

## Excluding Work From a Contract

by Gary Ransone

**M**ost residential construction disputes happen because the contractor and the homeowner have different expectations about how a job will be handled. I estimate that 90 percent of the disputes I've seen in my legal practice could have been avoided if the contractor had furnished the owner with a well-drafted construction agreement. A good contract spells out job costs, payment schedules, scope of work, exclusions, timetables, and warranty information, and includes clear language on how disputes will be handled.

Of all these issues, I've found that exclusions are most likely to be given short shrift. Many builders overlook them altogether — especially when rushing bid preparations for small jobs. But exclusions are just as important as the scope of work. Unless you specifically exclude the areas of work that you are not going to perform, the owner might assume they are included in the price. An exclusions section is critical because it helps prevent misunderstandings and gives the owner a full and realistic picture of the job and its cost.

Contractually agreeing to exclude detailed areas of work also gives the builder a clear legal basis from which to charge for legitimate change orders, should these excluded items come up during the job. If you don't pay attention to exclusions, you could end up personally absorbing the cost of certain changes, just to get the final check. Over the course of a year, this could add up to thousands of dollars.

Chances are that your customer will really appreciate having a list of excluded items as part of the contract. On larger jobs I usually recommend scheduling a preconstruction conference with the owners to go over every page of the agreement before signing it. Typically, they are most interested in the scope of work and the exclusions.

### Standard-Exclusions List

**T**he author's list of standard exclusions is comprehensive enough to cover practically anything Murphy's Law might throw at a GC. Source: *The Contractor's Legal Kit*.

- ✓ Plans, engineering fees, or governmental permits and fees of any kind
- ✓ Additional work required by governmental plan-checkers on final "red-lined" job copy of plans that are yet to be issued
- ✓ Testing, removal, and disposal of any materials containing asbestos (or any other hazardous material as defined by the EPA)
- ✓ Custom milling of any wood for use in project
- ✓ Moving owner's property around the site
- ✓ Labor or materials required to repair or replace any owner-supplied materials
- ✓ Repair of concealed underground utilities not located on prints or physically staked out by owner that are damaged during construction
- ✓ Surveying that may be required to establish accurate property boundaries for setback purposes (fences and old stakes may not be located on actual property lines)
- ✓ Final construction cleaning (contractor will leave site in "broom-swept" condition)
- ✓ Landscaping and irrigation work of any kind
- ✓ Temporary sanitation, power, or fencing
- ✓ Removal of soils under house in order to obtain 18 inches (or code-required height) of clear space between bottom of joists and soil
- ✓ Removal of filled ground or rock or any other materials not removable by ordinary hand tools (unless heavy equipment is specified in scope-of-work section)

*continued on next page*

## *Standard-Exclusions List — continued*

- ✓ Correction of existing out-of-plumb or out-of-level conditions in existing structure
- ✓ Correction of concealed substandard framing
- ✓ Rerouting/removal of vents, pipes, ducts, structural members, wiring, conduits, or steel mesh that may be discovered in the removal of walls or the cutting of openings in walls
- ✓ Removal and replacement of existing rot or insect infestation
- ✓ Failure of surrounding part of existing structure, despite contractor's good-faith efforts to minimize damage, such as plaster or drywall cracking and popped nails in adjacent rooms, or blockage of pipes or plumbing fixtures caused by loosened rust within pipes
- ✓ Construction of a continuously level foundation around structure (if lot is sloped more than 6 inches from front to back or side to side, contractor will step the foundation in accordance with the slope of the lot)
- ✓ Exact matching of existing finishes
- ✓ Public or private utility connection fees
- ✓ Repair of damage to roadways, driveways, or sidewalks that could occur when construction equipment and vehicles are being used in the normal course of construction
- ✓ Cost of correcting errors and omissions by the owner's design professionals and separate contractors
- ✓ Cost of correcting/testing/remediating mold/fungus/mildew and organic pathogens unless caused by the sole and active negligence of contractor as a direct result of a construction defect that caused sudden and significant water infiltration into a part of the structure
- ✓ Cost of removing ponding groundwater or other unusual concealed site conditions during excavation
- ✓ Extra costs associated with refusal of caisson drilling, cave-ins, etc.
- ✓ Cost to modify and/or remanufacture custom brackets and other custom-fabricated materials that are manufactured per plans and/or specifications but do not fit properly into the structure

## Two Types of Exclusions

The exclusions section of your contracts should include a list of project-specific exclusions and a list of standard exclusions.

The items you list in the project-specific section depend on the particular job; they usually reflect your discussions with the homeowners and any unique circumstances surrounding the project. For example, let's say you're doing a bathroom job and the owners tell you they'll purchase and install the towel bars, shower door, and so on. You need to list those tasks in the project-specific exclusions section of the contract. Later, if the owners forget this conversation and expect you to perform those tasks at no extra cost, you're covered, because the exclusions are spelled out in the contract.

With the standard exclusions, there's no need to start from scratch. Instead, you begin with an extensive boilerplate list that covers many parts of a project — some not applicable to your particular job — and revise it as necessary (see "Standard-Exclusions List," which begins on page 1).

## Beyond the Contract

The primary contract isn't the only place where you need an exclusions list. You should also make sure you understand what is not included in a subcontractor's bid. Exclusions from an electrical bid, for example, might include finished light fixtures or exhaust fans, as well as permits or permit fees. Once you know what isn't covered, you can either exclude those items from your agreement with the owner or have the sub give you a price for the excluded work so you can include it in your bid.

Some owners will want a written preliminary ballpark estimate before moving on to the contract. Any such estimate should have a list of exclusions. If you create an estimate to replace the cabinets and install a skylight in a kitchen, for instance, you might include language that the estimate doesn't encompass "new appliances, any electrical work, or any drywall work beyond that required for the skylight well."

Making absolutely clear what will and won't be included in your estimate immediately establishes you as an honest, up-front business person — and quickly turns away owners who are just tire-kicking.

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*Gary Ransone is an attorney and contractor based in Soquel, Calif. This column was adapted from his book The Contractor's Legal Kit.*