



Using Change Orders to Terminate a Contract

by Quenda Behler Story

Something like this happens to most small contractors sooner or later: The homeowner wants an addition on the rear of his house so he can have a bigger kitchen. He signs the contract; you order materials and start. After you tear out the existing wall, he decides that since you've got the kitchen torn up anyway, a bay window in the new rear wall would be nice.

You do the extra work, but before you can finish the project, the homeowner tells you to stop: He's out of money and can't pay you anymore.

Two Kinds of Trouble

This situation raises two sets of problems. The first involves payment: How do you get paid for the work you've already done? And what are your prospects for getting some compensation for the work the customer had promised to give you, but which he has now canceled? The other set of problems this situation raises has to do with protecting yourself from various legal liabilities. You may feel you're blameless in this situation — and you may be — but there are still legal hazards you need to avoid. Let's deal with these problems one at a time.

Getting paid. A lawsuit to collect payment for completed work is one of the simplest legal actions available. Prove you've done the work and haven't been paid, and you'll likely collect. If the debt is small enough, you can probably handle this suit yourself in small claims court, if your state has one.

But what about the money you would have earned if you'd been allowed to complete the project? This is a breach-of-contract situation that gets much more complicated, in both legal and business terms. There's no question you could sue for breach of contract. And though such suits are more complicated (and thus more time-consuming and costly) than are suits for payment for completed work, you'd probably win if

you've left a good paper trail.

However, suing a customer for breach of contract can create many problems for you, even if you win. For one, you may not get paid anyway, since the customer may truly be out of money. And even if you win and collect, you might lose in a more general sense, because word will spread that you're suing some broke customer for work you didn't even do — not a reputation you want to encourage. For all these reasons, I don't much favor suing a customer for breach of contract. You're better off collecting for the work you did and calling it a day.

Covering your backside. Even if you don't sue the customer for anything, however, a stop-work situation may land you in court — as a defendant. Believe it or not, you might be sued by subcontractors to whom you had promised work, by lending agencies who want to see a completed project and its attendant equity in return for the money they lent to the customer (but which you ultimately received), or even by the homeowner.

Sued by the homeowner? Don't laugh; it's happened many times. The homeowner, frustrated at having a project half-finished (and perhaps pushed by a lender to pressure you to complete the project) sues you, claiming that you breached the contract by not finishing the work. In one worse-case scenario, the customer says that he paid you the full amount called for in the contract (remember, he has the canceled checks to prove it), that you didn't complete the work, and that he wants you to finish the job. Or worse still, he wants you to pay him what it takes to get someone else to finish it. The customer's lender might make similar claims, and a sub — if angry enough — might also sue you for money he or she was counting on earning.

Paper Trail

Your ability to defend yourself from

any of these suits will depend on the paper trail you've left. Specifically, you'll need change orders of two different kinds. One will be a set of change orders for the extra work the customer asked for. The other will be a change order terminating the job.

The first set of change orders, of course, is the kind we constantly urge you in this column to obtain. Every time a customer asks for something outside the original contract, draw up a quick change order describing the extra work and its cost, and have the customer sign it. If you've taken this precaution and the customer stops work, your change orders will show the court that the customer asked you to do work outside the original contract. This will prevent the owner from claiming that the checks he wrote you for that work should be applied to the fee called for in the original contract, and will sink his argument that you fell short of your contractual obligations.

In addition, if a customer stops work because he's broke, you should get a change order right then and there that will formalize the stop-work order. This will protect your rights as well as those of your subs and even the customer, thereby greatly reducing the chances of a lawsuit once the work is stopped.

How it works. As soon as the homeowner tells you he's out of money and wants you to stop work, write up a change order establishing just that. Simply write the words "Change Order" across the top of a piece of paper that states the facts:

- at the customer's request the contract has been amended
- both parties now agree that X amount of work has been completed
- that Y amount of money has been paid
- that because of the customer's inability to pay for the balance of the work, the remainder of the contract is terminated.

Those are the bare bones of the change order you need. If the customer still owes you money for work done, the change order should also note that fact and state the amount. If there are outstanding debts to subcontractors, those too should be noted, and the subs should sign off on the change order as well. And if you've talked about finishing the work later, either describe specific arrangements in the

change order or indicate that those questions remain to be negotiated.

Win-win. If the customer hesitates to sign, point out that this change order protects him, too, because it releases him from the contract's remaining obligations. After all, without this change order, he is bound by the existing contract that he signed. You could sue him if you wanted to, but you're not that kind of person. You just want to resolve this fairly and cleanly. You don't intend to hold him to something he doesn't want, so you will let him change the contract. But he has to do it in writing.

You can keep this change order simple. Indeed, a fairly simple document



may be less intimidating and thus have a better chance of being signed. I like

legal-sized, triplicate forms as well as the next lawyer, but in this case your purposes will be served just as well (and perhaps better) by a dated, signed, handwritten note that explains briefly that the contract has been terminated by mutual consent because the homeowner cannot pay for further work, and that notes any further obligations either of you has. That document is just as legal as one made up in your lawyer's office. ■

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