



# **Dissecting Contracts**

## **for clauses and omissions that can cost you**

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# What Makes a Winning Snow Removal Contract?

- Length?
  - Depends on how much detail you want to get into
  - Size and scope of the services being provided
- Clarity
- Consistency
- Avoid Confusion. Avoid Litigation

# What Makes a Winning Snow Removal Contract?

- No universally applicable contract
- No “one-size-fits all”
- Take into consideration your individual circumstances and preferences
- Consider what is most efficient and functional for your organization

# Basics of Contract Formation

- Offer
- Acceptance
- Consideration
- Additional factors:
  - “Meeting of the Minds” (mutual agreement to the same certain terms)
  - Capacity of the parties (intent to create legal relations)
  - Legality of purpose

# Key Factors to Consider when Entering into a Contract

## A. Clarity

- Who is doing what?
- What is expected?
- What are my responsibilities?
- What do I need to do to get paid?
- Ask those questions up front

# Key Factors to Consider when Entering into a Contract

## B. Consistency

- Be sure to use the same terminology throughout.
- If you use “Contractor” to refer to one of the parties to the contract, don’t reference “Company” later on or “Service Contractor” or the name of the Contractor.
- If you use the term “Owner” to reference the owner of the property, stick with using that.
- We will look at some examples of this later on.

# What are the Essential Elements?

## 1. The Parties (WHO)

- Pretty Basic (usually)
- But...
  - Property management company
  - Homeowner's/condominium association
  - Be clear on who the actual parties to the contract are
  - Whose responsibility to pay? To make a claim or enforce the contract? Who has authority to bind?

# What are the Essential Elements?

## 2. The Term of the Contract (WHEN)

- How long does this contract last?
  - Determines when responsibilities are triggered and when terminated
- Does it have a termination date?
  - November to April? “The season”?
  - Year-to-year?
  - Is early termination possible?
- Does it renew in perpetuity? If so, how do I notify you if I want it to end?



# What are the Essential Elements?

## 3. Location (WHERE)

- Not just the physical address(es)
- Just the driveway, or sidewalks also?
- Just the parking lot, or entrance drives also?
- Are pedestrian areas considered part of the lot?

# What are the Essential Elements?

## 4. Payment terms (WHY)

- Per Push
- Per Event
- Seasonal Contract (lump sum)
- Time and materials
- If the contract is perpetual, how does the fee adjust each year or is it locked in?
- Prices for extras: salt/snow melt application, haul away/removal of piles, slush plowing (and who has authority to order these)
- Multiple properties, different prices?

# What are the Essential Elements?

## 4. Payment terms, continued (WHY)

### ■ Invoicing and Payment

- How frequently will the owner be invoiced?
- What form must the invoice take (app, paper, email, etc.)? Must owner verify that work was completed satisfactorily?
- When is payment expected?
- What form(s) of payment are accepted (additional fees with this?)
- Penalties for late/unpaid invoices?
- Is a down payment required?
- Minimum payment?
- Retainage?

# What are the Essential Elements?

## 5. Scope of Services (HOW)

- What services are included? Be specific.
- What is the triggering event? How many inches?
  - How is depth determined?
  - Request from property owner?
- Deadline/time to be completed by
- Can you use subcontractors?

# What are the Essential Elements?

## 6. Additional Elements that Should be Included in Contract

- Insurance Requirements
  - Amounts of Coverage
  - Certificate of Insurance, Additional Insured
- Indemnification
  - Mis-feasance versus Non-feasance (i.e., “arising from performance of, or failure to perform contract duties”)
  - Claims arising from sole negligence of owner
  - Proportionate share of claim determined to be joint negligence
- Independent Contractor Status
- Don’t forget: names, date, and signatures!

# What are Additional Elements?

## 7. Additional Elements that Could be Included in Contract

- Types of equipment to be used
- Special licenses/permits/certificates for operators
- Environmental considerations
- Reference to industry standards/standard of performance
- Governing law/state
- Confidentiality
- Specific damages in the event of a breach
- Force Majeure
- Timing and notice of claims

# Things to Avoid

- Any promise to remove snow accumulation down to pavement (and other impossibilities)
- Unrealistic response time
- Unclear scope of work
- Inadequate communication

# Some Examples

- Remember the Keys:
  - Clarity
  - Consistency



# General Contract Indemnification Language

- To the fullest extent permitted by applicable law, Service Contractor shall defend, indemnify, and hold harmless Owner and Manager and their respective officers, directors, employees, agents, partners, joint venturers, affiliates, successors, and assigns from and against any and all claims, demands, losses, expenses, damages, liabilities, fines, and penalties (each a “Claim”) whether actual or alleged, arising out of or relating to: (a) Service Contractor’s performance of (or failure to perform) the Contract Duties; (b) a breach of this Agreement by Service Contractor or any of its affiliates, subcontractors, agents, or employees; (c) any negligence or willful misconduct by Service Contractor or its affiliates, subcontractors, agents, or employees; (d) a violation of law by Service Contractor or any of its affiliates, subcontractors, agents, or employees; (e) any claims brought by Service Contractor’s employees, any determination that a relationship, other than that of independent contractor, exists between Owner and/or Manager and Service Contractor and/or its employees or any other employment-based complaint or grievance; or (f) infringement of any patent, trade secret, trademark, copyright, license, or other proprietary rights related to materials or resources provided by, or any other acts or omissions of, Service Contractor with respect to such rights.

# Subcontractor Indemnification Language

- The work performed by the Contractor shall be at the risk of the Contractor. To the fullest extent permitted by law, Contractor shall indemnify, defend (at Contractor's sole expense), and hold harmless ACME, affiliated companies of ACME, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns ("Indemnified Parties"), from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, investigative and repair costs, attorneys' fees and cost, consultants' fees and costs ("Claims") which arise or are in any way connected with the work performed, materials furnished, or services provided under this agreement by the Contractor or its agents. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of the Contractor, its employees or agents, whether active or passive. Said indemnity and defense obligations shall further apply, whether or not said Claims arise out of the concurrent act, omission, or negligence of the Indemnified Parties, whether active or passive. Contractor shall not be obligated to indemnify and defend Contractor or Owner for claims found to be due to the sole negligence or willful misconduct of Indemnified Parties. Contractor agrees to waive any and all subrogation rights for property damage or bodily injury against ACME arising directly or indirectly out of, relating to, or in connection with the performance of the service Contractor is engaged to provide.

# What's the difference?

- General Contract:

partners, joint ventures, affiliates, successors, and assigns from and against any and all claims, demands, losses, expenses, damages, liabilities, fines, and penalties (each a “Claim”) whether actual or alleged, arising out of or relating to: (a) Service Contractor’s performance of (or failure to perform the Contract Duties; (b) a breach of this Agreement by Service Contractor or any of its affiliates, subcontractors, agents, or employees; (c) any negligence or willful misconduct by Service Contractor or its affiliates, subcontractors, agents, or employees; (d) a violation of law by Service Contractor or

- Subcontract:

affiliated companies of ACME, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns (“Indemnified Parties”), from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, investigative and repair costs, attorneys’ fees and cost, consultants’ fees and costs (“Claims”) which arise or are in any way connected with the work performed, materials furnished, or services provided under this agreement by the Contractor or its agents. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of the Contractor, its employees or agents, whether active or passive. Said

# What's the difference?

- General Contract:

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- Subcontract:

affiliated companies of ACME, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns (“Indemnified Parties”), from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, investigative and repair costs, attorneys’ fees and cost, consultants’ fees and costs (“Claims”) which arise or are in any way connected with the work performed, materials furnished, or services provided under this agreement by the Contractor or its agents. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of the Contractor, its employees or agents, whether active or passive. Said

# Consistency (subcontractor contract):

- The work performed by the Contractor shall be at the risk of the Contractor. To the fullest extent permitted by law, Contractor shall indemnify, defend (at Contractor's sole expense), and hold harmless ACME, affiliated companies of ACME, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns ("Indemnified Parties"), from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, investigative and repair costs, attorneys' fees and cost, consultants' fees and costs ("Claims") which arise or are in any way connected with the work performed, materials furnished, or services provided under this agreement by the Contractor or its agents. These indemnity and defense obligations shall apply to any acts or omissions, negligent or willful misconduct of the Contractor, its employees or agents, whether active or passive. Said indemnity and defense obligations shall further apply, whether or not said Claims arise out of the concurrent act, omission, or negligence of the Indemnified Parties, whether active or passive. Contractor shall not be obligated to indemnify and defend Contractor or Owner for claims found to be due to the sole negligence or willful misconduct of Indemnified Parties. Contractor agrees to waive any and all subrogation rights for property damage or bodily injury against ACME arising directly or indirectly out of, relating to, or in connection with the performance of the service Contractor is engaged to provide.

# Parties:

- “Contractor” = Jackie’s Snowplowing (subcontractor for this particular property)
- ACME = General (not mentioned in this sentence)
- “Owner” = ??? (not defined, owner of property)
- “Indemnified Parties” = ...”ACME, affiliated companies of ACME, their partners, joint ventures, representatives, members, designees, officers, directors, shareholders, employees, agents, successors, and assigns (“Indemnified Parties”) ...



## Residential Contract Example (consistency):

- Client Name: Johnson Properties, LLC
- “ACME Services, Inc. (‘Contractor’) will do the above described work automatically. Other services, including the plowing of snowfalls less than the minimum stated, will be provided upon written request of the Client at the prices stated above.”

# Residential Contract Example (consistency):

## General Terms and Conditions

- 1) ACME Services, Inc. may also be referred to in this agreement as "Contractor", Client may also be referred to in this agreement as "Customer" or "Owner" or "Agent".
- 2) All work is to be performed according to standard practices.
- 3) All services will be provided as quickly as possible, but Contractor cannot guarantee the provision of service within any set period of time, nor will it be responsible for provision of service unless prevented by conditions or circumstances beyond its control.
- 4) The Contractor shall maintain Comprehensive General Liability, Workers' Compensation, and Employers' Liability and Automobile Liability coverage for the term of this contract. Contractor may use independent Contractors on jobs, such Contractors shall have comparable insurance coverage.
- 5) Contractor will assume no responsibility for ice control near low lying areas, in or near depressions, potholes or other defects on the property that are prone to collect water that can freeze. Contractor will not be responsible for ice caused by puddling or pooling of water on asphalt or other surface.
- 6) Contractor will not be responsible for snow or ice that results from site conditions, including but not limited to drainage of down spouts, roof, balconies, eavings, canopies, or improper grading, blocked or insufficient storm or water drains. Contractor will not be responsible for claims that arise due to slip and falls on painted curbs or parking strips.
- 7) Contractor will not plow within two (2) feet of parked vehicles and will not plow or apply product in between parked vehicles, cart corals or between parking strips.
- 8) Client understands it maintains a responsibility to inspect the Work performed by Contractor to determine if it is satisfactory and to their specification. If Client does not advise Contractor that there is a need for additional snow or ice management services, then the parties hereby agree that Contractor has satisfactorily performed its contractual duties at the time.
- 9) Client acknowledges that the application of De-Ice to ice or snow on the Premises will not and cannot always result in the immediate or complete removal of ice from the Premises. Slippery conditions may continue to prevail even after the work has been performed. The Client understands that the Contractor assumes no liability for this naturally occurring condition.
- 10) Client understands that snow plowing, by its very nature, involves pushing a blade over the surface of the pavement. If your pavement is defective, deteriorated, weakened, frost heaved, or was installed improperly, the results of this previous damage are more likely to appear after snow plowing. Contractor is not responsible for any damages to pavement or curbs unless Contractor has been negligent. Client is responsible for all damage caused to and/or by hidden objects.
- 11) If Client declines to have Contractor apply the Services to any portion of the Premises, the Client acknowledges that the Contractor is not responsible for any damages or claims whatsoever relating to or caused, in whole or in part, by the failure to apply the Services to the Premises in any particular circumstance.
- 12) For purposes of this contract, if a "Per Event" charge is included, the definition of an event shall be as follows: A period where snow falls to the ground plus/plus, or not accumulation results. A break in the survival of 4 hours will end the event and another event may start. One or more visits to the job site may be required to complete an event.
- 13) Snow accumulation totals for an Event or period of time will come from the National Weather Service Records as measured and reported by the University of Michigan Weather Observer in Ann Arbor.
- 14) Contractor will not be responsible for and the Client agrees to hold the Contractor harmless from delays in performance caused by strikes, acts of god, state of emergencies, and inability to obtain material or any other cause beyond the control of the Contractor. Further, Client understands that salt and de-icing material is a commodity and subject to price inflation as a result of availability and demand. If prices rise during the term of this agreement, Contractor is authorized to increase price of salt de-icing services.
- 15) The parties agree that Contractor shall not be responsible for personal injury, property damage, or any form of incidental or consequential damage arising out of or related to its performance of, or failure to perform, any of the work described herein. To the fullest extent permitted by law, Client shall defend, indemnify and hold harmless Contractor, its agents, consultants, employees from all claims for bodily injury and property damage that may arise as a result of any acts or omissions by Client, its agents or employees.
- 16) Customer agrees to provide ample space for the Work, storage if necessary of equipment and materials, use of electricity for power tools, without cost to the Contractor, and maintain convenient and unobstructed access to the Work location, and to permit necessary personal and equipment of Contractor free entry and egress to and from the premises.
- 17) This Contract and all questions relating to its validity, interpretation, performance, and enforcement shall be governed by, construed, interpreted, and enforced in accordance with the substantive laws of the State of Michigan. The parties further agree that any action or dispute brought to enforce or interpret this Contract, or any part thereof, shall be brought in the County in which Contractor's main offices are located.
- 18) This instrument contains the complete and entire agreement of the parties with respect to the subject matter herein contained and cancels and supersedes all prior agreements between the parties.
- 19) The validity or enforceability of any particular provision of this agreement shall not affect the other provisions hereof, and the Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted. If the customer issues purchase orders and following administration of this contract, then customer agrees and accepts the terms of this contract. In the event of any inconsistency between these terms herein and the terms and conditions of any other agreement or notice, the terms and conditions of this contract shall govern to the extent of that inconsistency.
- 20) This agreement may be amended only by a writing signed by all parties to this Agreement or their duly authorized agents.
- 21) This agreement may be executed in one or more counterparts, each of which will constitute one of and the same instrument.
- 22) Service interruption may occur should overdue balances reach or exceed 30 days. If the property is not serviced as a result of Client's failure to pay, Contractor will not be responsible for anything that occurs at Client's property and Client agrees to defend, indemnify and hold harmless Contractor, its owners, agents, consultants, employees, and sub-contractors, from all claims for bodily injury and property damage that occur or alleged to have occurred during that timeframe. In event the Client shall fail to make the payments hereunder pursuant to the agreed payment schedule or any agreement for Extra Work, the Contractor may treat this contract as breached by the Client, terminate its obligations hereunder and retain all payments previously made in liquidated damages for the Work and preparation previously done and for loss of profit. Continuation of performance of the contract by Contractor after failure of the Client to make the payments due hereunder pursuant to the above schedule of agreement for Extra Work, if any, shall not constitute a waiver of the Client's breach of contract, if Client fails or refuses to pay Contractor all the amounts due Contractor hereunder pursuant to the terms hereof and Contractor shall institute suit in this or any other jurisdiction to recover same. Contractor shall be entitled to and the Client agrees to pay the Contractor, in addition to the damages awarded to the Contractor for the Client's breach of contract, any and all court costs, filing fees, discovery expenses, and reasonable attorney fees incurred thereby.

Authorized Client Signature  
Responsible Contractor Signature

Date  
Date 11/1/2021

# Residential Contract Example (consistency):

## General Terms and Conditions

- 1) ACME Services, Inc. may also be referred to in this agreement as “Contractor”. Client may also be referred to in this agreement as “Customer” or “Owner” or “Agent”.
- However, “Client” is not used at all, “Owner” is not used at all, and “Agent” is not used at all.
- “Customer” is used three times, but completely replaces how the “Client” was identified on page 1

# Final Thoughts

- Clarity and Consistency
- Attention to detail helps avoid disputes and litigation
- Good communication with Client leads to less confusion, greater harmony, and better results
- Recognize what is most beneficial and efficient for your company when deciding on the variable terms (payment options, scope of services, duration of contract, etc.)

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