

THE FINAL PUNCHLIST MONEY PIT

A few contract clauses can neutralize a problematic consumer protection regulation and keep cash flow alive.

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When final payment is due, there may be items that require attention or re-work. But how much money do you spend each year trying to appease customers who can't seem to be pleased? Does your contract give you the cover you need to draw the line and avoid the final punchlist money pit?

Massachusetts law states that a home improvement contractor cannot request final payment from a customer “until the contract is completed to the satisfaction of the parties” (M.G.L. c. 142A, §2(a)(6)). The law even suggests that your contract needs to inform the customer of their rights in this regard. This requirement invites a potato-po-ta-toe type of subjectivity at the worst possible time: the end of the project, when you need to get paid and on to the next thing. At worst, shrewd customers leverage this law to not pay you or extract financial concessions or additional work from you. At best, project completion is held up while you accommodate a customer's opinions about how they personally think something is supposed to look, function or feel.

Massachusetts has detailed regulations governing residential home improvement contractors. M.G.L. c. 142A is the state's home improvement contractor statute. The meat of the statute is found in the “requirements” of §2 and the “prohibitions” of §17 – these are the clauses that a contractor must have in their contracts with customers. The requirements and prohibitions are, really, just best practices – things you should be doing anyway, especially in a state like Massachusetts, with strong consumer protection laws. But the “satisfaction of the parties” requirement of §2(a)(6) is a well-intentioned, clumsily drafted regulation.

Contractors enjoy several lines of defense against this thorny regulation. At the core of this protection is the “Residential Construction Performance Guidelines” by the National Association of Home Builders. Now in its 6th Edition, the Guidelines address everything from sitework, foundation and framing to HVAC, flooring and interior finish work, and many

common scenarios of customer concern. The Guidelines serve as an industry standard, if not THE industry standard for workmanship. The Guidelines also epitomize the motto of “Perfect is the goal, it is not the promise.” For example, they include reasonable tolerances for paint brushstrokes on wall surfaces, minor gaps in millwork joints, and slightly out-of-plumb building components. This is not a race to bottom. Even Michelangelo had off-days – and Michelangelo had workers and subcontractors who had off-days. The industry needs ways to objectively measure whether something is good (enough) or not. The Guidelines do this.

The Guidelines are relevant to your customer contracts in three ways:

1. The “scope of work” or “construction specifications” section of your customer contract can include (a) explicit reference to the Guidelines as the default level of workmanship that the builder promises and (b) acknowledgement by the customer that compliance with the Guidelines shall be considered satisfactory. Other referenced industry standards might include the “Journal of Light Construction” Field Guides or “Modern Carpentry” (11th Edition; Wagner & Smith). Of course, be sure to review (and make sure you can live up to) the Guidelines, or any other set of industry standards, before you include them in your contracts.
2. The “final payment” clause in your contract may (a) state that customer satisfaction to not be unreasonably withheld – and because there is already an acknowledgment that performance in accordance with the Guidelines is satisfactory (per #1, above), then satisfaction cannot be withheld, and (b) allow for a final payment holdback agreement. The Guidelines are not meant to ramrod a customer into final payment with no recourse for incomplete or truly shoddy work. Rather, we have a discussion or walkthrough with the customer and prepare a “Final Payment Holdback Agreement” (a signed addendum to the contract) in which each item of legitimate concern is called-out and a specific total dollar amount is held back from final payment pending completion of the items – but the entire final payment is not withheld. The Guidelines give the contractor an objective basis to push back against customers who may be in a send-it-back-to-the-kitchen mindset.
3. Structure your payment schedule (i.e. frontload payments as much as you legally can) so that the final payment is as small an amount as possible. If the customer aims to withhold payment on grounds they are not satisfied, and you are confident that they are unreasonably withholding satisfaction, then you choose how hard you want to double-down or negotiate – as opposed to begrudgingly spending additional time and money, feeling like you have no choice, to appease an unreasonable homeowner so you can collect that last check. If the parties are at an impasse, the customer outright refuses to pay (in breach of the contract), and you need to terminate the contract, then hopefully your payment schedule has put you in a position where you can absorb the loss and move on. Though the subject of many builder fantasies, it is rarely advisable to walk away, even when you may be entitled to.

If you are working in a state without a regulation like §2(a)(6), still, demanding customers often overestimate their authority to reject a contractor’s work. The next time a customer boldly

declares “I told you at the beginning that for this much money we expect nothing less than perfection,” the response is “okay, let’s look at our contract.”

The Guidelines are available for purchase through the NAHB website. But is it enough to reference the Guidelines in the contract – or do you have to give a copy to the customer? Just as you do not give the customer a copy of the applicable building code, you do not need to give them a copy of the Guidelines. Public libraries may have a copy of it. If not, then have an extra copy on hand for the customer, if they inquire.

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