no down payments or progress payments, write “none” in the table but do not cross out or delete the paragraph because it is required by law – verbatim from the statute. In any event, do not leave the table empty.

4. **Payment:** This section is not required by law, so it is negotiable. It contains many provisions to help accelerate collections. It goes hand-in-hand with the next section regarding finance charges and interest.

5. **Finance Charges and Interest:** California law requires a disclosure as to whether the agreement involves finance charges. Finance charges apply when a project is financed like a loan. Interest for past due payments are not finance charges, so this provision states that there are no finance charges under this Contract.

6. **Partial Lien Releases:** This provision is required by law.

7. **Extra Work and Change Orders:** This paragraph includes sentences required by California law, with an added provision stating that the customer agrees to execute change orders to increase the price to address conditions not reasonably anticipated by the Contractor. Always get a signed change order before commencing change order work.

8. **Limit of Liability and Indemnity:** This includes a release of claims for COVID-19. These releases have not yet been tested in court, but are more likely to be enforceable where there is a clear understanding between the parties as to the scope of the release. We highly recommend serious conversation with the customer about the way the coronavirus spreads, the difficulty in controlling it, and the release of COVID-19 claims. Please see the Script that accompanies the form for important information to convey to the customer.

9. **Commercial General Liability Insurance:** The name and telephone number of a contractor's general liability insurance carrier must be disclosed in California home improvement contracts. Replace the highlighted text with the name and telephone number of your insurance company. For projects outside California, consult with a lawyer licensed in the jurisdiction to determine whether a disclosure of insurance information is required.

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."

WE ARE HERE FOR YOU



Cross & Associates provides broad-based legal and consulting services to the cleaning and restoration industry in California. 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.