

Contract Communication

WE CAN DO BETTER!

We, have the contractual and apparent authority to direct contractor actions and initiate contract changes. Thus – we **MUST** consider the purpose and potential impact when communicating with contractors.

Format

Must serve the purpose and avoid the problems

Format	Drawbacks -Problems?
Telecon	
Text	
Email	
Letter	

Purpose?

1. Reactive or proactive?
2. Direction or Information
3. Document
4. Require action
5. Negotiate
6. Preserve rights (don't limit yourself)
7. Change to the contract (or not)
8. Contract requirement
9. Demonstrate control (auditors, regulators)
10. Notice (fills a contract obligation, starts a clock)
11. Mitigate risks
12. Response is or is not required by date
13. When and who to respond to

WARNING: We are always writing for the record.

Document What?

14. **Failure** to comply with contract, direction
15. **Violation** of xxx
16. **Accomplishment** of...
17. **Deadlines**
18. **Recovery** schedule
19. **Previous** notices
20. **Confirmation** of....
21. **History**, events,
22. **Citations** & references
23. **Facts only**; opinions and speculation will be misinterpreted

Unless the notice is refuted it adds evidence and it will be harder for someone to claim "they didn't know"

Write so it will be legally enforceable

24. **Who** Knew & **When** they knew it
25. **Who** else must be informed/notified
26. **One-time allowance**; not waiver of spec.
27. **Changes** & what didn't change
28. **Agreement** – tacit, overt,

A few comments about lawyers

29. Lawyers write the way they do to give other lawyers something to read
30. Even Lawyers don't agree where the commas belong or what the terms mean (@ \$350 per hour)
31. Separate "legal" clauses from the performance requirements
32. Don't let the lawyers write the parts that 'normal' folks are supposed to read.

Contract Communication

33. Lawyers can find ambiguities in everything,
- Comma placement
 - Timeliness
 - Your words (or lack thereof)
 - Using words with slightly different meanings to mention the same thing in multiple places (e.g. contract vs agreement)

*Your words
WILL be
used against
you in court*

Style suggestions

34. These are **not** letters to your grandmother
35. Write for the reader – not the writer
if I can't understand it – why did you write it?
36. Get to the point first, then explain
we are not building suspense or mystery
37. Always include who/how to respond
38. Please be advised.... Really?
39. BAD words: all, never, always, every, none, good, best, ASAP
40. Do NOT add feel-good adjectives or comments
41. Use numbered bullets so even people who can't count will know you are talking about bullet number 41
42. I like writing in the first person
43. Impress with your message not your vocabulary
44. Short words & sentences are easier to read
45. Write in bite-sized paragraphs
46. Avoid run-on sentences, mixed topics, mixed references
47. Use bullets instead of commas. Example:
Service staff must:
- Be uniformed – w/name tags*
 - Perform safely – section 3.1*
 - Comply with security requirements section 4*
 - Not disrupt the workplace*
 - Pass e-Verify check & carry ID*
48. Craft a careful message but don't make it crafty

Will vs Shall

49. "shall" directs the action of an 'actor' that can perform an action
- Better: when describing a Contract Condition; "must"
e.g. "delivery must be...."
 - When describing a Contractor's action; "shall" *e.g. "contractor shall provide...."*
 - Avoid "will" unless you are talking about a future event at a specified date ("QA will inspect on August 1)
 - Avoid open ended
e.g. contractor will be allowed to....
(if not now, when & how? And is further notice required?)

WORD Tips

50. Global Search and replace – no excuse for pronouns, inconsistent language, acronyms
51. Turn on line numbers when reviewing– NOT paragraph numbers (see example page)
52. Remove hidden text before distributing
e.g. track changes
53. Check document properties for issues
e.g. original document date, author
54. Do NOT use a template unless you have reviewed for consistency with current use
Convert to pdf before sending –does not always prevent changes

Life Lesson

It is much less painful to correct misunderstandings before a contract is signed.
Don't ignore confusion – it will never get better and will always get worse

Contract Communication

1 **Contract Letter _ what would you change?**

2 *Mr., A. Korn*
3 *Hot Air Heating Company*
4 *77 Sunset Strip*
5 *Neverland, WA 66666*

6
7 *Subject: Contracts 45555 & 63322*

8
9 *Dear Mr. Korm*

10
11 *Thank you for all the good work your company has accomplished. Our project management appreciates your*
12 *team leader agreeing to take the extra time to repair the damage caused by the faulty condensate drain.*

13
14 *Please review and comply with contract specifications. Installation of the compressors in building A should be*
15 *done before august. In addition, workers are required to be trained, have proper personal safety equipment,*
16 *undergo background checks and have proper supervision at all times.*

17
18 *Please let me know about your progress. Thank you very much,*

19
20 *Sincerely,*
21 *PW Herman, Senior Buyer*

22 **Contract Clauses- are clear & enforceable?**

23 *This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years*
24 *from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one*
25 *year prior notice in writing by either party.*

26 *Can the buyer terminate after only 1 year? (this clause resulted in an actual court case)*

27
28 *Buyer reserves the unilateral right to cancel the Purchase Order/Contract without any costs or expenses owed to*
29 *the seller. Buyer may request partial shipments to meet delivery schedule*

30
31 *Deliverables shall include final inspection report, signed by QA, pump curve chart, maintenance guide (3 copies),*
32 *wiring diagram for motor, material certifications and mounting bolt pattern 3 weeks after contract award*

Contract Communication

Example	Comments
<i>Given the chance, a contractor's lawyers, or even ours, will argue about it; unclear contracts, poor grammar and the intended meaning of a contract, letter or email.</i>	Sounds like a lawyer wrote this statement; a. too many commas b. too many qualifiers c. too vague d. too passive Is this just supposed to be informative or are we suggesting someone take action? What does "it" refer to?
<i>Whereas: some buyers use words and phrases just because they sound good</i>	Notwithstanding the temptation.... DON'T if you don't have to.
<i>Write contracts and SOWS in simple, clear, concise and direct language. Contract disputes arise over unclear intent and ambiguous language.</i>	Direction and rationale separated for clarity If a contract, SOW or specification can be interpreted with several different meanings, it will be, and you will likely lose the argument in court.
<i>...as stated in section 3, rewire the door so that it opens automatically</i>	Do NOT rewrite contract requirements – it invites ambiguity. Instead merely cite the reference or copy verbatim
<i>Please be advised that....</i>	Is this a friendly request or a formal notice? Contractor is directed to... is hereby notified that...
<i>..Ed will be the field supervisor</i>	When? Next year, after he graduates, only if I send another notice?
<i>...delivery shall be on Aug 1.</i>	"Shall" does NOT direct an object. Who? Shall do what?
<i>...unless you sue us in accordance with the changes clause, we can't pay you any extra..."</i>	JUST SAY NO! Stop giving contractors legal advice. Even if they don't succeed they will make a new claim that you gave them bad advice. Better: Contract clause 10.3 covers changes. [period and stop talking!] Contractor can find his own lawyer
<i>Text & email messages are fraught with peril</i>	<ul style="list-style-type: none"> • Text and email messages exist forever in many locations. • A record of the message will always turn up • A messaging device/system becomes legally discoverable • Electronic records have numerous problems

Resources & Reading

55. Here is a great example of our tax-dollars at work - providing very helpful advice from the government.

www.archives.gov/federal-register/write/legal-docs/clear-writing.html

56. Legal drafting blogs (some good advice and examples)

www.adamsdrafting.com/blog/ <http://sites.utexas.edu/legalwriting/category/legal-drafting>

57. <http://skloverworkingwisdom.com/blog/dont-be-hoodwinked-by-the-whereas-clauses-in-agreements/>

58. Here is a practical example:

www.mltweb.com/tools/imo.htm#Confirming

59. Electronic Discovery – *warning, processes have evolved significantly since I presented this in 2013*

www.mltweb.com/handouts/discovery.pdf

60. Electronic copy of this handout: www.mltweb.com/handouts/communicate.pdf