**COST PLUS HURRICANE REPAIR CONTRACTS CAN BE EXPENSIVE**

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The cost-plus repair contract is considered an attractive option by many homeowners. What’s not to like? Cost-plus sounds like there is no risk of excessive profit and the homeowner will only pay the actual cost of construction plus a set percentage to the contractor.

Sadly, in many cases cost-plus ends up costing the homeowner far more than a fixed price contract…. even a fixed price with a lot of profit for the builder. How can that happen, you ask? It happens because there is no incentive to keep costs low.

The contractor makes a percentage of costs. If costs go up, the contractor’s fee goes up. In a fixed price contract, the contractor has incentive to get the subs to sharpen their pencils and give a lower price and the sub is stuck with that price. The contractor prepares a bid based on the prices submitted by subcontractors and current cost of material. The contractor builds in a profit based on those costs, and may add a little extra for possible increases in material prices over life of the job.

There is no limit on how much prices can be increased under a cost-plus contract. There is also no fiduciary duty between contractor and homeowner. The parties are dealing at arm’s length in a business transaction and each is to look out for himself.

When the pricing reaches exorbitant levels, the homeowner might have a claim for fraud, breach of good faith and fair dealing, or even unfair and deceptive trade practice. Successfully pursuing those claims will usually require filing suit. Filing suit means lots of attorney fees and expense. If the homeowner was successful, the homeowner will have to find assets owned by the contractor to pay any judgment. That is often harder than winning the original lawsuit. So, homeowners are best advised to protect themselves with a good contract and vigilance during construction.

Estimates are not binding. That is why they are called estimates. Many homeowners sign a cost-plus contract believing the estimate will be the final price. It rarely is. One way to obtain some protection is to cap costs at a percentage above the estimate. That is rarely done as the homeowner does not think a cap is needed and the contractor does not want one. In many cases, the homeowner has no written estimate. If the estimate is already high, a cap may not be worth much. Hence, if a homeowner wants a cost-plus arrangement the homeowner should insist on an estimate, a cap and get a qualified expert to review the estimate to make sure it is in line with prevailing local costs.

A homeowner under a cost-plus contact can even pay twice for mistakes. It costs to correct mistakes in plans and mistakes in construction. Many contractors pass on these costs as part of the cost-plus under their contract.

Cost-plus contracts rarely give homeowners benefit of any rebates to the contractor from suppliers. Many suppliers give rebates and those do not show up on the invoice for a job. They are provided monthly or even annually as a credit to the contractor.

It is possible a contractor will work hard to get a homeowner the best possible price, and many do. But, a homeowner who has no knowledge of pricing in the construction trades can never be sure. That is why some hire a consultant who has that experience. That can be a big help, but may offer little protection in a cost-plus arrangement.

What else could possibly go wrong? Many contractors are not good with paperwork or record keeping. They cannot properly track what is billed for different jobs so they invoice the homeowner based on what they “think” is allocated to the homeowner’s job. Few lean in the homeowner’s favor so if they have any doubt, they slap the bill on the job that is cost-plus. Some use software that is project management rather than accounting.

With a fixed price contract, the homeowner does not have risk of increased costs except for changes during construction. Change orders are usually cost-plus and, again, there is no incentive for anyone to come in with their lowest price.

The homeowner with a fixed price contract may also find contract price different from what the contractor bills. Many contractors bill for percentage completed and the contract allocates the contract price among those percentages. Most builder contracts tend to front load the percentage, so the profit comes out of the job early rather than at the end. The contractor has little incentive to finish jobs when there is no profit in the last draws or the work will cost more than the draws will cover.

Another issue with fixed price contracts can be contractors billing more on a cost-plus basis than percentage of completion. They do that by equating cost of work done to percentage of completion. The blurring increases when there are changes and extras, which the contract says are to be billed at cost-plus. By the time dispute between homeowner and contractor reaches its zenith (i.e. contractor stops work), one of the biggest arguments can be whether the contract was for a set price or intended to be cost-plus.

Fixed price contracts often include a provision allowing the contractor to increase price if costs increase. That became common after the initial covid shutdown of suppliers and prices for commodities like lumber skyrocketed. That means the contract price is merely the floor, not what the homeowner expected.

Many fixed price contracts also include allowances for various parts of a job. Again, those allowances are merely the base price and are subject to increase by what the owner selects. Allowances are invoiced based on cost to the contractor. What incentive is there to reduce allowance item costs if they pass through, even if there is no add on? The same holds true for changes and extras, which almost all contracts provide are invoiced at cost plus.

Many contractors treat their customers the way they want to be treated. They try to get low prices and do their best to save money for the homeowner. Many see the opportunity for more profit in cost-plus arrangements, in whole or in part. How can a homeowner tell the difference between contractors? Most cannot, until things go awry. A few hire a consultant to review bids and even oversee construction, but most do not want that expense or simply don’t think of it.

The best time to avoid problems in construction is before the contract is signed. The bigger the project, the more a homeowner should consider hiring an attorney and even a construction consultant to assist with contract and pricing. In these cases, saving money in contract drafting can be penny wise but pound foolish.

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