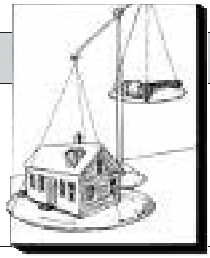

Change Orders: What Is Good Enough?

by Kenneth A. Slavens

Some time ago, a foundation subcontractor did some work on a development in Chicago. The foundation sub was subcontracted to a general contractor (GC), who was in turn under contract to the owner.

Once on the site, the foundation sub suggested to the GC that the foundation footings should be taken deeper than originally specified. The GC agreed. The general contractor and the foundation subcontractor framed and poured the deeper foundation and formed a few other "extras" at the general contractor's direction.

After the extras were performed, the sub asked the general to sign three written change orders covering the additional work. The general contractor didn't sign. When the sub submitted a bill for the extra work, the contractor refused to pay it. The sub went to court. For him, the lack of any paperwork executed prior to the extra work's performance, which before had seemed an unnecessary hassle, suddenly became a critical issue.

Doing the Paperwork

More often than not, when the parties to a contract discuss a change, the contractor comes away with the impression that the work is different than the original agreement, and therefore should result in more time, more money, or both. The customer, on the other hand (or, in the case described here, the GC), often walks away understanding that the work may be different, but thinking it will actually take the same or less effort, and so should not result in any additional charges. If this is the case, a clash over money is inevitable. This is where the change order comes in.

A change order codifies and confirms any changes to the original contract. With the necessary signatures, it authorizes and documents a change from the original plans, specifications, or other contract documents, as well as possible changes in the cost and/or the time of performance.

To recover for extra work, courts generally require a contractor to prove that:
- the work was outside the scope of the original contractual promise;
- the extra items were ordered *by the owner*;
- the owner agreed to pay extra for the work, either by words or conduct;
- the extras were not furnished by the contractor as a volunteer; and
- the extra items were not rendered necessary by any fault of the contractor.

These conditions are meant to balance the contractor's and owner's interests. The courts agree that a contractor should not have to furnish items clearly beyond what was originally promised.

But the courts also recognize the owner's right to know the extent of his obligation, and so forbid the contractor to perform extra work at the owner's expense without prior consent.

Technically, this consent need not be in writing. As with any contract, consent may be expressed in spoken language, or even by an action that recognizes the existence of an agreement, such as a handshake or a check paying for work billed.

But, as with original contracts, there's nothing like having it in writing: If it's not on paper, an agreement is only as good as a person's word. With change orders, getting it in writing is all the more important, because another contract governing the work to be done usually already exists. With no change order or other solid evidence to document the change (which is in essence a separate contract), the original contract generally takes priority, and will define the terms of compensation.

Anything's Better Than Nothing

Our foundation sub, for instance, had no written evidence that the owner even knew that the general contractor had directed and requested the additional work. Citing the lack of such evidence, the court denied the foundation sub's claim, saying it had failed to prove that the owner authorized the extras. In this situation, the court felt that even the implied consent of the general contractor could not obligate the owners to pay for extra work they hadn't authorized, the contractor's role as owner's agent notwithstanding.

Had our foundation contractor written to the GC and put him on notice that the work was considered extra work and identified the associated costs, the parties would have been given the opportunity to resolve the issues before the work was performed, and, perhaps more importantly, before the cost of doing the work was incurred by the foundation contractor with no assurance of being paid. Even if no formal contract had been executed, the existence of a letter from the sub to the GC would have proved the GC had known the extra costs, making it much more likely that the court would see the GC's subsequent request for work as explicit acceptance of a change order. The burden of proof might then have shifted to the GC.

The Job Isn't Over...

As a contractor concerned about good customer relations, you must remain flexible to accommodate requests for changes, but you also need to avoid working for free.

In most construction disputes, the side with the best documentation wins. Given the mass of paperwork accompanying most construction projects, anyone who expects a completely undocumented story to prevail is in for disappointment — the other side will almost always have something to point to and to hand to the judge or arbitrator.

A minimal level of protection can be had by sending a letter to the other party outlining your understanding of any discussion of proposed changes, and asking them to confirm your understanding. The correspondence need not be argumentative. But it needs to address the issues promptly, clearly, and directly, and to state any extra charges you plan on billing for. Ideally, a formal change order to be signed by both parties should accompany this letter.

Another approach is to start a file for every event or request you believe *may become* a change order. Though this may sound burdensome, the decision of when to start a file is simple: If the work is something you want to get paid for, and it's not already explicitly contracted for, you should open a file. Do this, and any empty file will be a clear signal that you need to generate some documentation — notes and sketches on when you discussed the changes, and preferably a follow-up letter and contract to the client confirming the change order and its cost — to establish a paper trail you can use to get paid. The more elaborate the documentation, the better. But the crucial thing is to have something — the more the merrier.

This process will not ensure payment. But it does ensure that should a dispute arise, you will be in the strongest position possible to present your argument as to why something is an extra, what it costs, and how the owner demonstrated his consent. This is the best anyone can reasonably expect. ■

Kenneth A. Slavens is an attorney with Brown & James, P.C., a law firm headquartered in St. Louis, Mo. that handles a large volume of construction law cases.