

Cost Plus (Time and Materials) Contracts

by Ray Myer, Construction Attorney and VCCA Legal Counsel

Contractors who specialize in residential construction, particularly high-end remodels, have long taken for granted that they may use a cost-plus or time and material contract for these projects. The Contractors State License Board has taken a contrary position: there is no such thing as a cost-plus or time and materials contract for a home improvement project. Citing Business and Professions Code section 7159(e), the License Board contends that the words "a schedule of payments showing the amount of each payment as a sum in dollars and cents" prohibits the use of cost plus contracts on residential remodel projects.

This means that the License Board can issue a citation and impose a fine against or suspend the license of any contractor that uses a cost plus or time and materials contract on a home remodel project. It makes no difference that the project plans are incomplete or that the owner has decided to make "creative use" of the plans (that is, to make lots of major changes to the scope of work). The License Board can take such action even if the owner signs a cost-plus or time and materials contract!

Contractors who are unwilling to sign fixed bid or lump sum home remodel contracts must use creative techniques to comply with the Contractors License Law. To prepare a schedule "showing the amount of each payment...in dollars and cents", the contractor should first generate a budget based on the plans and known owner expectations. The total budget amount will become the "contract price". The "payment schedule" is simply a breakdown of the "contract price" into periodic (e.g. biweekly or monthly) intervals. Each budget line item amount can be treated as an "allowance" subject to increase (or decrease) by means of written and signed change orders. Payment schedule amounts and intervals are also subject to adjustment by written and signed change orders. A contract provision can obligate the owner to pay a "guaranteed contract price" determined on a cost-plus or time and materials basis. Another provision can allow the contractor to suspend the work until the owner signs such a change order. Such a contract is detailed and cumbersome but it will force the parties to document all changes very carefully.

To my knowledge, there are no "form" or "store bought" cost-plus or time and materials contracts that comply with the License Law requirements for home improvement projects. It is always good practice to seek competent professional advise and counsel before attempting to draft or negotiate construction contracts.