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CLIENT ALERT

EXTRA WORK IS EXTRA WORK



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There has hardly ever been a construction project that did not entail some extra work purportedly beyond the scope of the contract.

Many contracts explicitly state that extra or additional work must be authorized by a written change order signed by the owner. Although there are some exceptions, such clauses normally will be enforced if they are clear. So, when asked to do extra work, the first step is to submit a written change order request and get a signature before proceeding with the work, if possible.

Depending on the complexity of the extra work, it could take anywhere from a day to a few weeks for your office to produce a change request. If the contractor is expected to execute the extra work immediately, then the contractor should at least get a signed field work ticket. Field work tickets usually do not have pricing information, but they can serve as confirmation that extra work has been requested and performed, and it may help establish that the owner waived strict compliance with the written change order requirement.

Illinois courts have developed a number of rules for determining whether a contractor is entitled to be paid extra for alleged extra work. Generally, the contractor seeking payment for extras has the burden of proving five things:

1. That the work was outside the scope of the contract;

2. That extra work was ordered by the owner;

3. That the owner agreed to pay for the extra work either by words or conduct;

4. That the extras were not furnished voluntarily; and

5. That the extra items were not rendered necessary by the contractor's own fault.

If the contract requires that extras be authorized by written change orders, and if there is no such writing, the contractor must also prove that the owner waived the requirement. Such a waiver must be proved with clear and convincing evidence. In court, "clear and convincing" evidence is deemed to be more than a mere "preponderance of the evidence," but less than the criminal standard, "beyond a reasonable doubt." Field work tickets could be very helpful in establishing waiver. Follow-up correspondence, or even just a confirming e-mail, could greatly help the contractor establish that the owner waived the requirement for a written change order.

The owner's mere statement that he "wants" something may not be sufficient to prove an extra. All owners "want" more, but that's not the same thing as actually ordering more work and agreeing to pay for it. The law requires proof of the latter.

Acceptance of work by the owner may or may not be sufficient to establish liability to pay for an extra. Since owner accep-

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tance is not absolute proof of liability for extra work, the contractor should not rely on it to take the place of an actual direction to do extra work and to pay for it. Normally, to establish the required level of proof, it is necessary to show that the owner actually ordered the extra work and agreed to pay extra for it.

If the contractor does not have any paperwork to authorize the extra work, and if the extra work is due to a deficiency in the drawings or specifications for the project, the contractor may still have recourse. The courts have held that the owner makes an implied warranty to the contractor that the plans and specifications will be sufficient for their particular purpose. If defective specifications require the contractor to do extra, unforeseen work or to incur extra costs in performing the contract, then the contractor may be able to recover those costs based on a theory that the owner breached this implied warranty. Although it would be better to get a written change request, the failure to get one may not always be fatal.

In a fast track project, the owner and contractor may never actually agree on a final scope. In such situations, it may be possible to pursue a claim for extras on a theory of unjust enrichment. Unjust enrichment may apply where the owner accepts and benefits from the contractor's extra work under circumstances which indicate that the extra work was not intended to be gratuitous. To prevail on a theory of unjust enrichment, the facts must be such as to show that the owner's enjoyment of the benefits of the contractor's extra work would violate funda-

mental principles of justice, equity, and good conscience. This is a case-by-case determination, however, and would typically require a lawsuit to resolve.

Contractors who foresee the necessity of extra work should notify the owner as soon as possible. Fairness requires that the contractor make his position clear not later than the time the owner has to decide on the "extra."

Please contact KUBASIAK, FYLSTRA, THORPE & ROTUNNO, P.C. if you have any questions regarding this alert, other construction-related issues, or our other practice areas.

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