

PROJECT PRICING: FLAT FEE vs. COST-PLUS

Massachusetts pricing regulations might put the nail in the coffin of “cost-plus” home improvement contracts.

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Providing a customer with a single-sum (aka “flat-fee”) contract price is not easy. The list of complicating factors and wild cards is long. The temptation to present customers with cost-plus, time-and-materials pricing is strong. Many contractors swear by this practice.

Two Massachusetts consumer protection laws should give contractors pause:

1. MA Home Improvement Contractor (HIC) Law, M.G.L. c. 142A, §2(a)(5). This HIC regulation applies to “home improvement” contracts.
2. MA Attorney General Regulation 940 CMR 38.00: UNFAIR AND DECEPTIVE FEES. 940 CMR 38.00 simply refers to “consumers” – a potentially wide swath of customers.

Violations of §2(a)(5) and 940 CMR 38.00 are automatic violations of our state’s consumer protection law, M.G.L. c. 93A. Violations can subject contractors to triple damages and attorney’s fees for an aggrieved customer. Cost-plus contractors should think about three possible pricing structures:

- (a) Provide a single-sum (or flat-fee) price and maintain a comprehensive, tight “unforeseen conditions” clause;
- (b) Provide customers a guaranteed maximum (G-Max) price in the contract, when working cost-plus; or
- (c) Employ a hybrid pricing approach for the occasional projects that have certain, discreet “known unknowns,” but are otherwise quotable on a single-sum basis.

Let's review the relevant parts of Massachusetts consumer protection law:

1. MA Home Improvement Contractor (HIC) Law, M.G.L. c. 142A, §2(a)(5).

Massachusetts law states that a home improvement contract must state “the total amount agreed to be paid for the work to be performed under said contract” (M.G.L. c. 142A, §2(a)(5); 210 CMR 18.05(2)(a)(5)). The HIC regulations are about consumer protection, above all else. §2(a)(5) is as simple and clear as it gets. It has been in effect for decades. It embodies the idea that homeowners are entitled to know, before signing, with a high degree of accuracy, what they are getting into financially – and that professional contractors should have the experience and knowledge to provide that number and live with it.

2. New State Attorney General Pricing Regulation.

940 CMR 38.00: UNFAIR AND DECEPTIVE FEES (effective September 2, 2025) is a new Massachusetts Attorney General consumer protection regulation that requires total price disclosure. The regulation is intended to combat junk fees and protect consumers against things like deceptive fees associated with automatic renewals or trial offers, or hidden fees like the proverbial “towel fee.” Like many laws, it casts a wide net.

940 CMR 38.04(1) states “an unfair and deceptive practice under [the state’s consumer protection act]” includes:

Misrepresenting or failing to disclose clearly and conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter, the Total Price of that Product.

How does this apply to home improvement contracts? Look at the regulation’s definitions (940 CMR 38.03):

Product. A good, whether tangible or intangible, or service available for Sale or included as part of a Sale for personal, family, or household use.

Total Price. The maximum price a consumer must pay for a Product, inclusive of all fees, charges, or other expenses. Total Price shall include the maximum price a consumer must pay for any mandatory ancillary Product offered as part of the same transaction. ...

At their core, cost-plus agreements present questions of common-sense fairness for the average homeowner – specifically, what incentive does my contractor have to keep costs down and run a tight ship? “I want the customer to be happy and so I won’t let the invoices get out of hand” doesn’t cut it. When in doubt, a tried-and-true touchstone is: what would a jury of your peers think?

If this information is taking the wind out of your cost-plus sails, do not despair. Contractors have three pricing choices:

- A. Adopt a single-sum (or flat-fee) pricing regime and maintain a comprehensive, tight “unforeseen conditions” clause.

To be clear, this is not about taking away the cover of cost-plus so that customers can nickel-and-dime the contractor. In fact, cost-plus contractors are more likely to open themselves up to the invoice-auditing homeowner who is upset because those 2x4’s and that composite decking could have been purchased for a lot cheaper at Big Orange Building Supply down the street, instead of the contractor’s long-trusted lumberyard of choice.

Single-sum, however, means single-sum. In single-sum contracts, there is no legal requirement to break down or itemize the price or provide receipts or invoices as you go. The contractor lives and dies by it. It is subject to change only through (a) customer changes (including material selections over or below the allowances set in the contract) or (b) unforeseen conditions that are the financial responsibility of the homeowner. A comprehensive, tight unforeseen conditions clause can provide single-sum contractors with substantial cover for the kinds of unforeseen/unforeseeable costs (like verifiable subcontractor or material price increases) they may be accustomed to just wrapping into their cost-plus invoicing.

- B. Provide a guaranteed maximum (G-Max) price in their cost-plus contracts.

Some contractors swear by cost-plus. Their business practices and systems and subcontractor relationships are based on cost-plus. They cannot be converted to quoting a single-sum price. Rather than thumb their nose at the law, how about just including a G-Max price in the contract? An experienced contractor should have the cost-of-construction awareness and knowledge to determine that G-Max number and live with it. The G-Max amount then becomes the stated “total” price required under §2(a)(5) and 940 CMR 38.04. The actual final price may be less. That is a good thing – no harm to the consumer there.

- C. Consider adopting a hybrid pricing approach for the occasional projects that have certain “known unknowns,” but are otherwise quotable on a single-sum basis.

A good example is a second-floor master bedroom/bathroom suite remodel, where the homeowners want to build out a larger bathroom, by taking the existing bathroom and expanding into adjacent unused closet and storage spaces. The toilet and shower drain will be relocated. The time and expense of this work will depend on the existing floor joists. Are they 2x8 or 2x10, and at what spacing? How badly are they already bored, drilled and notched? How much sistering and gusseting will be involved in running new shower and toilet waste lines through the joists? Are wires in the way? This is unknown, but the rest of the project (materials, labor, subcontractors, carry, mark-up) should otherwise be quotable as a single price. Further, once the subfloor is removed and the joist bays are exposed, it will be difficult to predict how long this portion of the work will take. In this situation, it would be reasonable for

the contractor to create a cost-plus carve-out in the pricing section of their contract. If the contractor can provide a G-Max for this part of the project as soon as they are able to evaluate the situation, that is even better.

For contractors that cannot be converted to single-sum pricing or cost-plus with G-Max pricing, and are damn-the-torpedoes-full-steam-ahead with pure cost-plus pricing, they may have a limited safe harbor in the Uniform Commercial Code, which states that an enforceable contract may still exist even where the price is not yet finalized (M.G.L. c. 106, Article 2, §2-305). This may be fine for non-home improvement contracts (commercial work, for example). But the UCC is broad and general in nature. When it comes to home improvement contracts, it would be hard to argue that the UCC trumps specifically-enacted consumer protection regulations like §2(a)(5) and 940 CMR 38.00. At best, it may help demonstrate that there is at least some small amount of good-faith basis in the law for a cost-plus home improvement construction contract. But who wants to test that in court?

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