

So, You Think You Have a Cost-Plus Contract?

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Many contracts for construction require compensation to be paid to the contractor for the costs of the work performed plus an amount equal to either a percentage or a flat amount. Agreements which require the payment of as-yet-unknown costs plus an additional fee is the working definition of a cost-plus contract. See e.g. *R.C. Barrett Development, Inc. v. Allred*, W.L.83 7910, 2(Wash.App. Div.2, 2004). Cost-plus contracts are generally held to be enforceable despite their lack of an essential term, namely price.

Cost-plus contracts do not grant a contractor carte-blanche to do whatever it desires. Construction contracts typically have construction drawings and specifications from which the contractor constructs the building and which serve to limit an owner's potential exposure. Regrettably, often times these documents are vague or incomplete, or the owner makes additions or changes to them for higher end materials or finishes, any of which makes costs exceed the owner's original expectations. When the money flows faster than the owner expected, problems and disputes usually arise on the project.

An owner's expectation is often pegged to an estimate from the contractor which describes what it anticipates the work will cost before it begins construction. The contractor often includes disclaimers of the estimate to prevent it from becoming a budget or a promise as to what the costs might be. But expectations are difficult to prevent and a contractor should protect itself by either taking steps to prevent its incorporation into the construction contract, or promptly notifying the owner of potential cost ramifications from changes or additions to the work, whether due to unforeseen conditions, more explicit drawings, or an owner's change. There is no specific authority requiring such a disclosure. However, because cost is

typically one of the two primary bones of contention on a project, prudence would dictate disclosure prior to commencing the "new" work. Such notification can become more complicated if the agreement fails to exclude form language regarding a need for change orders or approvals.

Ultimately, each side to the transaction desires clarity as to what to expect in the construction of the building, and even though both parties may be wholly trustworthy, prudence would dictate a clear description of the contractor's expectation for compensation and the owner's need to expend available funds.