

Completing the Job Early

by Quenda Behler Story

I write a lot of columns about delay because that's what most often happens on a construction job, especially in a rising economy where there's lots of work. But this economy may not be rising for a while, so suppose you finish a job early. It could happen — even to you.

Suppose you have two pending jobs, one scheduled for March that will pay \$30,000 and one in June that will pay \$60,000. Maybe you need to improve your cash flow, so you reschedule the jobs and do the June job in March. (In this example, we aren't listening to your March guy whine.) Or maybe the March job falls through, so you want to move up the June job.

So you finish early and send in your affidavit or whatever your contract requires you to do to demand payment, and the property owner says: I can't pay you until June.

What are your rights? Does he have to pay you early just because you're done?

Good Faith and Fair Dealing

Completion before the contract date can be disruptive for the property owner, especially if his financing arrangements are not set up for early payment, so the contractual requirement of good faith and fair dealing can be interpreted as requiring you to give the property owner early notice that you will be finishing significantly sooner than expected.

You may be saying, Hey, good faith and fair dealing aren't in my contract. Doesn't matter. Good faith and fair dealing are always an equitable requirement of contract enforcement, even if they're not in writing.

Jonathan Sweet, an expert on construction contract law, says that if the early completion costs the owner

money to adjust, good faith and fair dealing require the contractor to "see if the needs of the owner to delay completion until the completion date and the contractor to move ahead cannot *both* be accommodated. If not, and one would suffer a loss if forced to change the plans, then we look at the contract language."

If the contract says that the completion date will be "not later than," that language preserves the right of the contractor to finish early. (But be sure to tell the owner that you're going to finish early as soon as you know.) If the contract does not use that language, it appears that the property owner may have the right to delay payment until the contract completion date, or the time he reasonably expected to pay at the time of contracting.

The Owner Wants Early Completion

It might be the other way around. The property owner might be on the phone telling you that he needs you to finish early. Maybe you're a sub and he can't get another sub in until you're out of the way. Maybe there's some other kind of problem. The property owner might have ordered equipment that's going to be delivered soon, and if he can't put it on the job site because you haven't completed the structure yet, he'll have to pay storage charges and extra delivery charges.

When the property owner insists that you finish early, it's called acceleration. When this occurs, the contractor clearly has a right to demand reimbursement for any extra expenses the acceleration causes, including money for profit and overhead.

What is not clear is whether the

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contractor can simply say, No, I'm not speeding the job up.

As a general rule, the contractor is not required to accelerate unless the contract gives the property owner the right to require acceleration. Of course, the reason it's called a general rule is that when you get into the details, things really aren't that simple — because another general rule is that property owners usually have the right to demand change orders.

Doing More in the Same Amount of Time

Maybe the owner doesn't actually ask you to finish early; he just makes it impossible to finish by the completion date. Change orders, as we all know, consume valuable time. Adding a bunch of change orders to a job has the effect of shortening the time available to do the work. What you could easily have finished in a month doesn't look as easy when a half dozen change orders have been added to the job list.

This situation is called constructive acceleration. The contract completion date hasn't been moved, just the amount of work to be completed.

There are lots of lawsuits that say that contractors are required to accept reasonable change orders. That's because, as we all know when we sign those papers, there will be change orders. It's a reasonable expectation. But how many change orders are reasonable? Some lawsuits have ruled that dozens of change orders are reasonable, while others have ruled that as few as five are *unreasonable*. How many are unreasonable depends on what the change orders call for and how foreseeable they were at the time of negotiating.

If the change order is actually unreasonable, you can refuse it. But you need to do that carefully: because unreasonable change orders may reflect an unreasonable customer who can cause you trouble whether you're

right or wrong; and because if you do get into the legal arena, you want to be sure you can prove unreasonableness. What I mean by "carefully" is first try to work the problem out with your customer; second, *document* every contact with your customer and all your reasons for refusing. If your customer continues to be unreasonable, get advice from an attorney. 

Quenda Behler Story has practiced and taught law for over 25 years and is the author of The Contractor's Plain-English Legal Guide (Craftsman).