

Ignore Change Order Procedures at Your Own Risk

by Quenda Behler Story

The change order clause in many construction contracts calls for the architect or the customer to receive a certain number of days' notice in advance of proposed change orders and/or to preapprove contract changes in writing. If you run a construction company and work regularly with subcontractors, you want to follow the contract procedure, because otherwise you might find the architect or the customer refusing to pay for those change orders.

But we all know what happens on the job site. The site superintendent sees that, although the specs call for 2x8 floor joists, the span will actually require 2x12s. The job is in Grand Rapids, Mich., where hunting season has started, and whoever is supposed to approve change orders has his cell phone turned off so he won't scare the deer. The superintendent knows that waiting will bring the job schedule to a very expensive halt, so he tells the subs to go ahead and use 2x12s.

The work proceeds, but then, when the site superintendent starts the second floor, he discovers that things don't line up properly between the floors. This time he doesn't even try to chase down whoever is supposed to preapprove change orders; he just goes ahead and tells his subs to make the necessary changes.

So, suppose you're the contractor in this example. You know those change orders were not approved in the way the contract called for, but maybe you don't worry about it, because it was all essential to the job, the architect or customer was informed (after the fact) and didn't object, and, anyway, nobody is going to try to get out of paying people for necessary work that actually saved them money in the long run.

Excuse me, I have to stop and snicker.

Case in Point

An appeal of a lawsuit, *Amprite v. Tennessee Stadium Group*, is pending in the Tennessee courts on this very question: If change orders are issued differently from what the contract calls for, can the subcontractor — who, after all, has a copy of that contract — get paid for his work on those change orders? This is such an important question — and one that comes up all the time — that the American Subcontractors Association has intervened in the *Amprite* appeal to help the subcontractors win.

The *Amprite* case involved one of those "fast track" contracts with an early completion bonus, so everyone on the site was under pressure to move the job along as quickly as

have a job with \$2 million worth of any kind of change orders?

One reason you don't want to see your subs have trouble getting paid for change orders is that if the property owner weasels out of paying, the subs usually can't sue the property owner — so they'll sue you. (After all, that's why they're called subcontractors — because they contract with the general contractor, not the customer.)

Also, even though the contractor is the defendant in *Amprite*, in many cases involving improperly authorized change orders, the contractor is the plaintiff and is trying to collect from the property owner. And that contractor is going to be relying on the same legal arguments the *Amprite* subs used.

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possible. Following the contract procedure on every change order would have slowed things down, so the contractor didn't follow it. When the subs expressed their concern that the contract approval procedure was not being followed (which they did on several occasions), they were told not to worry, they'd get paid anyway.

But when it came time to settle up, the owners, who were not the ones who had made what amounted to a waiver of the change order clause, wouldn't pay. So the contractor said, in essence, to the subs: Sorry about that.

The electrical subs then sued the contractor for payment of almost \$2 million worth of change orders.

Why should you care if the *Amprite* subs get paid, especially considering that you probably never expect to

Legality vs. Fairness

The electrical subs in *Amprite* won their case at the trial level, where the court's 36-page opinion discussed the various legal theories — such as quantum meruit arguments, possible waivers, and implied contracts — that might be used to order the defendant to pay the subs. Ultimately, the judge boiled down all of those theories to this idea: No matter what the contract says, it's not fair for someone to stand silently by while a subcontractor does the work and, then when the bill comes in, yell, "Gotcha!"

The *Amprite* judge wound up saying to the contractor, in effect: Hey, remember that bonus you got for early completion? You were able to finish early by promising your subs that they would be paid, so that is an

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implied contract, between you and the subs, to pay them from your bonus money.

Does that judge's opinion mean that you and your subcontractors can rely on those legal theories when it comes to collecting from the property owner for an unauthorized change order that caused a \$500 cost overrun? No, you cannot.

The sheer number and variety of legal theories on this subject clearly indicate that the outcomes of these cases are not predictable. Sometimes the subcontractors will win, and sometimes they won't. Generally speaking, courts don't like to rewrite contracts. After all, if the parties to the contract didn't want to use the change order procedure prescribed in it, why didn't they just renegotiate the contract?

Because there's so much unpredictability in these kinds of lawsuits, the contractor in *Amprite* appealed the trial judge's decision. That's why the ASA got involved: The organization is trying to firm up the legal ground beneath its member's feet by establishing a precedent that will support the best interests of subcontractors.

So what's the lesson here for you? First, if you're a contractor, pay close attention to how those change order procedures are written in the contract, because you need to be able to work with them in the real time of the job. If you're a subcontractor, read the clause on change orders *before* you do the work. This is important, because you might not be able to collect on a change order that was not authorized exactly according to the contract procedure. 

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