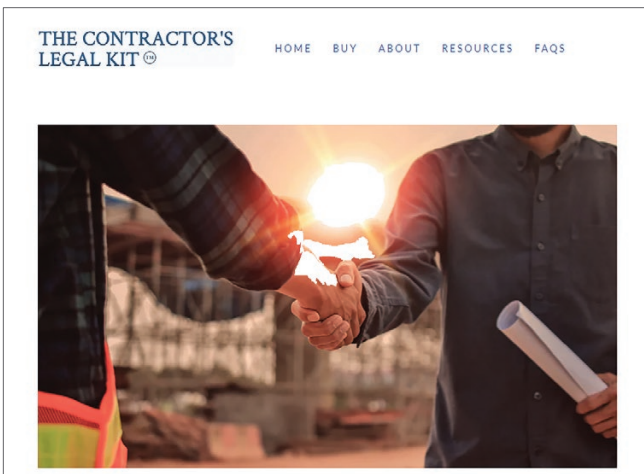


BY DAVID GERSTEL

Construction Contracts and Legal Education in a Digital Box



The new, online edition of the *Contractor's Legal Kit* includes editable construction agreements and forms. Along with them, it provides a *User's Guide* that amounts to a basic legal education for building contractors.

Early in my career as a builder, I was lucky to be told by wiser heads that I needed a comprehensive contract to regulate relationships with my clients. Just a handshake and verbal agreement would not do. But I discovered that when it came to contracts, I had three bad options: a skimpy off-the-shelf “proposal and agreement,” a contract from The American Institute of Architects, or a contract drawn up for me by an attorney who specialized in construction law. The first was near worthless. The second took good care of architects but left construction contractors out in the cold. The third was brutally expensive.

Fortunately, help soon arrived in the form of a concise and reasonably priced book. Its author, Gary Ransone, is both a general contractor and an attorney. His *Contractor's Legal Kit* offered succinct contracts for the homebuilding and remodeling jobs I was doing. Now, a few decades later, Ransone has both updated his *Legal Kit* and upgraded it as an internet download (available at thecontractorslegalkit.com). Its numerous forms and contracts are provided as Word documents readily adjustable to conform to requirements of

your state and fit your projects. Further, the documents are accompanied by an excellent *User's Guide* that clearly explains the legal necessities underlying each of their clauses.

After working my way through it end to end, my reaction to the *Kit* was “Wow!” It is a hugely valuable resource for any construction contractor—especially those just starting out or not yet in possession of reasonably priced and viable contracts for their projects. The *Kit* can help you clearly establish mutual obligations and expectations with a client before a project begins. The contracts and other documents it provides can protect you in case of lawsuits. Better yet, they will forestall litigation altogether by preventing misunderstandings and bitterness.

The core of the *Kit* is a series of construction contracts. These range from a short agreement suitable for a small remodel to be built for a fixed price to a comprehensive design-build agreement. If you are a residential builder, one or the other of the contracts will likely suit any homebuilding or remodeling project you will take on. Along with the contracts, Ransone provides useful contract addendums and informational forms, including:

- A material price escalation clause. It is notable for its fairness. While it protects builders against brutal spikes in material costs, it also provides that no additional overhead or profit will be charged on top of any increased charges for material.
- An addendum that limits clients to a single punch list upon substantial completion of a project. Of course, for it is the best marketing they can do, a sensible builder would return to a project to clean up a few items the client might notice post-punch list. But the addendum protects you against the occasional client who calls you back over and over to touch up imperfections, some of which they may have created.
- A letter to the client titled “Ups and Downs of Remodeling.” When I sat down with clients to go over our contract for a remodel job, I’d alert them to the stress they were about to experience. I’d caution them about “the 90% blues”—how, as it neared completion, a project would seem to slow to a crawl, with completion receding into the distance. Ransone’s letter, with its forecast of the emotions a client is likely to experience at each stage of a remodel—dismay during demo as strangers tear the home apart, relief during framing, and happiness upon completion—is a step up from my conversation with clients.

The full range of provisions embedded in the *Kit*'s contracts forms a protective wall around a builder. Among them: A reminder to owners that they must promptly make the decisions necessary

KEY CONTENTS OF THE LEGAL KIT

Preconstruction Agreements and Forms

- Estimating and preconstruction services agreement
- Design-build preconstruction services agreement
- Change order contingency fund information form
- Subcontractor information form
- Preconstruction conference form

Construction Contracts

- Short-form fixed-price agreement
- Long-form fixed-price agreement
- Time and materials agreement
- Cost-plus-percentage-fee agreement
- Cost-plus-fixed-fee agreement
- Construction management agreement
- Design-build agreement
- Short- and long-form subcontractor agreements

Forms for Use During Construction

- Short-form change order
- Change order with an accounting summary
- Short-form construction invoice
- Long-form construction invoice

for workflow and a caution that if they are not decisive, they can be required to compensate the contractor for lost time. A clause emphasizing that perfection is not promised but that “deviations (do) arise” and citing minor cracking in drywall and concrete along with other examples. And another declaring that though he will give it his best shot, the contractor cannot guarantee, due to explicitly stated factors, that new finishes will exactly match existing finishes.

Ransone, however, cautions users of the *Kit* that it cannot, in and of itself, protect them from all the hazards of construction contracting. They share in the responsibility. He is particularly insistent on that score when it comes to client requests for extra work during projects, a danger zone where countless contractors have crashed financially. Ransone insists that you must be persistent in the processing of written agreements that call for work beyond that provided for in the original contract: “A builder/remodeler who has been around the block knows certain owners, who tell you on Monday to finish the extra work at all costs (‘Just get it done, whatever it takes!’), may not feel the same way about paying for the extra work when the bills come due ... A signed change order will almost entirely eliminate arguments over the owner’s obligation to pay for the additional work.”

Ransone emphasizes the need to process a change order even for work covered by an allowance should it turn out to be low. A young builder I admire could have used that advice. He set an allowance of some \$4,000 for dry rot repair during a remodel. The extent of the work exceeded his expectations by 10x. Thinking he was covered by the allowance, he did not create a change order for additional labor,

material, and markups. The owners refused to pay anything more than the contract allowance. Enraged, the builder hired a lawyer at considerable cost and sued. He lost, of course. He did owe it to the owners to keep them informed of rising costs rather than ambushing them with a steep upcharge.

The *Kit* gives you what you need to effectively handle change orders: A short change order form and a longer form with an accounting summary. Plus, a change order contingency fund form that lays out for owners the causes of change orders and advises them to set aside funds to pay for them. I placed similar information in my own contracts. As a result of that—and of persistent processing of change orders—I never went unpaid for extra work. Abide by Ransone’s guidance on change orders and use his contingency form, and you can have the same fortunate experience.

The new digital Kit goes far beyond providing contracts and related forms. Its *User’s Guide* amounts to a basic legal education for builders. Ransone delivers that with a stroke of brilliance—annotations explaining and commenting in jargon-free language on every significant clause in every contract.

For example, an annotation to the “preconstruction estimating services agreement” explains that a key clause in the agreement is intended to communicate 1) the contractor’s hopes and 2) the owner’s obligations. “The clause,” Ransone writes, “indicates that the Contractor is interested in performing the actual (construction) work once the preconstruction phase of the project is completed” while making clear that “the owner is under no obligation” to award a construction contract to the contractor.

That said, Ransone continues: “Developing a positive relationship with the owner during preconstruction may well lead to a contract for construction.” (Amen to that! I built virtually every project for which I provided estimating and value engineering services).

In his cost-plus-a-fixed-fee contract, Ransone provides that clients be charged for the work of preparing their billings. With any T&M job, billing is a laborious task. A contractor can legitimately require compensation for the work so long as he is not also charging for it in his overhead markup.

Here Ransone again balances protection for the contractor with protection for the client. He calls for the client to be provided with documentation (invoices, time sheets, etc.) that backs up the billings. And, strikingly, he suggests a cap be put on the charges for preparation of the billings. In his annotation, he explains, “Providing the hard copy documentation ... will help maintain the trust between the owner and contractor.” And, of course, capping the charges will likewise support that trust.

Reading the annotations and learning the reasons for the clauses in the *Kit*’s contracts and forms, you realize that you’re being instructed by a guy who’s been in the trenches. In fact, Ransone tells us that as a general contractor, he has made and learned from the very mistakes he cautions us about. Thus, he underscores lawyerly advice on change orders by reporting that he learned the lessons himself from losing thousands of dollars by doing extra work without signed change orders.

A worthy theme unites the many clauses and annotations in the *Kit*: Be candid. Be clear. Put all your cards on the table. Avoid

surprising the client. Before construction begins and during it, make sure the client knows all there is to know about their obligations to you and yours to them.

Ransone's longer form change order with its accounting summary (below) exemplifies complete communication. Like the shorter form, it describes the change in the scope of work and the charge for it. Then, with additional lines, it shows owners how much additional cost they have taken on due to change orders and provides them with an update on their new total financial obligation.

II. ACCOUNTING SUMMARY

- A. Original Contract Amount: \$ _____
- B. Net Change by All Prior Change Orders: \$ _____
- C. Adjusted Gross Contract Amount Prior to This Change Order: \$ _____
- D. Amount of This Change Order: \$ _____
- E. Adjusted Gross Contract Amount Including This Change Order: \$ _____

My own experience with change orders underscores the value of another feature of Ransone's longer change order form. A prospective client once told me that she'd heard only one complaint from the past clients she'd talked to: They'd said their projects took longer than expected. I was nonplussed, then saw my blunder. Though I had updated charges, I had gotten lazy and failed to update project completion dates in the change orders. The clients reasonably kept the original completion date in mind and consequently thought their projects had run longer than provided for in our contract.

By providing lines for schedule changes along with lines for cost changes, the *Kit's* longer form change order sets you up to do an even better job of preventing misunderstandings with clients. Clients appreciate updates on completion dates as well as on cost. Along with the quality of the work, those are their main concerns. Keeping them up to date maintains trust.

Ransone's preconstruction services agreement could be enhanced to further his astute balancing of protections for builders with those for clients and thereby keep the peace between them. The *Kit's* agreement is a good start toward a needed contract for estimating and other preconstruction work—a service that seasoned builders worldwide now offer to their clients. It covers essential topics such as schedule, permits, hazardous material, and fees.

However, I believe the agreement includes two provisions that might reduce a contractor's chances of getting construction jobs when providing preconstruction services. One of those provisions allows the contractor to charge without limitation for these services. The other allows the contractor to terminate services at will and walk away from a project—and do that without refunding to the client any of the preconstruction charges. These two provisions are a departure from the *Kit's* usual balancing of interests. They can turn clients off. Thereby, they will reduce a contractor's chances of winning jobs via preconstruction services. (A more equitable fee

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provision along with a more extensive specification of preconstruction services than the *Kit* provides can be found in my book *Nail Your Numbers: A Path to Skilled Construction Estimating and Bidding*.)

Elsewhere as well, as he maintains that protective wall around builders, Ransone occasionally strays from his consideration for clients. Thus, he encourages builders to bill clients weekly (an amplification of his wise advice to builders to never fall further behind in billing than by an amount you can pursue at low cost in a small claims court). But then he goes on to require that clients pay each bill by the very next day.

Reading that, I envisioned a tired client getting home on a Thursday night after a long day at the office, finding a bill accompanied by the extensive documentation Ransone suggests, and being required to digest the paperwork and pay the bill within 24 hours—and to do that week after week as a project crawls forward. That's a good way to make a client hate you by the end of the job. Instead, I find it works out fine to give clients a few days to pay.

Lastly, the otherwise sound material-cost-escalation clause leans too far toward builders. If clients must, as Ransone's form provides, pay extra when the cost of materials markedly rises, should they not likewise get a credit if material costs markedly decline? Providing for that possibility, remote though it might seem, would sound another note of fairness that could strengthen client trust.

Ransone emphasizes throughout that contracts cannot substitute for workmanlike construction and well-run projects. Do lousy work and no contract will protect you from your clients' wrath. Clear and comprehensive contracts are, however, part of the workmanlike production of a project. They are critical to the crafting and maintaining of the human relationships that undergird a project. Use Ransone's contracts with the wisdom that the annotations in the *User's Guide* impart, and you will be on your way to producing workmanlike contracts.

I find the *Kit* easy to use. The *User's Guide* with its annotations is a single document with a table of contents. Each of the individual contracts, as well as the optional clauses and forms, is included as a separate and clearly labeled Word document that, as noted earlier, you can readily modify. For about the cost of a Skil 77, you can buy the new digital *Kit* at thecontractorslegalkit.com and download it to your computer. You will then have a tool that enables you to build understanding and trust with your clients while also constructing a protective wall around your prosperity and happiness as a builder.

David Gerstel is a builder and author. His books include Nail Your Numbers: A Path to Skilled Construction Estimating and Bidding and Building Freedom: A Construction Pro's Path to Financial Independence.