

Negotiating an End to a Contract

by Kevin M. Veler

A remodeler contacted me to discuss a problem he thought he'd resolved but clearly hadn't. Earlier in the year, soon after beginning a major project, he'd realized he was working for one of those "customers from hell." This person was extremely picky and expected his project to be built to a higher standard than was customary in the area. He failed to make selections on time, demanded that work be performed out of sequence, and called local building inspectors about perceived code violations. There were no violations — but having to deal with the inspectors still cost the remodeler a lot of time and goodwill.

It's important to document that there was a mutual agreement for you to cease work. Otherwise you leave yourself open to charges that you abandoned the job.

Neither side was happy with how things were going, so after a heart-to-heart talk the remodeler and the customer agreed to part ways. The remodeler pulled his crew and two weeks later sent a final bill for work performed and materials ordered or installed.

In the meantime, the customer had hired an attorney. Instead of sending the final check, he demanded money from the remodeler. He and his attorney asserted that there was never an agreement to terminate and that the remodeler had abandoned the project. They demanded that the remodeler pay for another contractor to correct allegedly defective work and complete the project.

Termination

There are a number of ways to terminate construction contracts. Spec builders have it easy — their contracts

typically allow them to terminate problem customers at their own discretion by notifying the customer and refunding what has been paid. They can then sell the house to another buyer. This isn't an option for remodelers.

A remodeler has two choices: use the termination clause in the contract or negotiate a settlement. Standard termination clauses don't kick in until one of the parties defaults and there's been a "material breach of contract" (see *Legal*, 3/05). Unfortunately for the remodeler who contacted me, the customer had not defaulted, so the termination clause did not apply — even though the customer was costing him money and driving him crazy.

That left the remodeler with the second option — negotiating a settlement, which is what he had tried to do before calling me. But he failed to plan the meeting very well and he did not properly document the agreement.

Paper Trail

When the relationship between a contractor and a customer sours, both sides are likely to be angry and upset. Do what you can to reduce these emotions. It helps to make a sincere statement of sympathy and condolence — which can be done without admitting fault or weakening your negotiating position. Once the anger and emotion are out of the way, you can deal with the situation as the business problem it is.

Ideally, you should go into this meeting with a written termination agreement that you prepared in advance. The document should state that the contractor is ceasing work by mutual agreement of the parties. It should list — or have space to list — the points the parties agree on. It should also state that if the parties can't agree on final terms, you will restart the job or otherwise comply with the contract — with appropriate extensions to the schedule — after a set period of time or after providing written notice.

If you don't go in with a prepared agreement, then at least follow up immediately with an e-mail confirming that there has been a mutual understanding to stop work on the project and that if the customer disagrees he

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should contact you. Don't forget to ask a question you know the customer will respond to; the return e-mail response will prove that your message was received. (If this strategy doesn't work, follow up yet again — this time with a call).

markup. The markup should have been specified in your contract; if not, that's something else you need to negotiate. For example, the agreement could read: *"The parties agree that the cabinetry has been delivered and installed to the satisfaction of*

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The important point is that you must document the fact that there was a mutual agreement for you to cease work on the project. Otherwise you leave yourself open to charges that you abandoned the job. Abandonment triggers a default and allows the customer to hold the contractor responsible for the damages, including costs of completion in excess of the remaining contract balance.

Payment

Make sure you know when you arrive at the meeting how much money the customer owes you, and be prepared to reach an agreement on a final payment amount. Also, be sure you've addressed the issues of termination with your subs and that you've included in your calculations what it will cost to terminate their contracts. If at all possible, get the customer to write the check then and there. You don't want to give him or her time to feel "buyer's remorse" and back out of the deal.

If you cannot come up with an exact dollar amount — maybe the subs haven't completed their bills — get the customer to agree on what work has been completed and which bills, once received, will be paid.

Don't forget to include an appropriate

the consumer. When the contractor receives the subcontractor's invoice for the cabinets (list of cabinets attached), he will forward it to the consumer, who agrees to pay the invoice amount plus a 35 percent markup within 10 days of receipt."

Outcome

As it turned out, the remodeler who came to me with this problem had a well-written contract and the customer's demands were well beyond any reasonable expectation of what was required by law. Also, because of how the payment schedule was devised, the remodeler was relatively current on payments.

Therefore, he was able to negotiate a clean walkaway and needed a only a small final check to come out near the breakeven point. After an exchange of letters with the customer's lawyer, we were able to achieve an effective cease-fire. No one admitted fault, and the remodeler did not get the entire amount he felt entitled to — plus he had to pay some legal fees — but he did get away from the client without being sued.

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