

Written change orders

How much protection does a written change order requirement in your contract provide? When used properly, quite a bit.

By NORM STREU & REBECCA BEATCH

A written change order requirement forces both the owner and the contractor to assess the scope and cost of extra work as soon as the issue arises. By requiring an immediate discussion, the goal is future disputes are avoided. Because there can be numerous change orders on any given construction project, it is important that any issues are resolved at an early stage. Unauthorized extras form the basis of expensive lawsuits that could have been avoided had the parties immediately discussed the scope and nature of any extra work, the cost of that work and the impact of that work on the remainder of the project.

Enforceability

When written change order requirements are not followed, parties often find themselves in disputes regarding whether or not the contractor is entitled to be paid for that work. Courts in British Columbia have upheld written change order clauses when assessing whether an owner or contractor is responsible for the cost of extra work. Generally, if a contract contains a written change order requirement, a contractor is not entitled to the cost of extra work unless it complied with the written notice requirements.

What To Include In Written Change Orders

To avoid disputes down the line, it is essential a written request for a change order contains all necessary information to identify the complete scope and total cost of the work. The first step is to ensure the owner is made aware of the extra work before it commences. All the required extra work should be carefully and completely described so that down the line there can be no argument with respect to what was included in the change order.

Once the owner is made aware of the extra work, it is important to correctly determine the cost of the extra work. Contractors and owners should ensure their calculation of the cost of the extra work includes all direct costs, such as labour and materials. In addition, where possible, a change order should outline indirect costs, such as delay and impact on other work. Where scheduling is an issue, the change order should reference the amount of extra time required to complete the work.

What Happens When The Written Change Order Requirement Is Not Met?

In reality, there are times when a contractor is simply unable to meet the written change order requirements. Where there is no written change order and a dispute arises, the courts apply the following test to determine the contractor's entitlement to be paid:

1. Was the work actually extra work? That is, did it not fall within the scope of the original contract?
2. Did the owner give express or implied instructions that the work was to be done?
3. Was the owner informed or aware the extra work would increase the cost?
4. Did the owner waive the clause requiring changes to be made in writing or did the owner acquiesce in ignoring these provisions?

If a contractor can establish all these requirements were met for each individual change order, then the court will award the contractor its costs. The application of this test to each individual work order is, however, time consuming, uncertain and somewhat imprecise. Therefore, when it is not possible to obtain written change orders to avoid future disputes and legal battles, contractors should consider:

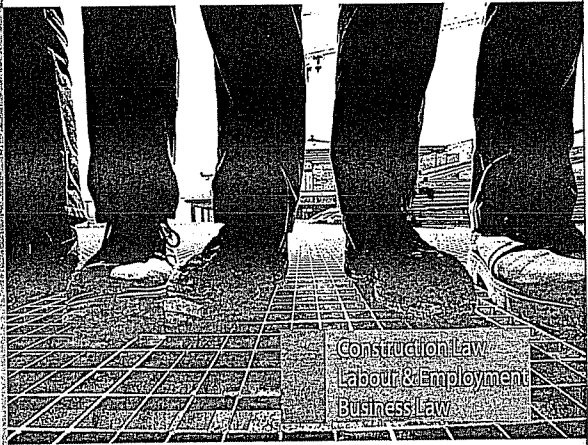
- Taking all reasonable steps to ensure the owner is made aware of the work before it begins;
- If the parties cannot agree on the cost of the extra work, obtaining a written change order that recognizes the work as an extra and authorizes the work, with a fair and reasonable price to be determined at a later date; and
- Keeping copies of all correspondence and notes of all meetings with the owner regarding the extra work.

When properly applied, written change order clauses can benefit both parties to a construction contract. By forcing an early discussion on the scope and cost of extra work, both parties can avoid the uncertainty and expense of legal action.

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