**CONSTRUCTION CONTRACTS REQUIRE ATTENTION**

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Most residential construction contractors do a good job for a reasonable price. That does not mean homeowners should contract with a handshake. A written contract is always a good idea to confirm the agreement of the parties. It is a lot harder to argue about terms of an agreement when it is written.

Most contractors agree that a written contract is a good idea and will offer a homeowner their preprinted form for signature. Therein lies the rub, as that form is most assuredly favorable to the contractor. A homeowner is well advised to read the form carefully and not simply assume that because it is preprinted it is fair and reasonable.

The two most important parts of a home construction or home improvement contract are price and description of what is to be done. Price is not as simple as it might seem.

Some contracts include a clause that allows the contractor to increase the price if the cost of materials increases. That is not generally favorable to the homeowner as those contracts usually do not have a corresponding provision providing for decrease in price if material costs go down. Homeowners should not agree to one without the other and most homeowners should insist that the contractor assume the risk of increased material costs. That adds some incentive to quick completion.

Terms for payment are important. Most contracts ask for a big down payment and some have a schedule for periodic payments the project is substantial. The homeowner should ask for an explanation of how down payment was calculated. The homeowner should also confirm that any schedule for periodic payments does not result in the contractor receiving a larger percentage in payment than value of work performed. The homeowner is in a weak bargaining position if the contract is so frontloaded that the contractor gets all of the profit long before the job is done. The contract should also require the contractor provide all releases from subcontractors and suppliers necessary to insure the property is lien free each time a progress payment is made.

Change orders is another area where price can be problematic. Change orders are for changes from the original scope of work and are usually priced by adding what the contractor pays a subcontractor plus a percentage for profit and overhead. What’s wrong with that? There is no incentive for a subcontractor to give the contractor a low price when the subcontractor will get paid and the contractor gets profit and overhead on top. A homeowner should consider mandating that change orders be priced at pricing for comparable items included in the original contract. That can mean the original contract should be more specific as to the pricing calculation for various elements of the job.

If change orders sound like the homeowner opening his or her checkbook, the same can be true of a cost-plus contract. Under a cost-plus contract, the contractor agrees to do work at the contractor’s actual cost with additional percentage added for profit and overhead. Unless the contract mandates competitive bidding and evidence to confirm pricing is competitive, there is no incentive for any of the subs or material suppliers to provide low pricing. The contractor’s profit goes up when the subcontractor pricing goes up. Many homeowners feel that a cost-plus contract will keep their expense to a minimum because the contractor does not have to build in a cushion or hide costs to make sure the job is profitable. In some cases, it does the opposite.

Scope of work should be as detailed as possible. Far too many contracts reference the general scope of the job. There should be some type of plans, drawings, specifications of material, colors and other details to limit later disagreement. Detail also helps limit change orders, which not only affect price but can also add time to completion

Time for completion should be specified. Most form contracts provided a lot of escape language for a contractor for weather, unavailability of materials, labor, etc. Rather than allowing broad language for delay, the homeowner should consider negotiating a firm completion date with built-in cushion for the contractor. A homeowner could also negotiate a per diem charge for each day of delay past the scheduled completion date. Florida courts will enforce late completion payment clauses as what is known as liquidated damages as long as they are not so outlandish as to be considered unreasonable and a penalty. In one recent case, the court upheld a $250 per day payment from the contractor for each day of delay.

Biggest dispute between homeowner and contractor often accompanies the contractor’s request for final payment. Homeowner says the job is not done or not done correctly and wants compensation for delay or defects. The contractor threatens to file a lien unless the contractor is paid. What happens then?

A contractor has a right to a lien for improvements to real property. Florida statutes provide attorney fees to the prevailing party in any action to foreclose a contractor’s lien. Foreclosure is similar to foreclosing a mortgage. Homeowners rarely prevail in these cases because the contractor did provide material and improved the property. Although the contractor may not get everything the contractor wants, the contractor is usually the winner. Judges and juries tend to lean toward finding that someone who has provided materials or services should be paid, leaving homeowners fighting to prove why payment should not be made.

Dispute at request for final payment often focuses on incomplete or improperly completed work. The homeowner may want an escrow to ensure the contractor will remedy the deficiency, but most contractors have contracts that prohibit escrow for punchlist items. A homeowner should attempt to negotiate a provision in the contract for a reasonable escrow equal to the estimated cost of remedying any deficiency. Because there might be an argument about what that cost would be, perhaps another provision for third-party expert to determine the cost in the event of dispute is appropriate.

If the completed work is deficient, a homeowner is not without recourse. The measure of damages for deficient construction is the cost of remedy, as long as that is not economic waste. Economic waste means the cost of the remedy far exceeds the benefit. If the cost of remedy would be economic waste, measure of damages is the difference in value between as built and as supposed to be built. A homeowner can also entitled to loss of use equal to the fair rental value of the property.

Most construction contracts do not include a provision for attorney fees in event of dispute because contractors know they can file a lien and get attorney fees if successful in foreclosing the lien. Homeowners should consider requiring a provision in their contract for attorney fees to the prevailing party. That way, if the homeowner has to sue the builder, the homeowner could be eligible for attorney fees in addition to damages. Lawsuits are expensive and often the cost of pursuit exceeds the amount of recovery, unless the prevailing party can get attorney fees to boot.

Hiring a reputable contractor is a good start. Making sure the contract is clear and protective for both parties is even better. These are matters that should be done at the very start of any construction project.

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