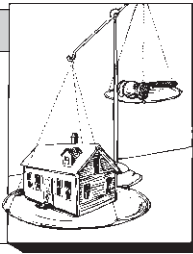


Getting Paid for Extras

by Leny K. Wallen-Friedman, Esq.



In most construction jobs, the owner sooner or later asks the contractor to perform work that is not included in the original contract. Usually, these requests are made orally. For a contractor, fulfilling these requests is risky, since disputes can come up later about whether the work was an "extra" or part of the original contract. Getting the request in writing will usually prevent such disputes. However, if for some reason you don't get a written order, you can improve your chances of getting paid if you know some of the legal principles governing these situations.

Written Change Orders

Most construction contracts give the owner the right to ask for the work the contract covers. However, the contracts usually also state that the owner must request such changes in writing, and that the contractor can't perform the work without a written order. This "written change-order requirement," as it is known, protects both parties. It protects the owner from fraudulent claims by the contractor for unauthorized extra work; and it protects the contractor from claims made by the owner that the extra work done was actually part of the original contract.

A change order provision commonly found in contracts is the following one from the American Institute of Architects (A.I.A.) "General Conditions of the Contract for Construction" (A.I.A. Document A201):

12.1 Change Order

12.1.1 A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after execution of the Contract, authorizing a change in the Work or an adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates his agreement therewith, including the adjustment in the Contract Sum or the Contract Time. 12.1.2. The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such changes in the Work shall be authorized by Change Order, and shall be performed under the applicable conditions of the Documents.

This language is fairly straightforward. Particularly relevant to contractors is the statement that "the Contract Sum and the Contract Time may be changed only by Change Order." The message is clear: The contractor who does extras without a

written change order risks working for free.

Waiving the Change Order Requirement

Of course, for a number of reasons, extras are often done on verbal request. While it is best to avoid these situations, you can reduce their risk by following certain steps. Most of these are aimed at showing that the owner waived the written change order requirement. A number of court decisions have held that when such a waiver exists, the contractor should be paid despite the lack of a written order.

The key question is what constitutes a waiver. Courts have found the following to constitute a waiver of the written order requirement:

- 1) an oral request by the owner to have the work done and subsequent oral acceptance of the work by the owner;
- 2) any additional payment for such extras, even if they were ordered by someone who was not the owner's authorized representative.

In addition, an implied waiver may be found to exist where the owner or his agent was on the site, was aware of the additional work, agreed to it and acknowledged that it was additional, and approved or accepted the work as complete. Other similar conditions might also constitute a waiver.

Waivers offer the contractor some protection, but they are subject to limitations and interpretation. For instance, many courts hesitate to find waivers for work done on publicly funded jobs, holding that written requests are needed to prevent fraudulent claims for extra work and collusion between city officials and contractors and to keep projects within budget. Therefore, on public jobs a contractor may not get paid for extra work agreed to orally, even if it is clear the extra work was requested. (See *Montgomery v. City of Philadelphia*, 391 Pa. 607, 616, 139 A.2d 347, 351 [1958].)

Payment may also be denied if the court decides the work was part of the original contract. For example, in *RAD-Razorback Limited Partnership v. Coney*, 289 Ark. 550, 713 S.W. 2d 462 (1986), a contractor sought payment for "extra" excavation work, but the court held that the contract obligated the contractor to clear all unsuitable soil from the entire site. Significantly, the court noted that the lack of a written change order and of a "protest letter" from the contractor compelled this conclusion, suggesting that such documentation might have swayed the court in the other direction.

Protest Letter

A protest letter is a letter from the contractor to the owner stating that work agreed upon orally and being or already executed is additional to the

original contract and requires extra compensation. A protest letter should be written whenever there is a difference of opinion over whether work is "extra."

Another reason to write a protest letter is if an owner refuses or simply neglects to supply a written change order. One response to this situation is to refuse to do the extra work until the written order comes. However, this can be costly if it delays the job, particularly if a court later finds the

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work requested was not an extra. The safest course is to go ahead with the work but write a protest letter stating what work was ordered, that it is an extra to the contract, and that the owner failed to supply a written order. This will strengthen your case if a dispute over payment arises.

Who May Bind the Owner?

Every contract should have a provision stating who may "bind" the owner. This avoids later disputes about who is authorized to request extra work. A broad provision favoring the contractor might state that "any change authorized by an officer, partner, architect, project manager, field representative, or other agent of Owner shall be binding upon the Owner." However, this provision should serve only as a "backstop" clause to a regular program of getting written change orders from designated owner representatives. It helps if these representatives are specifically named in the contract.

Summary

The key to getting paid for extras is documentation. Ideally, you should never perform any extra work without a written change order signed by you and by the owner or a contractually designated representative. The order should clearly define the work to be done and how much it will cost. If for some reason you don't get such an order, send the owner a protest letter confirming the request and specifying the work and its cost.

Finally, you can protect yourself further by recording anything the owner or owner's representatives do that might indicate a waiver of the written change order requirement. Pay particular attention to:

- 1) the owner's or agent's oral request;
- 2) the owner's knowledge that the extra work is being done;
- 3) the owner's acceptance of it, and
- 5) any payment for extras. ■

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