



Model Residential Contracts:

KEY CLAUSES & PRACTICAL APPLICATIONS

Model Residential Contracts: Key Clauses & Practical Applications

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Overview

- ▶ WSBA Construction Law Section's **Model Residential Contracts**
- ▶ Key contract clauses that matter most in residential construction
- ▶ Drafting approaches that protect **both owners and contractors**

WSBA Model Residential Contracts

- ▶ Standard **Lump Sum** and **Cost-Plus** templates
- ▶ Created to help homeowners and builders **fairly allocate risk**
- ▶ Designed as **neutral starting points** consistent with industry norms
- ▶ Not legal advice—users must **adapt for each project**

Revision History

- ▶ **Revised and republished in 2022 by:**
 - ▶ **Bryce Sinner**, Landerholm P.S.
 - ▶ **Masaki “Saki” Yamada**, Ahlers Cressman & Sleight PLLC
 - ▶ **Scott Campbell**, Wallace & Campbell PLLC
- ▶ Full review included modernization, harmonization, and presentation to the WSBA Construction Law Section Executive Committee for approval.

Where to Find Them

- ▶ The Model Residential Contracts are available **free** on the WSBA Construction Law Section website:
- ▶ **wsba.org** → **Legal Community** → **Sections** → **Construction Law Section**
- ▶ <https://www.wsba.org/legal-community/sections/construction-law-section>

Scope of Work

- ▶ **What it is:**
The definitive description of the contractor's obligations—typically defined in the contract and supported by referenced plans, specifications, and/or the contractor's proposal.
- ▶ **Why it matters:**
Everything else (price, payment, schedule, changes) keys off the scope. Vague scope leads to change orders, cost overruns, and disputes. Clear scope reduces scope creep, anchors change pricing, and limits after-the-fact claims that work was included or excluded.
- ▶ **Drafting tips:**
 - Incorporate by reference all drawings/specs (list each document).
 - Identify clarifications and exclusions (assumptions, what's not included, work by others).
 - Be cautious when referencing a contractor's proposal—it may contain terms that conflict with the contract.
 - Ensure the scope aligns with the pricing method (lump sum, allowances, cost-plus, etc.).

Pricing & Contract Type

- ▶ **What it is:**
The contract's pricing framework and method for calculating the contractor's compensation—typically tied to the defined scope, selected pricing structure, and any allowances or unit-based components.
- ▶ **Why it matters:**
Pricing structure determines who bears cost-overrun risk, what documentation is required, how changes are valued, and how predictable the total project cost will be for the owner. Clear pricing terms help avoid disputes over reimbursable costs, allowances, and unexpected increases.
- ▶ **Common Structures:**
 - **Lump Sum:** Single fixed price for a defined scope; high predictability for the owner; contractor carries most cost-overrun risk.
 - **Cost Plus (with or without GMP):** Owner pays actual documented costs + fee; greater transparency; owner bears risk unless capped by a GMP.
 - **Unit Price:** Appropriate where quantities are uncertain; payment based on measured installed units.
 - **Allowances:** Placeholder amounts for items not yet selected or fully defined.
- ▶ **Drafting tips:**
 - Tie pricing directly to the defined scope (and all allowances).
 - For cost-plus, define reimbursable costs, required documentation, audit rights, and notice requirements for cost increases.
 - Consider price-escalation language for volatile materials or long-lead items.

Payment, Retainage, Lender Requirements & Liens

- ▶ **What it is:**
The contract's framework for how and when the contractor is paid—typically through monthly progress payments based on percent complete—plus the protections tied to retainage, lender requirements, and lien management.
- ▶ **Why it matters:**
Payment terms drive cash flow, define conditions for owner protections, and determine when work is deemed complete for billing. Clear payment mechanics reduce disputes, protect the owner from premature payment, and ensure lien rights are properly managed.
- ▶ **Drafting tips:**
 - Use a **Schedule of Values** to allocate the contract price across scopes of work.
 - Retain **up to 5% retainage** to protect the owner until completion.
 - Require conditions precedent to payment (e.g., lien waivers, inspections, approvals).
 - Align payment procedures with **lender requirements** when financing is involved.
 - Require **conditional lien waivers** with each pay application (from contractor and qualifying subs/suppliers).

Time & Schedule

- ▶ **What it is:**
The framework for when work begins, how long it should take, and how progress and completion are measured—typically including the start trigger, substantial completion date, milestones, and sequencing expectations.
- ▶ **Why it matters:**
Schedule terms drive project progress, determine when payment and warranty periods start, and affect exposure to delay claims. Clear schedule requirements reduce disputes about timing, performance, and responsibility for delays.
- ▶ **Drafting tips:**
 - Identify the **start trigger** (e.g., permit issuance, notice to proceed).
 - Set a **substantial completion date** and any key milestones.
 - Make **time is of the essence** explicit if strict adherence is required.
 - Verify completion through **objective criteria** (CO or design-professional certification); require a formal certificate of substantial completion.
 - Use **liquidated damages** for late completion, calibrated to reasonable anticipated owner losses and coordinated with any waiver of consequential damages.

Changes

▶ **What it is:**

The contract's procedure for modifying scope, price, or schedule after execution.

▶ **Why it matters:**

Change orders are a major source of disputes. A clear process prevents unauthorized work, unexpected cost increases, and disagreements over what was approved.

▶ **Drafting tips:**

- Require **written, signed change orders** before work proceeds (emergencies aside).
- State that each change must include associated **price and time adjustments**.
- For cost-plus contracts, define how compensation is calculated (T&M rates, markups, documentation).
- Clarify who has authority to approve changes (owner, architect, lender, etc.).
- Prohibit the contractor from proceeding based on verbal instructions or assumptions.

Differing Site Conditions

▶ **What it is:**

A contract provision allocating risk for concealed or unknown physical conditions that differ materially from what the contractor could reasonably anticipate.

▶ **Why it matters:**

DSCs are a common source of cost and schedule impacts. Clear DSC language prevents unfair risk shifting and reduces disputes over responsibility for unforeseen subsurface or concealed conditions.

▶ **Drafting tips:**

- Define what qualifies as a **differing site condition** (concealed, unknown, and materially different from indicated or reasonably anticipated).
- Require **prompt written notice** and **pause-work** procedures when conditions are encountered.
- Clarify whether the site is treated as “**unclassified**” (contractor bears full subsurface risk) or whether risk is shared via the DSC clause.
- Tie any adjustments (price/time) to the **change order process**.

Claim Procedures

▶ **What it is:**

The contract's process for submitting requests for additional time or money—typically for delay, disruption, extra work, or changed conditions.

▶ **Why it matters:**

Claim procedures create real-time notice and documentation, allowing issues to be evaluated while evidence is fresh. They also prevent surprise, aggregated claims late in the project.

▶ **Drafting tips:**

- Require **prompt written notice** (e.g., 7–14 days from when the contractor knew or should have known).
- Make compliance a **condition precedent**—failure to follow the procedure results in **waiver**.
- Require **contemporaneous documentation**, including cost and schedule impact analysis with the initial notice.
- Tie claim resolution to the project's **change order** and **schedule** procedures.

Delays & Force Majeure

- ▶ **What it is:**
The contract's framework for allocating responsibility for delays and determining whether the contractor is entitled to **time, money**, both, or neither.
- ▶ **Why it matters:**
Clear delay categories determine schedule extensions, liquidated damages exposure, and entitlement to cost recovery. Washington law also restricts how parties may allocate delay risk.
- ▶ **Delay Categories:**
 - **Compensable Delay:** Delay caused by the owner (or parties acting for the owner). Contractor is typically entitled to **time + money**.
 - **Excusable Delay:** Delay beyond both parties' control (e.g., force majeure, unusually severe weather, certain governmental actions). Contractor is typically entitled to **time only**.
 - **Non-Excusable Delay:** Delay within contractor's control (poor management, subcontractor failure, ordinary weather). Contractor receives **no time or money**.
- ▶ **Washington-Specific Rule:**
 - **"No Damage for Delay" clauses are void in Washington**—a contract cannot waive a contractor's right to damages for **owner-caused unreasonable delay**. RCW 4.24.360 declares such clauses **against public policy** and **unenforceable**.
- ▶ **Drafting tips:**
 - Define each delay category clearly.
 - Tie delay relief to **timely notice** and the project's **claim procedures**.
 - Align delay provisions with **liquidated damages** and the substantial completion framework.

Indemnification & Liability Allocation

- ▶ **What it is:**
A clause allocating responsibility for third-party claims (injury, property damage, code/permit violations, lien claims) arising out of the contractor's work.
- ▶ **Why it matters:**
Indemnity provisions shift risk, but Washington law **prohibits indemnifying an owner for their own sole negligence** and limits indemnity for **concurrent negligence** to the contractor's own proportionate fault.
- ▶ **Drafting tips:**
 - **Define scope carefully:** Cover injury, property damage, environmental issues, code/permit breaches, and lien claims—but only to the extent permitted by law.
 - **Comply with RCW 4.24.115:**
 - Indemnity for an owner's **sole negligence** is **void**.
 - Indemnity for **concurrent negligence** is allowed **only to the extent of the contractor's own negligence**, and **only** if expressly stated.
 - Any waiver of workers' comp immunity must be **express** and **mutually negotiated**.
 - **Duty to defend:** Washington's statute restricts requiring a contractor to defend an owner for claims arising out of the owner's negligence. Defense obligations must be carefully tailored.
 - **Survival:** State whether indemnity obligations continue after completion.
 - **Coordinate with other clauses:** Ensure limitation-of-liability or waiver-of-damages provisions do not unintentionally undermine indemnity rights.

Insurance & Bonds

- ▶ **What it is:**
The contract's requirements for insurance and surety protection during construction—allocating risk for jobsite injuries, property damage, and performance/nonpayment exposures.
- ▶ **Why it matters:**
Proper insurance and bonding protect both owner and contractor from financial loss, ensure coverage for construction-phase risks, and prevent gaps that lead to disputes or uncovered claims.
- ▶ **Drafting tips:**
 - **Commercial General Liability (CGL):** Require owner to be an **additional insured** for ongoing and completed operations.
 - **Workers' Compensation:** Mandatory statutory coverage for all contractor and subcontractor employees.
 - **Builder's Risk:** Clarify who purchases it and what perils are covered (theft, fire, wind, etc.); note that it **does not cover defective work**.
 - **Performance & Payment Bonds:** Optional but provide strong protection—performance bonds cover defective/incomplete work; payment bonds protect against nonpayment of subs and suppliers.
 - **Proof of Coverage:** Require certificates **plus actual additional-insured endorsements**; include **waiver of subrogation** where appropriate.

Warranties

- ▶ **What it is:**
Contractual assurances that the contractor's work meets required standards—and the primary mechanism for addressing construction defects in Washington, where implied protections are limited.
- ▶ **Why it matters:**
Washington **does not recognize a general cause of action for negligent construction** and has **no broad implied warranty of workmanship**, making **express warranties** critical.
Washington's limited implied warranty of habitability applies only to **first purchasers**, only when the builder is a **commercial builder**, and only for **fundamental defects** that render the residence unfit for its intended purpose. [\[hl-law.com\]](http://hl-law.com)
- ▶ **Drafting tips:**
 - Include an **express warranty of workmanlike construction**, since Washington does *not* imply one.
 - Define the **duration**, starting at substantial completion, and require a clear **notice-and-cure** process.
 - Maintain an express obligation to repair or replace defective work within the warranty period.
 - State that express warranties are **in addition to** other available contract remedies (unless the parties intend an exclusive remedy).
 - Assign **manufacturer warranties** to the owner at closeout.

Waiver of Consequential Damages & Limitation of Liability

▶ **What it is:**

A clause in which both parties waive “indirect” losses—such as lost profits, loss of use, financing costs, or reputational harm—and/or limit their total liability under the contract.

▶ **Why it matters:**

Waivers reduce exposure to catastrophic, unpriced risk and help keep contract pricing competitive. They focus recovery on direct damages rather than speculative or outsized consequential losses.

▶ **Drafting tips:**

- Define the scope of the waiver (e.g., lost profits, loss of use, financing costs, business interruption).
- Ensure the waiver or limitation **does not conflict** with liquidated damages, indemnity rights, or statutory claims you intend to preserve.
- Clarify whether the limitation applies to all claims or excludes certain categories (e.g., gross negligence, willful misconduct).
- Pair with clear liquidated damages if schedule risk needs a defined remedy.

Termination

- ▶ **What it is:**
The contract's framework for ending the relationship—either due to breach or at the owner's discretion—and defining how work, payment, and project handoff are finalized.
- ▶ **Why it matters:**
Clear termination rights and procedures prevent wrongful-termination claims, ensure orderly closeout, and define how remaining work and costs are handled.
- ▶ **Drafting tips:**
 - **Termination for Cause:** Allowed for material breach (e.g., chronic nonpayment, failure to perform, safety violations, persistent noncompliance). Require **notice and an opportunity to cure**.
 - **Termination for Convenience:** Owner may terminate without contractor breach; contractor is paid for **work performed to date** and, where agreed, **reasonable demobilization costs**.
 - **Accounting & Closeout:** Specify how **final payment** is calculated, how **subcontracts are assigned**, and how the **site and materials** are turned over.
 - Clarify documentation required at termination (e.g., lien releases, inventory of stored materials, accounting of work in progress).

Dispute Resolution

▶ **What it is:**

A structured process for resolving disputes—often through staged steps to encourage early resolution before formal proceedings.

▶ **Why it matters:**

A well-drafted clause reduces cost, preserves relationships, and ensures disputes are resolved in the proper forum under the correct state law.

▶ **Drafting tips:**

- Use a **tiered process**: good-faith negotiation → mediation → arbitration or litigation (choose one, unless narrowly defining exceptions).
- Require **pre-suit mediation** as a condition precedent to filing in court or initiating arbitration.
- Specify **Washington law** as the governing law and choose a **reasonable venue**, typically the county where the project is located.
- Define mediator/arbitrator selection, cost-sharing, and any carve-outs (e.g., for injunctive relief to preserve lien rights).
- Ensure the clause aligns with the contract's notice, claim, and schedule provisions.

Conclusion

▶ Key Takeaways:

- The WSBA Model Residential Contracts provide a **neutral, reliable starting point**.
- Good drafting prevents disputes: clarity in **scope, pricing, payment, schedule, and changes** is essential.
- Washington-specific rules matter—especially on **delays, indemnity, and warranties**.
- Align contract terms with project realities: risk allocation, documentation, communication, and enforceable procedures.

▶ Final Thought:

Strong contracts don't eliminate disputes—they give you the tools to **manage them effectively** and protect your client's interests.

▶ Thank You

Questions? Happy to discuss examples or real-world applications.