

# Contractors and Contracts

Here are some tips that you may like to consider when entering into a contract. You may need to ask more questions and it is best to seek legal advice and advice from an accountant.

Even if you're operating in a part of the industry where it's hard to get a contract, you might want to ask the same questions about your potential customers.

## Contractors<sup>2</sup>

### *Factors to consider when assessing a contract*

These are general tips only and it is advisable to obtain advice from your legal and financial advisors on your specific situation.

It would be useful to find out how long the contractor has been in business. To do this, you can conduct a business or company search. Because you might be working solely for the contractor, you might wish to ask if your superannuation and workers' compensation insurance will be catered for. It is essential that your contract be in writing and all conditions be clearly written down after negotiations, so that you incur no losses. It is best to get legal advice before signing any contracts.

When you talk to a contractor, ask these questions:

- **Do I have to pay for goodwill and/or a franchise or contract fee?**
- **Am I guaranteed a minimum number of hours per week?**
- **Am I paid a waiting time allowance?**
- **Does the company offer me a flat hourly fee, free of deductions, or does it take out a percentage of the vehicle's gross earnings to cover the company's costs?**

Many companies take out a percentage of the total earning of the vehicle and this can be up to 45%, a figure that appears to be very excessive.

Remember that it is the company which is quoting in the market place, and if it quotes low just to win the business, then your potential to earn revenue is reduced. It won't affect the company quoting – it will still earn its percentage, no matter what.

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<sup>2</sup> From *Do I Want to be an Owner-driver?* with the permission of the Owner-drivers Association of South Australia Ltd.

- **Are there periods where earnings can be affected?**

For example, after Christmas can be a period when the demand for transport services is quiet.

- **Are there provisions (in writing) for a price increase?**

Remember there are costs that can affect your financial return. What if the price of fuel continues to escalate – are there provisions by the company to allow rate adjustments for you to cover this increased operating cost?

- **Why is a company advertising for owner-drivers on a regular basis?**

One possible reason for a high turnover of operators in a company is poor financial returns.

#### **Talk to other owner-drivers**

Probably the best sources of information about a company are other owner-drivers. They will give you more candid answers than recruiters. When you talk to other owner-drivers, find out how long they have been working with the company. If the owner-driver has been with the company for more than two years, pay attention to what he or she says. Better owner-drivers don't jump ship at the first sign of trouble. You could ask these questions:

- Are you happy with the company? If not, why not?
- Do you get paid on time?
- Are the charge backs on your settlement fair?
- Do your settlements clearly itemise deductions?
- Does the company penalise you if you refuse a load?
- Do you get home at reasonable intervals?
- How are complaints handled?

#### **Running your own business**

If you become an owner-driver, no matter what sector of the transport industry you enter, you will be running your own business.

You must be aware of your costs, including fuel, repairs and services, tyres, insurance etc, and unless you know these costs you can't determine what rate you need to charge to be profitable.

### **Do your research**

When you research a company, don't act like someone going for a job. You are a businessperson striking a deal with another businessperson. You have to look out for your best interests. Don't shy away from asking tough questions. You might not get the answers you want, but it's better to find out how the company responds to certain issues before you sign a contract.

You can use the checklist on the next page to record information about the contractors or companies that you are investigating. Some of the items apply to courier companies, but you can modify the form to include the questions you want to ask about each company. The list is general in nature and you should check with your accountant and lawyer on other issues to check.

You can copy or print out the checklist separately from the 'Useful Forms' chapter of this guide, or download it from the 'Owner-drivers guide' website, [www.dpi.wa.gov.au/ownerdrivers](http://www.dpi.wa.gov.au/ownerdrivers).

<b>Contractor checklist</b>		
Name of company		
Name of representative		
Phone number		
Date		
Do I have to pay a goodwill and/or franchise or contract fee?	Yes / No	If yes, how much?
What is the hourly rate being paid?	\$	
Am I guaranteed a minimum number of hours per week?	Yes / No	If yes, how many?
Are they prepared to put this in writing?	Yes / No	
Am I paid a waiting time allowance?	Yes / No	If yes, how much?
Does the company take fees out of the gross remuneration?	Yes / No	
If yes, which ones?	Radio Uniform Comprehensive insurance Public liability insurance Load transit insurance Sickness and accident insurance Management	Yes / No Yes / No Yes / No Yes / No Yes / No Yes / No Yes / No
To cover the company's costs, does the company take a percentage out of the vehicle's gross earnings?	Yes / No	If yes, how much?
Is the company advertising for owner-drivers on a regular basis?	Yes / No	If yes, why?
Are there periods where earnings can be affected?	Yes / No	If yes, when?
How soon are accounts settled?		
Does the company provide maintenance facilities?	Yes / No	If yes, is there a charge?
What are the provisions if either party wishes to terminate the contract before the term runs out?		

## The contract

As an owner-driver you will want to ensure a regular supply of work. Companies you deal with will also want to secure drivers to meet their requirements.

When seeking work as an owner-driver, you may be presented with a contractor's agreement and asked to sign it before commencing work.

This agreement will often appear like a standard form with details such as your trading name and address inserted (often into schedules at the end). You will be asked to sign. This is the time to exercise caution.

### **DO NOT SIGN UNTIL:**

- you have read the document;
- you have received independent legal advice;
- you have received financial advice;
- you have understood the document and its implications; and
- all of your questions have been satisfactorily answered.

There are many issues that need to be addressed, including the following.

- **The term of the agreement**

You must know how long the contract will run. Do not rely on what you are told, but see what is specified in the contract. If you are purchasing a vehicle or paying for the contract, this is most important.

You will also want to see that there is a clause that permits you to renew the contract for a further term if you wish to do so.

- **How may the agreement be terminated?**

Having satisfied yourself that the contract term is appropriate (eg a five-year term), watch out for any clause that states, "Either party may terminate this contract upon providing 14 days notice to the other party."

Usually the contract may be terminated early only upon the happening of an extraordinary event such as bankruptcy, criminal conduct, extended ill health, breach of a fundamental term of the contract etc. However, it may be in your interest to have flexibility regarding termination of the contract and it is best to see your lawyer for advice on this.

- **Does the agreement guarantee a minimum quantity of work?**

The contract is of no value to you if it does not assure you of work.

- **Are you obliged to perform all work allocated to you?**

Too much can be almost as bad as too little. If you are obliged to perform all work, your failure to do so may be a breach of contract that results in the termination of the contract.

You should see if the contract gives you the ability to engage a sub-contractor to perform extra work or do your work if you are unavailable.

- **How is the rate of pay calculated and paid?**

This is often stated vaguely and in such a way as may not be capable of enforcement – eg “Payment shall be made in accordance with the company manual as varied from time to time” would be unacceptable.

Rate of payment must be clear and the manner of payment is also important – eg payment three months in arrears is going to cause cash flow problems at the outset.

- **What provision is there for future rate changes?**

A five-year contract that fixes the pay rate is unacceptable, as all costs and especially fuel costs will rise. You will need to examine the provision for pay increases carefully, as it can often cause future conflict.

- **Can you perform any work for anyone else?**

Are you intending to contract your services exclusively to one company or do you intend to perform additional work either on your own behalf or for another company.

Make sure your contract matches your intention. If the assurance of a specific quantity of work is not stated in the contract, it is even more important to preserve the right to carry out outside work.

- **Are you restricted from operating your vehicle after the contract ends and if so, in what way?**

Upon termination of a contract, some provisions continue in force! Often a contract will contain a ‘restraint of trade’ clause preventing the driver from working within a particular radius for a specified period of time. If the restraint is too broad, the courts will strike it out of the contract, but you will not want to go to court to find out. If you do, you will find out that there are many shades of grey and the exercise will be stressful and expensive. If in any doubt about the restraint of trade clause, see your lawyer.

A better way is to negotiate acceptable terms before signing the contract. Don’t rely on verbal representations made at the time, eg if the contractor says, “Don’t worry about the restraint clause: we won’t enforce that.”

If they say a particular clause will not be enforced, it should be deleted. If they say they will change an unacceptable clause, make sure they put the change into the contract.
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- **What if one of the contractor's customers asks you to work for them?**

There are likely to be confidentiality clauses and the restraint clause will also need to be considered.

- **What happens if you want to sell your truck?**

Can the benefit of the contract you are entering into be transferred into the name of the purchaser of your truck? Do you need the consent of the company and if so in what circumstances can that consent be refused? Do reasons have to be given?

- **Is there a buy in price and if so, can it be recovered at the end of the agreement?**

If you are paying a large price to gain the benefit of the contract, it will be important to know that the buy in price can be recouped later. An ability to make a profit will be even better.

To avoid pitfalls and traps contained in the 'fine print', you should always obtain independent legal advice before signing any such documents so that you know what you are doing before it is too late, and so that negotiations can be entered into to seek the removal or amendment of any oppressive term to the mutual satisfaction of both parties.

If you have read the contract carefully and obtained legal advice, you should know the answers to the above questions. If you don't like the answers that you get, you can attempt to negotiate alternatives and can get assistance from a solicitor or from your industry association.

Having gone to the trouble of understanding your contract, make sure you keep a completed copy for your own future reference.

## ***Tendering***

Tenders are invitations to apply for a contract on the conditions stated in the tender. A selection process then determines the successful tenderer.

It is important that you read a tender document carefully and understand exactly what the conditions are that you are committing yourself to.

Again it is important to contact a solicitor or your accountant who is experienced in understanding documents and who can give you sound advice.

Like contracts, tender conditions must be fair and equitable to both parties.

When quoting for work through tendering, it is important that you don't just quote a low rate to win in the process – you should also put in a price that shows value for money and takes into account your financial viability. If it is a government tender, it is best to refer to State Supply Commission guidelines and The State Supply Commission Act. These documents will help you to better understand your obligations if responding to a government tender.